PRINCIPLES

OF

MUHAMMADAN LAW

AN ESSAY AT

A COMPLETE STATEMENT OF THE

PERSONAL LAW APPLICABLE TO MUSLIMS

IN

BRITISH INDIA.

BY

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TO MY FATHER.

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

Dante.

PREFACE.

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

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

branches of the law, I found that in a less degree, but in a more insidious form, similar criticisms could be applied to their usual presentations : The available text books on Muhammadan law cannot be said to count among their many excellencies the merit of giving prominence to the fact that a very few leading principles underlie each subject of the law, and that the whole of that subject is an exemplification of those principles. In regard to the law of inheritance not much thought is needed to show that the rules must have some common bearing upon, and some relation to, one central fact. Hence, in regard to this branch, efforts are more frequently made to trace out the scheme of the law. But the fate of the other branches of the law is less fortunate. It is forgotten that Muhammadan law started with a few simple rules, the continued expansion of which forms the body of the law now known to us ; and that the most important mode of expansion was undertaken not piece-meal, but in the form of comprehensive expositions of the law as a whole : so that whatever other features the rules of Muhammadan law may have, they must have the characteristics of inter-dependence and coherence.

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

No one can be more conscious of the possibilities of error in a work of this nature than its author, and I can only say that every effort has been made to avoid error. "Where with intention I have erred,"—where, I mean, I have chosen to differ from the views expressed by authorities whose reputation would have been suffi-

cient to give dignity even to erroneous views (assuming them to be capable of error), or where I have strayed into expressing opinions on points uncovered by authority, I trust that I may find justification in the fact that it is beneficial in the interest of law as a science that authors should venture where Judges fear to tread.

From one form of boldness, however, I have studiously refrained. I have never dared consciously to differ from the views expressed in the original texts of Muhammadan law. This forbearance may no doubt itself appear to be of questionable wisdom, since the exhibition of some contempt for the ancient text-writers has not infrequently been the main credential of a right to speak with authority on Muhammadan law. My attitude towards the texts is, however, based on the fact that seeming inconsistencies or errors in the texts are in many cases only examples of that conciseness which is possible, and even necessary, where both the writer and the reader carry their law in their heads, and do not keep it stored up in libraries; at other times they exemplify the desire of the old authors to write in such a manner as not to be easily understood by those who do not devote long years of study to the subject, or who seek to be their own teachers, instead of sitting at the feet of a master. This frame of mind is well illustrated by such maxims of the Christian theologians as "Si quis capere potest, capiat," or "Qui semetipsum docet, asinum habet discipulum, asinum magistrum." When on the other hand, it is remembered that the texts are printed without any marks of punctuation, without arrangements into paragraphs, without any distinction in the size of the letters, without footnotes, and seldom with any headings, with hardly anything to indicate where one word ends, and another begins,—the marvel is that they should be intelligible, in most cases, to those who refer to them only occasionally and piecemeal : nothing could testify more emphatically to their lucidity.

I have of course not considered myself bound by the arrangement or classification of the various subjects usual amongst the Arabic text-writers. The sequence of topics prevalent amongst them, though it still preserves traces of logical analysis, has become cumbrous and not seldom confusing, owing to the texts, as they were originally written, having been overloaded by the insertion of details relating to allied topics, which were not present to the minds of the original authors. Thus, for instance, it comes about that the whole law of maintenance is dealt with in the texts, in the book on

divorce. The explanation being, no doubt, that the earliest texts must have contained a casual refrence merely to the maintenance of a divorced wife, then as occasion arose, rules about maintaining an undivorced wife were added, and then the rules about maintaining all other relations,—each succeeding set of rules being placed by the side of the topic most nearly allied to itself.

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

With reference to the help that friends and well wishers have given to me I can hardly express myself adequately : In some cases tendering thanks is in itself a privilege, and accepting them not far removed from conferring a fresh obligation : It is owing to the encouragement I received from Sir Basil Scott, Chief Justice of Bombay, that I decided to have my manuscript copy in print. Mr. Justice Batchelor and Mr. Justice Heaton have, with great kindness, read or looked over portions of the book as they have been printed, and have evinced such interest in the book as even to lighten a task which has ever been in itself a labour of love. Mr. S. E. Kurwa, Barrister-at-Law, has been kind enough to read a great portion of the work in manuscript, and in proofs, and to verify most of the authorities cited, and has checked and corrected the Table of Enactments. Amongst other friends who do not belong to the law, I must mention Shaikh Faizullabhai Sahib, Principal of the Anjuman-i-Islam Schools, where I received part of my early education, to thank him for translating texts from the Arabic,—which he is eminently qualified to do by his wide and precise knowledge of that language, by his familiarity with books on Muslim law and theology, and by that modesty of temperament which made him ever willing to consider such suggestions as I could make to ensure the accuracy of his renderings. I barely refer to Mr. Hasan Latif, and refrain from mentioning more of such friends as I fear that those who are not lawyers prefer to have little connection with that portion of human activity with which lawyers are concerned.

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EXPLANATION OF ABBREVIATIONS.

The reports are cited in the usual manner,—except that the letters "I. L. R." are omitted from the references to the Indian Law Reports Series.

"Bail." is Neil B. E. Baillie's "Digest of Moohummudan Law, 1865—1869, I and II. respectively indicating the first and second parts of the work. The first part deals with the Sunni 'Hanafi' law, and is a translation mainly of the 'Fatawa 'Alamgiri.' The second deals with the Shiah 'Ithna' Ashari' law, and consists of translations from the 'Sharya-ul-Islam,' and other Shiah authorities.

"Hed." is S. G. Grady's Edition of Hamilton's 'Hedaya,' (2nd Ed. 1870).

"Macn." is W. H. Macnaghten's "Principles and Precedents of Moohummudan Law," edited by W. Sloan.

The references are to pages throughout, unless otherwise mentioned; 'para.' refers to a paragraph on the page cited, numbering also the incomplete paragraphs (if any) with which page commences or ends. *l.* is line. s. is section, col. is column.

ADDENDA ET CORRIGENDA.

p. 6 *l.* 16 for " Quran II. 179," read " Quran II. 172 "
p. 18 *l.* 90 for "irmidhi Tinvests" read "Tirmidhi invests"
p. 29 Title for "H E." read "T H E "
p. 32 *l.* for " XXVIII of 1850," read " XXVIII of 1855 "
p. 33 *l.* 10 for " XVII " read " XVIII "
p. 53 *l.* 1 for " marriages " read " marriage "
2 for " person " read " persons "
p. 54 *l.* 11 for "chetty" read "Chitty"
p. 55. s. 20 (2) *l.* 8 from bottom after "is of unsound mind or" add " when the woman"
p. 60. *l.* 7 from bottom, add to the word " husband's " the following footnote :—

Nichhabhai Pragji v. *Isse Khan Haji Abdula Khan* (1866) 2 Bom. H.C.R., 297, (wife has power to dispose of her own property by gift, sale, or lease without consent of husband); *R.* v. *Khatabai* (1869) 6 Bom. H.C.R., (Cr. Ca.), 9, (wife may be convicted of theft of her husband's property.)

p. 61 para. 30 *l.* 1 for " what great respect " read " with great respect "
l. 14 for " inscipiendo " read " inspiciendo "
p. 64 marginal note for "ime" read " term "
p. 81 *n.* 2 for " more " read " mere "
p. 93 *l.* 2 for " from the father's side " read " on the father's side "
p. 102 *l.* 3 of *ill.*, omit " if "
p. 106 *l.* 1 of para. 3 for " Act X " read " Act IX "
p. 112 *n.* 3 for " 1875 " read " 1876 "
p. 113 s. 98 *l.* 3 for of 'mu'ajja' read 'muwajjal'
p. 114 *n.* for " act X of 1908 " read " act IX of 1908 "
p. 115 *n.* 9. for " s. 100 " read " s. 101"
p. 155 *et seq.* for " mubarat " read 'mubàrăät'
p. 175 *n.* 5 for "agreement" read "argument"
p. 187 *n.* 4 for " 49g and 50 Vict." read " 49, & 50 Vict."
p. 205 *l.* 21 for ' Act XVIII ' read Act XVII
p. 206 *l.* 3 from bottom, for "appear" read " appears "
p. 236 *n.* 1, for s. 69, read s. 6
p. 237 *n.* 4 refers to "rebellious" in *ill.* 2, *l.* 2.
p. 250 para. 2 omit the last three words viz., " from each other's "
p. 276, s. 366 } Add as a footnote:—
p. 279, s. 369 } It has been held that a gift may validly be made of a right to receive a definite fraction of the offerings that might be made in future at a shrine, the subject of gift in such a case being held to be not the future offerings, but the present right to receive them, *Ahmad-ud-din* v. *Ilahi Bakhsh* (1912) 34 all 464,

p 349 *n.* 3 for " Shaih " read " Shiah"
p. 379 *l.* 9 after " upon " add close inverted commas
p. 390 *l.* 14 of para. 2, for " cases" read "basis"
p. 393 *n.* 4 add " see also *Mahomed Ibrahim v. Abdul Latif* (1912) 14 Bom. L. R. 987."
p. 394 *l.* 4 for 'qadam-i-shauf' read 'qadam-i-sharif '
p. 400 *l.* 13 for " haramlo " read " 'haramto ' "
p. 403 *n.* 3 for " ustalrix " read " testatrix "
p. 415 *n.* 1. for " risks " read " rules"
p. 440 *n.* 3 add: *Kadakamvalli* v. *Mokkath* (1897) 30 Mad, 388.
p. 461 *l.* 6 from bottom " Act X " read " Act IX "
p. 479 *l.* 3 for " 350 " read for " 550 "
p. 495 *l.* 2 from bottom omit "to"
p. 495 last line, for "p. 258" read "p, 255"
p. 525 marginal note, for "will of junior" read " will of minor"

MUHAMMADAN LAW.

CHAPTER I.

INTRODUCTION.

§1.—*The Sources of Muhammadan Law.*

Conscious and unconscious development of the law.

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

Importance

It is not surprising indeed that the personality of the Prophet Muhammad should loom so large in the minds of all who

[1] "Ancient Law," 3rd Ed., 3.

approach any matter associated with him or his religion, as to draw them away from the study of anything not connected with him; for "more than any man that ever lived Muhammad shaped the destinies of his people." [1] But law has to be traced for its true origin to a period far anterior to its articulate enunciation; long before an idea can be crystallised into a positive enactment it must have floated in the minds and hovered over the actions of the people, amongst whom it subsequently takes definite shape. Thus to take our start from the Quran for finding out the first origins of Muslim Institutions, is to leave out of consideration a great portion of the really illuminating history of those institutions,—it is to omit to study that which would often be the only explanation of the varying forms taken by the rules of law, or the interpretations given to them, and of the controversies and disputations which puzzle later generations,—it is to commence our study, not when the phenomena with which we have to deal are few and simple, but when they have become perplexing from their number and diversity.

the Quran not a code.

Those who have written on the Laws of the Mussulmans and have ignored the customs and usages that prevailed before the Quran was revealed, cannot take refuge under either the form or substance of that book. For the Quran does not in any portion of it profess to be a code complete in itself. It was

—neither in form.

given to the world not as a code, but in fragments, during a period of 22 years (609 to 632 after Christ); and it was never collected and arranged in the life-time of the Prophet. At his death the Quran consisted of the passages taken down on palm-leaves or skins "put promiscuously into a chest observing no order of time." [2] Abu Bakr (who succeeded the Prophet as Khalifa, and died in 634, after a rule of two years) had the various passages forming the Quran collected for the first time. Zaid Ibn Thabit, who was entrusted with the work, says: "I sought for the Quran and collected it from the leaves of the date and white stones and the breasts of people who remembered it." "What Abu Bakr did else being perhaps no more than to range the chapters in their present order, which he seems to have done without any regard to time, having generally placed the longest first." [2] Another sixteen years elapsed and then 'Uthman ordered the

[1] Nicholson's Literary History of the Arabs," 179.

[2] See Sale's "Koran," Preliminary Discourse, Sec. 3.

second recension of the Quran; and then (in 650 after Christ, i.e. 18 years after the death of the Prophet) it took the textual form in which we have it at the present day. All the transcripts now existing are from 'Uthman's edition, for the varying copies then existing were committed to the flames. Since then there has been no alteration; there is, says Sir William Muir in his "Life of Mahomet" "probably no other work in the world which has remained twelve centuries with so pure a text."

—nor substance.

The Quran differs no less from a Code in regard to its contents than in regard to its form. A very small portion of it has any reference to law: The following verse may throw some light on its object and purpose —

> "That is the Book! There is no doubt therein; a guide to the persons who believe in the unseen, and are steadfast in prayer; and of what we have given them expend in alms; who believe in what is revealed to them and what was revealed before them:— and of the hereafter they are sure."
>
> Quran, II, 1.

Islam itself a continuation.

It will thus be seen that the main purpose of the Quran is not that of a Code. It indeed gives expression to Islam as a religion, but this it does most often, unconsciously, if we may say so, and spontaneously, rather than categorically—in the form of reflections on life and about the future, rather than of dogmas; and "religion" in this connection must be understood in a sense much broader than that which we give to that term at the present time: it must be understood as a "divine influence underlying and supporting every relation of life and every social institution."[1] And still the Quran is one of the shortest of the great religious books of the world—being less lengthy than the New Testament alone. Again, Islam itself is not given in the Quran as a new doctrine, but as a continuation of the old religions that were brought by the Prophets before Muhammad to their tribes —

> "Say ye: we believe in God, and that which hath been sent down to us, and that which hath been sent down to Abraham and Ismail and Isaac and Jacob and the tribes; and that which hath been given to Moses and to Jesus and that which was given to the Prophet from their Lord. No difference do we make between them—and to God are we resigned."
>
> Quran, II, 130.

[1] Max Muller's "Introduction to the Science of Religion" (London 1878) 152.

Illustration from Law of Inheritance.

Nor is this so only with the purely religious part of Islam. Even the law of Inheritance, a subject which is distinguished in the language of the Arabic lawyers by the term "*Farâiz*," *i. e.*, the "Ordinances of God"—because the Quran is fuller and more explicit on this branch of the law than on any other—is not completely stated in the Quran. We find, for instance, that the Quran is silent as to those rules of succession which were already established by usage, and which did not require alteration; and therefore nothing is said in it about the rights of sons, and other males, to inherit, except in so far as the customary law relating to them was modified in favour of females and others. The legal portion of the Quran must therefore be compared, if at all, to an amending Act, rather than to a Code. Had it been otherwise, it would have lost much of its force and conciseness; for the Arabs who were tenacious of their own customs, were well acquainted with them, and wanted no repetition of them. [1]

Causes why Pre-Islamic customs not studied:
1. Well known to Arabs.

Thus the very circumstance that their old usages and customs were so familiar to the Arabs as not to require repetition, was a cause why they came to be unduly neglected in the first days of Islam, and why the Quran was always taken as the starting point for the study of the Law. But the course that may have been natural and convenient in countries and at a time when the Pre-Islamic customs of Arabia were familiar to all, is followed, *cessante ratione*, to the present day in India, and writers on the law of inheritance commence the subject, by treating of what is laid down in the Quran without referring to what preceded it. The result is that the scheme underlying the law is buried in a number of disconnected details, which are bewildering to the reader having no means of "discerning their relation to the parent theory."

2. Admiration for the Prophet, and contempt for the days before him.

But there is another and more lasting cause for the neglect of all that preceded the Prophet: There soon arose, on the one hand an enthusiastic admiration and love for his character, and on the other, a contempt for the period before Islam and all connected with it. It is difficult for non-Muslims and for men who are not acquainted with the character of Muhammad to have any conception of the feelings with which he came to be regarded,—"with his mighty powers of imagination, elevation

[1] The Arabic word *Rawasim*, means monuments recording the customs and usages of the people. It is allied to *Rasm* which originally meant, a mark, and then acquired the meaning, custom and law.

of mind, delicacy, and refinement of feeling." [1] Instances may be easily multiplied to show how eager the Mussulmans were from the earliest times to see the Prophet, or to be able to claim the least connection with him. [2] How strongly the personality of the Prophet as a guide in the smallest concerns of life dominated the minds of men of the greatest intellect and learning, may be exemplified by the fact that the Imam Ibn Hanbal [3] would not eat water-melons, because though he knew that the Prophet ate them, he could not discover in what manner he did so. [4]

3. The reforms of Islam transformed Ara society.

"Nor did the desire to refer to the Prophet as the great exemplar of life, and to leave the Pre-Islamic customs and usages unnoticed, save in a casual manner, arise merely from a personal admiration for the Prophet: The reforms introduced by Islam were such as to bring about a complete transformation of the society of the Arabs. So conscious were the Arabs themselves of this change, that they began to refer to the period before Muhammad as the *Ayyam-il-Jahiliyya*, i.e., " the period of ignorance or rather wildness or savagery, in antithesis to the

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

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

[3] The leader of one of the four schools of the Sunnis. His reputation for learning was so great that 80,000 men and 60,000 women are said to have attended his funeral.

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

moral reasonableness of a civilized man."[1] For the Mussulmans were taught by their religion:

> "To fear God, by which ye beseech each other, and respect women, who have borne you, for God is watching over you."
>
> Quran, IV, 1.

and that:

> "It is not righteousness that ye turn your face towards the East and to the West, but righteousness is in him who believeth in God . . . and who giveth wealth for the love of God to his kinsfolk, and to orphans, and the needy, and the son of the road, and to them that ask for alms, and for the freeing of slaves, and who is instant in prayer and giveth alms, and those who fulfil their covenant when they covenant, and the patient in adversity and affliction, and in time of violence; these are they who are true, and these are they who fear God."
>
> *Quran, II, 179.*

and it was natural that they should think with horror of the days of superstition and idolatry when the widow formed part of the estate of her deceased husband and could be "inherited" like chattels and goods, and when daughters were buried alive. The believers in the one God thus distrusted all the precedents of the days of superstition and idolatry, and feared to take anything from the old manners and customs, unless there was some living proof that the Prophet of God did not disapprove of it.[2]

Quran taken as starting point and FIRST SOURCE of law.

These feelings find no equivocal expression in the law: The Pre-Islamic customs are hardly ever referred to by the Muslim jurists[3] for the purpose of elucidating the law—the Quran is

[1] See Nicholson's "Literary History of the Arabs," 30.

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

[3] The following passages will illustrate how cursorily Muslim authors refer to the customs of Pre-Islamic times:—"The Arabs observed some of the prohibitions of the Quran, for they did not marry mothers or daughters or aunts on either side, and the grossest thing they did was that a man took two sisters in marriage at the same time, or that the son succeeded to his father's wife."—Shahristani's *Kitabu'l-Milal wa'n-Nihal* (ed. by Cureton), p. 440. "The Arabs had their own laws which they followed; and Islam maintained some of

for them the first source of the law, in point of time, no less than in point of importance—and if the Book is silent, it is supplemented by or interpreted in the light of the practice of the Prophet: Traditions recording the actions and sayings of the Prophet (which are called the *Sunna*, *Hadith* or *Riwayat*) thus take their place as the second of the *Asls* [1] or main sources of the laws and institutions of Islam.

Traditions. SECOND SOURCE.

There are frequent references to the authority of the Traditions in the sayings of the Prophet himself; e. g. "The Prophet said 'that which the Prophet of God hath made unlawful is like what God hath made so.'" [2] Again Anas reports: "The Prophet of God said to me 'Son, if you are able, keep your heart, from morning till night, and from night till morning, free from malice towards anyone.' Then he said 'Oh my son, this is one of my laws, and he who loveth my laws verily loveth me, and he who loveth me will be with me in paradise'" Muhammad seems to have foreseen the danger that might arise from the zeal of too devoted followers; for, when his advice on a point of horticulture was followed with scrupulous care, he said, "I am no more than man, but when I enjoin anything respecting religion, receive it; and when I order anything about the affairs of the world, then I am nothing more than man."[2] And again with respect to the relative authority of the Quran and the 'Sunna' he said: "My words are not contrary to the words of God, but the word of God can contradict mine." [3]

But though the Pre-Islamic usages have been ousted from all formal recognition in Islam, and the 'Sunna' is made to take their place, yet a good many of the old customs must be lying embedded in the Traditions themselves: For taking the usual classification of the 'Sunna' into the *Sunnat-ul-fi'el* (i. e. the traditions about what the Prophet did himself), the *Sunnat-ul-Qaul* (that which he enjoined by words) and thirdly the *Sunnat-ul-Taqrir*

customs (i. e. of

them, and repealed others. . . . Their custom forbade marriage with the mother and the daughter: This was maintained. They used to disapprove of a man marrying the widow of his father, and Islam forbade this altogether. The practice of cutting the right hand of the thief prevailed among them, and Islam upheld this."—*Saba'i-ku-udh-dhahab*, p. 102. I am indebted for the last quotation to Mr. Justice Abdur Rahim's articles in the Columbia Law Times, see Vol. VII, pp. 101, 186, 255.

[1] *Asl* is usually translated "Source,"—on the ambiguity of which word in English see Austin's "Jurisprudence" Lect. XXVIII (4th Ed), II 526-8, and see Holland's "Jurisprudence" (7th Ed.), 49 on its three senses. (1) The quarter from which we obtain our knowledge, (2) the mode in which, or the persons through whom, those rules have been framed, which have the force of law and (3) the authority which gives them that force.

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

[3] Ibid. I, 6, 3

(that which was done in his presence, without his disapproval) the last must have represented largely the original customs and usages of the Pre-Islamic Arabs. The task however of investigating the sources from which the ideas and notions underlying the Muhammadan Law arise, becomes difficult owing to the fact that we have seldom any means of distinguishing in the 'Sunna,' what portion of the practice of the Prophet was a departure from the pre-existing usages; and even where he is reported to have disapproved of any course of conduct, there is often nothing to show whether the course of conduct disapproved by him was in accordance with the Pre-Islamic usages.[1] It must be admitted that the Traditions can after all throw only a "fitful and imperfect light" on the Institutions of the Arabs before Muhammad—too imperfect very often to allow of our putting forward any theory which is not "gratuitous and premature." Yet we have the authority of Sir Henry Maine for thinking that even theories which may be so characterised "rescue jurisprudence from that worse and more ignoble condition not unknown to 'ourselves' in which nothing like a generalization is aspired to, and law is regarded as a mere empirical pursuit."[2]

Pre-Islamic Customs as such ousted;

We have thus seen how important and integral a part of the Islamic Institutions the Pre-Islamic customs are and from what has just preceded the reader will gather how and through what reasons the second stage in the history of Muhammadan law is reached when all avowed dependence upon the aid of those customs is thrown off by the 'Faqihs' (canonical lawyers) of Islam.

[1] Scholars who have studied the early history of Muslim institutions have been able to glean information "scanty and uncertain at best" from the following and similar sources: The great lexicons such as the *Lisan-ul-'Arab* by Jamaluddin ibn Mukarram (d. 711 A. H.) and the *Qamus* of Pherozabadi, the collections of poems such as the *Kitab-ul-Aghani* of Abul Faraj Isfahani, the *Iqd-ul-Farid* by Ibn Abdi Rabbihi (the laureate of Abdul Rehman III of Spain) and the *Hamasa* of Habib bin Aws (d. 245 A. H.). The Arabs themselves have a saying that "poetry is the public register of the Arabs." Allied to poetry are the proverbs, of which there are collections by Mofazzal-ul-Zabbi (cir. 170 A. H.) and Maydani (circ. 523 A. H.) Then there are the geographical works of HasanIbn Ahmad-al—Hamadani named *Jezirat-ul-Arab*, and *Al-Iklil*. The seventh book of the latter work treats of the traditions of Pre-Islamic times. The accounts of modern writers on the customs and manners now prevailing in Muslim countries such as Lane and Burton are also helpful. Much information is to be obtained from the Commentaries on the Quran by Tabari, Zamakhshari and Baidhawi, &c., on those portions of the Quran which altered the pre-existing usages—notably about infanticide (Quran, VI, 137) orphans and women, *ib* IV, 18-20). Mr. Price and M. Caussin de Perceval have made full use of these sources in their books. See also Prof. de Goeje's Article on "Tabari and the Early Arab Historians" in the Encyclop. Britt. (9th Ed.) XXXIII—1, et seqq. Long after this was written Mr. Justice Abdur Rahim's Book on "Muhammadan Jurisprudence" made its appearance. Its first pages show that the views expressed here are not opposed to those of persons who are far better qualified to speak on the subject.

[2] "Ancient Law," 3rd Ed., 175.

Henceforth the development of the law has necessarily to be referred only to forces contained within Islam itself—viz., the Quran and the Traditions. [1]

Necessity of rapid expansion of the Law in

So long indeed as the Arabs were confined in their activities to a portion of Arabia, the Quran and the reports about the practice of the Prophet were ample for all their affairs. But in the course of the twenty years that the Prophet gave the law—ten of which were passed in his early struggles, before he had much influence—he could not possibly have met with all the varied cases that would spring up when the Muslim faith spread from Arabia to Persia and Spain. How rapidly the occasion arose for expanding the law may be more easily stated than realised: For within three years of the death of the Prophet, Damascus was taken ; Syria and Mesopotamia were added in the course of four more years ; another four sufficed to carry the armies of the Khalif to Egypt and to Persia. In the 41st year of the Hijra the Muslims were at Herat ; in the 56th year at Samarqand, Carthage fell in the 74th year, and Toledo in the 93rd. These armies did not go merely for conquest. The dynamic force that roused the Arabs to such unparalleled activity was religion [2]—and wherever the Arab armies went, priests and theologians accompanied them to give to the conquered nations the light of Islam.

Practical Codification of the Law by Muslim

If during all these years of conquest the laws of the new religion had consisted of only the few legal rules contained in the Quran, and if there had been nothing else to fall back upon, but scanty reports of the practice of the Prophet, it is plain that the local laws and usages could have been displaced only to a very slight extent, and we should have had different systems of Islamic Law for each country where that religion had spread—each system based on the laws of the particular country, as altered by a few new principles introduced by Islam. The law relating to land, partially exemplifies this process. But that is an exceptional

[1] What has been said above about the Quran and the 'Sunna,' may afford some explanation of the fact that writers on the law of inheritance are guilty of so gross an inversion of the historical order in the treatment of their subject, and why they begin their treatises with a statement of the laws contained in the Quran, instead of dealing first with the general scheme on which the system is based—as though it would be detrimental to the dignity and authority of the Quran if it were considered in its chronological order, after the Pre-Islamic customs and the portions of the 'Sunna' which leave the early usages unaltered.

[2] "The Muslims were the army, and their wars were for the faith, and not for the things of the world" Ibn-ul-Tiqtaqa's *Al-Fakhri* (ed. by Ahlwardt, 1860, 101,). There is a later edition of this history by Prof. Derenburg, 1895. I have quoted from Prof. Browne's renderings.

case; as a rule it may be said, that though we have many schools of Muhammadan Law, these schools have not a territorial basis, but a sectarian basis. The laws of the Sunnis and Shiahs may differ, but the followers of the same sect whether in Algeria or in India are governed by the same laws. This unity in the laws of the Mussulmans arises from the fact that at the same time that the new faith began to spread, there arose a great number of jurists distinguished alike for their zeal for Islam, and for their ability to systematize the Science of Law—who wrote treatises that supplied the place of codes for the Mussulmans, transforming Muhammadan Law from a few detached rules to a complete system of jurisprudence. [1]

Political influences on the Law.

For the purpose however of following the main currents of thought which may be traced in the expansion of Islamic ideas, it must be recalled to memory that after the death of the Prophet his first four successors (called *Al-Khulafa-ur-Rashidūn* or "the just Khalifs") carried on the Government of the Muslim empire in much the same manner as the Prophet had done. [2] This course was natural, not only because of their personal characters, but because the memory of the Prophet was so recent that any departure from his practice would have received violent opposition. The earlier Khalifs were at the same time actively and avowedly assisted by an advisory Council of the 'as-háb' (companions) of the Prophet, who could well claim to be the repositories of the thoughts, and ideals of the Prophet. But this did not last long. The assassination of 'Ali, the fourth Khalif was followed by the accession of Mu'awiyah (40 A. H.) a shrewd ruler more of a statesman than a religious head. The majority of the 'Ummayyad dynasty (as the descendants of Mu'awiyah were called) were kings of the same character, if not of the same ability, and their support of Islam was actuated far more by worldly motives than could ever be attributed to the "just Khalifs." [3]

[1] Prof. Mirza Kazim Beg of the University of St. Petersburg in tracing the Progress of Islamic Jurisprudence (*Journ. Asiat.*, Ser. Quatr., Tom XV., 158, et. seqq.) mentions the names of 27 eminent *Faqihs* who died within the first century of the Hijra, and as he says, the list is by no means exhaustive.

[2] The government of the Prophet and the first Khalifs is described in the *Al-Fakhri* in an interesting passage which is given in Prof. Browne's "Literary History of Persia," I, 188-189.

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

It was during the reign of the 'Ummayyads that the full possibilities of the traditions as a source of the law began to be realized—it was felt to be an enormous power in the hands of the lawyers, to be able to rely on accounts of the practice of the Prophet which could be so easily manufactured. The third class of the traditions—the *Sunnat-ul-Taqrir*—resting as it does on the tacit approval of the Prophet, would lend itself to most easy manipulation for the support of any course of conduct approved by common sentiment, or desired by the legal authority of the time. On the one hand the 'Sunna' is authoritative only so far as its contents go, whereas the Quran has its legal force in itself, and its very words constitute the law, and the two differ from each other in the same way as the unwritten law of the English lawyers differs from what they call written law. [1] The 'Sunna' could therefore be explained and distinguished, when occasion required, with far greater ease than the Quran. Hence it is not surprising that the "forging of traditions became a recognised political and religious weapon." "While every impartial student of Islam," says Mr. Nicholson, "will admit the justice of Ibn-Qutayba's [2] claim that 'no religion has such historical attestations as Islam,' he must at the same time cordially assent to the observation made by another Muhammadan, 'In nothing do we see pious men more given to falsehood than in Tradition,'" [3]—and out of the vast store of the 'Sunna' Abu Hanifa (A. H. 80-150) is said to have considered only 18 as trustworthy. The process of forgery might have been stopped, had some such steps been taken for the early collection of the Traditions in an authentic and authoritative form, as was done with the Quran. But in the days of the first Khalifs the life of the Prophet was too vividly present before their minds for any such action, and later some of the staunchest friends of Islam were opposed to the Traditions being collected for various reasons, one of which was a fear that if they were put in writing they might come to compete with the Quran itself. [4]

Nature of their authority.

[1] Austin's Jurispr. 1, 195.

[2] Died 276 A. H.; he was for some time Qazi at Dinawar, the author of *Kitab-ul-Ma'arif*, *She'ir Wa'l Shu'ara*, *Adab-ul-Katib* and *Uyun-ul-Akhbar*.

[3] "Literary History of the Arabs" 145.

[4] See "Muslim Theology" by Prof. D. B. Macdonald, 76. This feeling is well illustrated by the fact that in the second century of the Hijra the Traditionist Abdur Rehman ibn Hamala Al Aslami (d. A. H. 144) had to plead defective mempry before he could induce his teacher Sa'id ibn Al Musayyib to permit his teachings to be reduced to writing. That these

Collections of traditions.

It was only in the reign of 'Umar II. (99-101 A. H.) and it is said, at his special request, that Abu ibn Shuhab-az-Zuhri (who died in 120 A. H.) made the first known collection of the traditions. Abdul Malik ibn Juraij made another collection at about the same time. These collections were however arranged not according to the subjects with which they deal, but according to the names of the companions relating them, and were thus called *Masnads* which means "attributed to or related or alleged (on the authority of another)." It is not till the appearance of the *Muwatta* of Malik ibn Anas (who died in 179 A. H.) that we get a *Musannaf*, i. e., a collection of traditions arranged and classified according to subjects. This book has been called "the first great Corpus of Muhammadan Law." [1] Meantime Ibn 'Ali Ajwa (who was executed in 155 A. H.) had confessed to having circulated 4,000 false traditions. A century later, when Abu Da'ud As-Sijistani wrote the *Kitab-us-Sunnan*, which is one of the six most authoritative Sunni books on the Traditions, he found 500,000 in circulation, of which he considered only 4,800 to be genuine.

The task of distinguishing the genuine from the spurious traditions was undertaken by the collectors of the Sunna with that sense of duty and earnestness, which characterised the early Mussulman jurists, and hence have arisen a body of rules which are allied to the principles of forensic evidence. [2]

fears were not unfounded is shown by the history of the Jews, who also had a code of traditions; and it was a saying with the Pharisee that "the words of the Scribes were lovely above the words of the law, and more weighty than the law and the prophets." In allusion to this it is said: "Thus have ye made the commandment of God of none effect by your traditions"—Matthew, XV, 6. The history of traditions amongst the Christians also affords an interesting parallel on some points; see, e. g., "Life of Christ" by Dr. Weiss (translated by J. W. Hope.) I, 17 et seqq. and I, 143.

[1] Nicholson's "Literary History of the Arabs" 337.

[2] The following words of de Goeje well describe the form of recording and the mode of investigating the Traditions: "Each event is related in the words of eye-witnesses or contemporaries transmitted to the final narrator through a chain of intermediate reporters (*rawis*) each of whom passed on the original report to his successor. Often the same account is given in two or more slightly divergent forms which have come down to us through different chains of reporters. Often, too, one event or one important detail is told in several ways on the basis of several contemporary statements transmitted to the final narrator through distinct lines of tradition. The writer therefore exercises no independent criticism except as regards the choice of authorities, for he rejects accounts of which the first author or one of the intermediate links seems to him unworthy of credit, and sometimes he states which of several accounts seems to him the best."—Encyclop. Britt., (9th Ed.,) XXIII, 1. De Goeje is speaking of the Arab historians but his words apply equally to the process followed by the traditions. They tested the reliability or otherwise of the traditions purely by their opinion whether the reporters were "worthy" persons or not. The Shiahs, for instance, reject the traditions in which one of the persons comprising the chain of the *rawis* is an opponent of 'Ali. The books are however full of the law of evidence and proof.

The Renaissance of Islam under the early 'Abbasides.

At about the same time events had happened in the political world of Islam, which were fraught with momentous consequences to its future. In the year 127 A. H. (750 of the Christian Era), Marwan the 'Umayyad Khalif was defeated and dethroned, and the empire fell into the hands of Abdul 'Abbas As-Saffah the first of the 'Abbaside Khalifs of Baghdad, which dynasty reigned from 132 to 656 A. H. (i. e., 750 to 1258 of the Christian Era). The 'Abbasides traced their descent from the uncle of the Prophet, and both by this close connection with him and by their long rivalry with and hostility to the 'Ummayyads they came forward as the restorers of Islam after the period when the strict principles of that religion had been relegated to a secondary position by the successors of Mu'awiyah. "It was," to quote the picturesque language of *Al-Fakhri*, "a dynasty abounding in good qualities, richly endowed with generous attributes, wherein the wares of Science found a ready sale, the merchandise of Culture was in great demand, the observances of Religion were respected, charitable bequests flowed freely, the world was prosperous, the Holy Shrine was well cared for, and the frontiers were bravely kept." It was also at this period that men like Imam Ja'far-as-Sadiq (A. H. 80-148), Abu Hanifa (A. H. 80-150), Malik ibn Anas (A. H. 95-175), As-Sauri (A. H. 95-161), Ash-Shafi'i (A. H. 150-204), Ibn Hanbal (A. H. 164-241) and Az-Zahiri (A. H. 202-270) flourished—than whose names, we have no greater in the history of Islamic jurisprudence.

The Law as a complete code for all future times

These great lawyers, philosophers and theologians—for they "took all knowledge for their province," and were eminent in every branch of it known in their day—placed before themselves the task of completely stating the law so as to embrace the whole body of jurisprudence, and to deal with all possible kinds of human activity, not only for their own times but for all future times. They must have soon found that the system "which had sufficed to guard the rights to a few sheep or camels"[1] had to be transformed before it could fulfil the function that they assigned to it. It must also have been clear to them that such a transformation could not be brought about, if they had to restrict themselves to the Quran, and such of the Traditions as they could accept as authentic.

Thus besides a book in the Fatawa-i-'Alamgiri devoted to evidence generally the last Chapter of the Book on wills deals with the evidence required to prove wills.

[1] Macdonald. "Muslim Theology."

THIRD SOURCE of law: 'Ijma.'

The first resource of which the jurists availed themselves after exhausting the 'Sunna,' is closely connected with it, and need not detain us long. Failing both the Quran and all direct precedents of the Prophet himself, the "consensus of his companions," who were imbued with his spirit, was naturally considered by the jurists as the best guide to the law. This, the third *Asl* or foundation of the law according to Muslim jurists, is called *Ijma'*, which, says Mr. Justice Abdur Rahim, "is defined as agreement of the jurists among the followers of Muhammad in a particular age on a question of law." [1]

The minds that were capable of arranging and evolving a whole system from the undigested materials in their possession, did not leave the *Ijma'* in a nebulous state. It may be said of them that nothing that they touched they did not elaborate and refine; and we have a carefully compiled set of rules as to the classes of matters on which *Ijma'* may be effective, the persons whose opinions are to be authoritative, the course that has to be followed where there is a conflict of authorities, and other cognate subjects. [2]

Insufficiency of 'Ijma'' to completely supply the hiatus in the law.

It does not require much consideration to see that *Ijma'* could not afford all the aid that the Quran and the Sunna required to furnish materials for the construction of a code theoretically complete. For *Ijma,'* too, can throw light only on the cases which actually arose in the course of a few years, and could hardly keep pace with the speculative powers of keen philosophers who had their ideas expanded by the great strides that Islam had made territorially in the course of the century. To cope with all the cases conjured up by speculation, no less powerful an agency was necessary than the right of the jurist to apply his own reasoning faculties to the problem before him. This was, however, a very great step to take, and there was keen controversy amongst

[1] See the "Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki Shafi'i and Hanbali Schools" by Mr. Justice Abdur Rahim. (1911) 115—136.

[2] The great Hindu law-giver at the end of his code proceeds in a manner that may be compared with interest to the course followed by the Mussulman lawyers: "If it be asked," says Manu, "how it should be with respect to (points of) the law which have not been (specially) mentioned (the answer is) 'that which Brahmanas who are Shishtas (*i. e.*, eminent) propound, shall doubtless have legal (force.)'"—Manu XII. 1? The place of eminent Brahmanas" is filled in Islam by those who were the companions of the Prophet in his life-time and his successors after him. The "roots" of Hindu Law are four: revelation (through inspired seers), traditions from sages; usages: equity as approved by reason (Manu II. 6). In "Doctor and Student" I. 4, it is stated that the law of England is grounded on six principal grounds: first it is grounded on the law of reason; secondly, on the law of God; thirdly on divers general customs of the nation; fourthly on divers principles that be called maxims; fifthly on divers statutes made in Parliament—Holland "Jurisprudence" 50 n.

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

> "With Him are the keys of the unseen. None knows them save He ; He knows what is in the land and in the sea ; and there falls not a leaf save that He knows it ; nor a grain in the darkness of the earth nor aught that is moist, nor aught that is dry, save that is in His Perspicuous Book."
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> Quran, VI, 59.

For these Doctors the "Perspicuous Book" of God was none other than the Quran. The words attributed to 'Umar with reference to the burning of the Alexandrian Library (whether they were ever uttered by him or not),[1] represent truly the views of this school, the most notable exponent of which was Da'ud Az-Zahir (d. 270 A. H.). The school of Az-Zahir did not have many followers. It could hardly be expected to have many. But it represents in an extreme form one very important direction of activity that learning took in Islam in the period at which we have arrived—the study of the Quran, and its interpretation, which are classed as a separate Science.[2] Many volumes are written on this subject, and the greatest amount of erudition and ingenuity have been spent upon it—every letter of the Sacred Book has been counted—the words and sentences have been classified so as to show which have meanings that are obvious, and which recondite—concordances have been prepared stating under which of the numerous classes each word comes—and each sentence has been definitely and authoritatively characterised as capable of receiving either only the literal meaning or of permitting the statement to be expanded. Then again the total kinds of arguments deducible from the Quran are categorically laid down.

The Scientific study of the Quran. Principles of interpretation, etc.

Those who are familiar with the fact that the "XII Tables are the foundation of the whole fabric of Roman Law," and that Gaius wrote six Books on them, [3] can have little difficulty in understanding that, when the results produced by a long series of interpretations and expositions of a short and simple rule of law, —dealing with a wide subject,—are stated in the form of a few

Growth of Law by interpretation: an

[1] See] Encyclopœdia Brittanica, (9th Ed). I, 778.

[2] Prof. Browne refers to the Quran as a "theological kernel"—see "Literary History of Persia" I, 270.

[3] Hunter's "Roman Law" (3rd Ed,) 16.

bald propositions, they are apt, at first sight, to appear far-fetched, and occasionally unscientific. The student of Muhammadan Law who on a bare reading of the verses of the Quran, or the traditions, which form the basis of that law, considers himself qualified to criticise the interpretations put on them, must be compared to the student of English Law, who is bold enough to embark on a criticism of the interpretations put on the Statute of Frauds, or of Uses, or, to take a more recent piece of Legislation, the Workmen's Compensation Act—without any knowledge of previous decisions, and without being acquainted with the doctrine of *stare decisis*, and the reasoning of the eminent judges who have built up the Law of England. The latter is no doubt a rare being: the present writer is conscious that he must have failed in his efforts not to swell the ranks of the former.

Criticism of methods: interpretation.

"Purpose" and "intention" or "object" of a rule of law.

The words of an English writer though referring to a very different branch of knowledge are so suggestive in this connection that they are quoted without any apology:

> "Such words as 'purpose,' 'intention' have a different sense when used in ordinary parlance from that which they bear when applied in crititcism and science. In ordinary parlance a man's 'purpose' means his conscious purpose, of which he is the best judge; in science the 'purpose' of a thing is the purpose it actually serves, and is discoverable only by analysis. Thus science discovers that the 'purpose' of earthworms is to break up the soil; the 'design' of colouring in flowers is to attract insects, though the flower is not credited with foresight nor the worm with disinterestedness. . . . . This has been well put by Ulrici, . . . 'It would be. . . absurd to think that because a poet cannot say with perfect philosophic certainty, in the form of reflection and pure thought, what it was that he wished and intended to produce, that he never thought at all.'"[1]

All this applies, *mutatis mutandis*, to the first principles of law laid down by a great legislator or moralist.

'Qiyas' the FOURTH SOURCE of Muhammadan law.

It has already been said that the rigid school of law which Az-Zahir represents found favour with few. But though the majority of the doctors were agreed on the necessity of having recourse to pure reasoning in order to supplement the Quran, Sunna and *Ijma'* for developing the law, they had great difficulty in fixing upon the exact form in which, and the limitations with which, reason could be employed in questions of law and religion. Even the first step forward gave rise to serious controversies: Of the leaders of the four great Sunni schools, three were opposed to Abu Hanifa in his wide use of *Qiyas*, or reasoning by

[1] Moulton, "Shakespeare as a Dramatic Artist." (3rd Ed.) (1897), 27.

analogy from the Quran, Sunna and *Ijma'*,[1] and in his restriction of the two latter within the strictest limits.

Controversies about permissibility of 'Qiyas.'

The student of Muhammadan Law in India who approaches it, full of ideas taken from the present legal system of England, with its free and bold application of old rules to new circumstances, for introducing new principles of law, may think that an apology is due to him for any justification of so simple a process as *Qiyas*,—which strictly does not even purport to create new principles, but merely to apply old established principles to new circumstances.[2] But in answer to such an objection the following words of Sir Henry Maine may be appropriately quoted: "The warning," he says, " cannot be too often repeated that the grand source of mistake in questions of jurisprudence is the impression that those reasons which actuate us at the present moment in the maintenance of an existing institution, have necessarily anything in common with the sentiment in which the institution originated."[3] Together with this warning we must recall to mind the anxiety of Blackstone in the eighteenth century after Christ to disprove the imputation that Judges made law, and the pains taken by Bentham and Austin in the nineteenth century to prove and justify the opposite theory[4]—and we must remember that the period with which we are dealing is not the eighteenth or nineteenth century, but a thousand years anterior to it, and then we may succeed in an endeavour to realise what a great struggle it must have been for the first Muslim jurists, steeped in the theology of Islam, when that religion had just been given to the world, to proceed on the basis that the system of life as given by the Prophet was not complete in every detail, whether of law or of faith. It must have seemed to them

Reasons for doubts as to

[1] See *Journ. Asiat.*, Ser. III, Tom. 14, p. 243 on the *Ahl-ul-Qiyas* and the *Ahl-ul-Sunna*, i. e., those who give prominence to *Qiyas* and the *Sunna* respectively as sour of law.

[2] The following words of the Privy Council illustrate the most modern use of *Qiyas* or analogy: "As to gifts by way of will. . . . such a disposition of property to take effect upon the death of the donor, though revocable in his life-time, is until revocation, a continuous act of gift, up to the moment of death....There is no law expressly and in terms applicable to persons who so can take. The law of will has however grown up, so to speak, naturally from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance, to be governed by the established principles and the analogies which have heretofore prevailed in like cases:" *The Tagore case* (1872) L.R. I. A. Supp. Vol. at pp. 67-8. In another case their lordships applied the analogy of gifts to Waqfs saying: "It is safer to follow this analogy than to draw logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts."—*Baqar Ali Khan* v. *Anjuman Ara Begum* (1902) 30 I. A. 94. 25 All. 236,254.

[3] "Ancient Law," 3rd Ed., p. 189.

[4] Hale, "Common Law," Ch. VI., cited in Austin's "Jurisprudence," Lect. 37; Bentham Works, III. 223. 230-31; V. 248-9. 497 8; VI. 53-57; VII. 197, 261.

a bold thing to claim that the minds of ordinary men, however learned and profound, could add to anything which emanated from the Prophet of God.[1] They had not the perspective of thirteen centuries to see wherein lay the true strength and the real mission of the Prophet.[2]

Traditional authority for the four sources of law, the 'Sunna', 'Ijma'' and 'Qiyas.'

The *Quran*, the *Sunna*, *Ijma'* and *Qiyas* are therefore recognised at the present day as the foundations of Islamic law. well-authenticated tradition which is to be found in the *Kitab-us-Sunnan* of Abu Da'ud Sijistani as well the *Masnad-i-Darimi*, and the collection of Abu Abdullah irmidhi, Tinvests these four sources with the approval of the Prophet himself. For it is related that when Maadh was being sent to Yaman, the Prophet asked him on what he would base his decisions: "I will judge them according to the Book of God," he replied. "But if that contains nothing to the purpose?" "Then upon the precedents of the Prophet." "But if that also fails you?" "Then I will make efforts to form my own judgment." And the Prophet raised his hands,[3] and said, "Praise be to God, who guides the messenger of His Prophet in what He pleases."

OTHER SOURCES of law.

1 "'Urf' or Custom.

In addition however to the four chief sources of the law to which the Mussulman lawyers consciously referred, we find that law was occasionally supplemented by *'Urf* or "local usage."[4] The law so obtained would be likely to be best adapted to the varying classes of people who embraced Islam, but it was distinguished in the language of the jurists from the *Shar'* or religious law which was derived from the four sources that we have been considering, and it found little place in the treatises on the law written by the earlier theologians. These books which take the place of Codes in Muhammadan law, occasionally refer

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

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

[3] Or as the *Mishcat-ul-Masabih* has it, "the Prophet struck his hands on the breast of Maadh." Book XVI, Ch. iii, part 2.

[4] Originally the word *'Urf* means "Known" or public, and the English word "tariff" is the same as the Arabic *ta'rif* which is a derivative from *'Urf*.

to the customs of the country.[1] There is little direct reference in them to the Pre-Islamic customs of the Arabs, which as we have seen, formed a great part of the law in the early days, but which —when not rejected altogether—were assimilated or transformed into a purely Islamic emanation in the manner already indicated.

Place of Pre-Islamic customs of Arabia in Muhammadan Law.

The following illuminating quotation from Mr. Justice Abdur-Rahim's "Muhammadan Jurisprudence" is transcribed with the kind permission of its author :—

"Those customs and usages of the people of Arabia, which were not expressly repealed during the life-time of the Prophet, are held to have been sanctioned by the Law-giver by His silence. Customs (*'urf, ta'amul, 'adat*) generally as a source of laws are spoken of as having the force of Ijma', and their validity is based on the same texts as the validity of the latter. It is laid down in 'Hedaya' that custom holds the same rank as *Ijma'* in the absence of an express text, [2] and in another place in the same book, custom is spoken of as being the arbiter of analogy.

Authority of customs.

"Custom does not command any spiritual authority like *Ijma'* of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy ; it must not, however be opposed to a clear text of the Quran or of an authentic tradition.[3] There is agreement of opinion among the Sunnis, that custom overrides analogical law, and a student of Muhammadan Law cannot help noticing that custom played no small part in its growth especially during the time of the Companions and their successors. The Hanafi writers on Jurisprudence include custom as a source of law, under the principle of *istihsan* or juristic preference.

Characteristics of valid customs in Muhammadan Law:

"Custom properly so called should be distinguished from the usage of a particular trade of business. The latter, from its very nature, need not be prevalent among the people generally.

"Custom which is recognised as having the force of law, must be generally prevalent in a country. It is not necessary that it should have had its origin in the time of the Companions of the Prophet ; but it does not appear what time, if any, must elapse before a custom will be accepted by the court. It may be that even a custom, which has sprung up within living memory, will be enforced if it be found to be generally prevalent among the Muhammadans of the country in which the question of its validity has arisen. The author of Raddu'l-Mukhtar defines *ta'anul* as custom as what is more often practised than not.[4]

1. general prevalence.

"The practice of a few individuals or of a limited class of men will not, however, be recognised. Nor would a usage have the force of law, so long

[1] See, e. g., the *Hidaya*, Books on *Zakat Widda* and *Ariat*; and the *Tahrir-ul-Ahkam*, Book on *Qarz*: Sir Wm. Jones's "Digest of Shiah Laws," I, 180; see also Malcolm's "History of Persia," II, 311-317, 319, 326, 346, 351 which an interesting account of *'Urf* in Persia.

[2] Hedaya VI, 177-8.

[3] [Customs may be enforced in British India though they are opposed to the Quran or Sunna—See Section 10 below and the comment on it—F. B. T.]

[4] Radd-ul-Mukhtar, III. 408.

as it is confined to a particular locality, such as a village, or a town, an has not found general vogue in the country in which the question arises.[1] Practice on a few occasions will not be recognised as a valid custom.

2. It is territorial.

"It is of the very essence of a custom that it should be territorial, so that custom of one country cannot affect the general law of other countries. Further, it has authority only so long as it prevails, so that the custom of one age has no force in another age.[2] In India in the Punjab and among the Khojas of Bombay, Muhammadan law has on many points been superseded, or considerably modified by customs adopted from the Hindus and sanctioned by the Legislature and the courts. But some of these customs, such as those relating to succession and inheritance, would, according to the principles of Muhammadan Jurisprudence, be illegal, being opposed to the text law."[3]

OTHER MODES of reasoning.

There were however three other modes of reasoning besides *Qiyas*, which have not gained equal importance as resources available to lawyers, but which nevertheless deserve attention, if only as illustrations of the growth of the conception of law amongst Mussulman jurists.

(a) 'Istihsan'.

The first of these was adopted by Imam Abu Hanifa to guard against absolute dependence on analogical reasoning. "Analogy, the most useful of instruments in the maturity of jurisprudence," says Sir H. Maine, "is the most dangerous of snares in its infancy."[4] Abu Hanifa therefore adopted a corrective: *Istihsan*, which means literally "approbation" and may be translated "liberal construction or "juristic preference." This term was used by the great jurist to express the liberty that he assumed, of laying down the law, which, in his discretion, the special circumstances required, rather than that law which analogy indicated.[5] This, it need hardly be pointed out, is under no circumstances a weapon that can easily be given to any person who does not represent the fountain-head of legislation. But it was objected to, not only as it left a great deal of discretion in the exposition of the law, but, what was far more important in the eyes of the Mussulmans, it applied to the law a test not referable to the Quran and religion, but to external circumstances

[1] Fathul-Qadir, VI, 65.

[2] Radd-ul-Mukhtar, III, 408-409.

[3] Abdur-Rahim, "Muhammadan Jurisprudence" 136-137.

[4] "Ancient Law" (3rd Ed.) 19.

[5] Parke J's remarks in *Mirehouse* v. *Rennel* (1833) 1 Cl. and Fin. 527, 546. "We must apply those rules of law" ("which we derive from egal principles and judicial precedents")"where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them in those cases to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could devise. It appears to us to be of great importance to keep this principle steadily in view. . . . for the interests of law as a science."

independent of Islam. Needless to say, the use of *Istihsan* was not acquiesced in by the colleagues of Abu Hanifa.

(b) Another great jurist, who was also a great traditionist, (differing in this respect from Abu Hanifa) Malik ibn Anas (94-179 A. H.), also felt the necessity of some surer test for the development of law on right lines, than the use of analogy, which ensured no doubt the expansion of the law in such a manner as to preserve common features, but through which a formal symmetry was often obtained at the sacrifice of utility. But he considered that the introduction of *Istihsan* as recommended by Abu Hanifa was open to grave objections. With the aim of reconciling these two opposing factors he proposed the use of *Istislah, i. e.*, "seeking peace" or "amending:" Imam Malik laid down, that ordinarily analogy was to be the means by which the law should be made to expand, but if it appears that a rule indicated by analogy is opposed to general utility, then *Istislah*, "amendment," should be resorted to. By this means the jurist could avail himself of the same powers as those that Abu Hanifa desired, but he was restricted in two directions: The rule of law pointed out by analogy could not be set aside either at the option of the individual exponent of the law, or with reference merely to the circumstances of the particular case. The rule indicated by analogy could, according to Imam Malik, be disregarded only if it would be harmful to the public in general.[1]

ibn Anas

(c) The third mode of reasoning in law has gained almost equal footing with the four first "foundations of the law:" *Ijtihad.* The word means "labouring hard, or studying intensely to arrive at a sound opinion or judgment" and is allied to the expression (*Ajtahido*) used by Maádh on the occasion already referred to.[2] Its study so far as the Sunni law is concerned, is more interesting as showing the trend of thought in the past, than of practical use at the present day : for after the death of Ibn Hanbal (241 A. H., 856 after Christ) there have been no recognized Sunni *Mujtahids*, or persons entitled to use *Ijtihad* or private judgment in expounding the four original sources of law, at first hand. It must be noticed, however, that the authority of the *Mujtahid* is based not on his holding any office in the State,

[1] Prof. Mirza Kazim Beg has explained in the *Journal Asiatique*, Ser. Quatr., Vol. 15, p. 158, et seqq., the influence of *Ijtihad* in the growth of Muhammadan Law. Readers of German will find an article on *Ijtihad* and *Fatawa* by Goldziher in the *Zeitschrift* of the German Oriental Society, LIII, 645, et seqq.

[2] Ante p. 18, (second para.).

but it is derived purely from the learning and reputation of the individual. Thus the qualifications of the *Mujtahid* consist of a complete knowledge of the Quran, i. e., he should know the sacred text by heart, and be able to say when and where each verse was revealed, and he should also have a perfect knowledge of all the Traditions, and all the branches of the Science of Law. He should besides be a man of austere piety. In short the qualifications required are such, that there has not been even a *Muqallid* (or *Mujtahid* of the third class) recognised by the Sunnis since Imam Qazi Khan (d. 592 A. H., 1196 after Christ). The cases of Tabari and As-Suyuti, who have written valuable commentaries on the Quran, and the former of whom is also known as a great historian, are mentioned as having been denied,[1] by public opinion, their claim to be considered *Mujtahids*.[2]

Administration of the law by the Qazis—The 'Fatawa'.

The capacity of growth in Muslim law may seem to be exhausted when the succession of *Mujtahids* comes to a close. But if we refer to the books on the powers of the Qazis and Muftis and consider the wide discretion allowed to them when they had to apply the law to the facts which came before them for adjudication, we find that though progress was arrested in one direction, it was given full scope in another.[3] The free and extensive use of these discretionary powers by the Qazis and Muftis is illustrated by the compilations of the *Fatawa* or decisions of great Muslim judges. Many points are settled by these decisions on which the authoritative treatises that precede them can give no guidance.[4]

Powers of

It may appear paradoxical to give almost unlimited powers to the Qazi and at the same time place such difficulties in the recognition of any *Mujtahids* for so many centuries. The explanation seems to be that the *Mujtahid* is a representative of religion (and, as such, exercises also a great, though indefinite, authority in secular law) whereas the Qazi exercises no voice in matters of religion, and gives orders only about the affairs of the world. The distinction between the two offices should be borne in

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

[2] For the use of *Ijtihad* in Persia, see Sir John Malcolm's History, II, 313, et seqq.

[3] The history of the functions of the Law-Officers in Muslim countries deserves study, as the wide discretion in their power permits of their giving equitable interpretations to rules that are seemingly immutable. The "fusion of Law and Equity" was effected in Muslim Law by assigning to the ordinary Judges the additional functions of the Praetor and Chancellor. See Von Hammer's "Histoire de l'Empire Ottoman," III, 310 et. passim; and Malcolm's "History of Persia," II, 317, et seqq.

[4] A great portion of the Hanafi law is based not on the views of Abu Hanifa, but on the decisions of his "disciple" Qazi Abu Yusuf,

Qazi's function distinct from those of 'Mujtahid.

mind, and will throw some light on the reasons which may have induced Imam Abu Hanifa to refuse to accept the post of *Qazi-ul-Quzát*, though refusal meant imprisonment. Nothing shows more emphatically the great weight and authority exercised by the religious heads in an Islamic country, than that the deposition of the late Sultan Abdul Hamid of Turkey was formally based on the *Fatwa* of the Shaikh-ul-Islam.[1] The Mussulmans are therefore jealous of giving to the religious head, in addition to his normal authority, the still wider powers of a speculative nature in the domain of religion, which would be his, by right, if he were acknowledged as a *Mujtahid*. The *Fatawa* of the Qazis and Muftis on the other hand, while necessary for the case and decisive of it "had no ulterior authority except such as was given to it by the professional repute of the magistrate, who happened to be in office at the time." They should be compared in this regard not to the decisions of the English Law Courts, but to the *Responsa prudentium*[2] of Roman Law. They would never have filled so important a place in legal literature, had they not been carefully compiled from the decisions of the most famous Qazis, and by persons who had themselves achieved eminence as exponents of the law.[3]

The practical shape which the development of the Sunni law took, may therefore be indicated by saying that, while the power of theorising on the law, so as to bind future generations, (which is virtual legistation), is denied to any *Mujtahid* or canonical exponent, those who are charged with the practical administration of justice, are given ample liberty to use their discretion as the facts of each case may require.[4]

Ijtihad in Shiah Law.

There is a difference at this stage between the Shiahs and Sunnis, which must be pointed out. The Shiahs recognised *Imams* as their heads in all matters both spiritual and secular for

[1] It may perhaps be permitted to us to refer with pride to the fact that, in giving that *Fatwa*, the Shaikh-ul-Islam consulted, and was assisted by the learning of, the Indian Mussulman who now occupies a seat on the highest tribunal of the British Empire: E. F. Knight's "Awakening of Turkey," 347-9. The office of Shaikh-ul-Islam was created at the time of the capture of Constantinople, 857. A. H. It will be remembered that Shakespeare makes Henry V, consult the Archbishop of Canterbury on the point whether he was legally entitled to the French Crown.

[2] Which Cicero calls *Res judicata* Top. 5,28. See Hunter's "Roman Law," 60, 119. After some fluctuations it was laid down by a Constitution of Justin "non exemplis sed legibus judicandum est"-Cod. VII 45, 13.

[3] The *Fatawa-i-'Alamgiri* is very full in the book on the *Adab-i-Qazi* ("the Duties of the Qazi"), the 19th Chapter of which deals with the use of *Ijtihad* by him.

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

a much longer period than the Sunnis. [1] *Mujtahids* consequently come to hold quite a different rank in the Shiah hierarchy; but they continue to be recognised to the present day. Apart from this, however, the principles of thought underlying the two systems are much the same, though they arrived at complete maturity at different periods, and hence the influence of *Ijtihad* is not the same in both. The continued existence of *Imams* and *Mujtahids* amongst the Shiahs may account for the few collections of the *Fatawa* of Shiah Qazis. There is less room for them in a system where a higher authority is present.

Muhammadan Law and modern requirements.

Strictures are sometimes passed on the inapplicability of portions of Muhammadan Law to modern circumstances in British India. The inapplicability must be ascribed, in part at least, to the fact that the substantive law of Islam so far as it is applied in India has been divorced from the adjective law. The two form integral portions of one system, and each suffers by a disregard of the other; hence though the adjective Muhammadan Law is not directly applicable in British India, as such. a reference to it may occasionally explain the real scope and effect of the substantive law and may even be a guide as to how it should operate in particular cases. [2]

Muhammadan Law and Religion.

Again the influence of religion in Muhammadan Law is referred to as a point in which it differs from the Laws of Western nations. But the Greeks spoke of Law "as a discovery and gift of God [3]" and it is well known that the priestly colleges moulded the Roman Law. [4] In 1456, Chief Justice Prisot of England declared that "Scripture was the Common Law on which all classes of Laws were founded," [5] and in 1857, Chief Baron Kelly and the Court of Exchequer laid down that "Christianity is part and parcel of the law of the land." [6]

Difficulty of historical study of Muhammadan Law.

Before bringing to a conclusion this preliminary survey of the elements composing the law of Islam, it may perhaps be

[1] Thus Abu'l Fatah al Shahrastani says of the beliefs of one of the Shiah Sects: "'Ali united" according to them, "in his own person the knowledge of all mysteries, and communicated it to his son Muhammad Ibn-ul-Hanafiyya, who passed it to his son Abu Hashim, and that the true possessor of this universal knowledge is the true Imam"—*Kitab-ul-Milalwa'l Nihal*, Part I, 169. See also Pococke "Historiae Arabum" pp. 23, 257, Sale's Koran "Prelim. Discourse," Sec. 8, Malcolm's "History of Persia" II, 346, et. seqq.

[2] See *Khajah Hidayut* v. *Rai Jan*, (1844) 3 Moo. I.A. 295, 318.

[3] Demosthenes Adv. Aristogeit I, 774. Plato Gorgias 484B. Chrysippus apud. D. Laert. VII. 88, see Holland's "Jurisprudence" 18, 19, 43, 47.

[4] Cf. "Lex. . . ratio est recta summi Jovis" Cicero De Leg. II. 4.

[5] Year Book 34 Hen. VI. 40 quoted by Holland *op. cit.*

[6] *Cowan* v. *Milbourne* (1867) L. R. 2, Ex. 230.

permissible to state the enormous difficulties of taking into account even the most important of the forces that have moulded it It is easy no doubt to adopt a formal classification and enumeration of them. But we must not be misled into thinking that the *Quran*, *Sunna*, *Ijma'*, *Qiyas* and *Ijtihad* represent each of them a single force. A real study of the history of Muslim institutions can no more end with discovering whether a rule of law has been based on one or other of these "foundations", than the historical study of English law can satisfactorily begin and end when we have discovered whether an Act of Parliament originated from the House of Lords, or the House of Commons, or whether a particular decision was given by a Chancery, or Common Law Judge. To take an example : the history of Waqfs must not only take into account what is laid down in the books that are cited in our law Courts, and does not consist merely in separating (so far as possible) the influence in the law of each of the five forces that we have named, but must go back to the earliest records of similar transactions that can be discovered. If we do so, we shall find, for instance, passages in the old Arab poetry throwing light on the disposition made by the Pre-Islamic Arabs, which were perhaps the precursors of the Waqfs of our day.[1] We must peep into the history of the Barmaki family in the days of the Kalifs of Baghdad, and of the institutions established in Spain. We should also have to endeavour to distinguish the accretions of ideas derived from the theories that prevailed amongst the theologians, and from the legal systems of neighbouring lands with whom the Mussulmans came into contact, and from the schools of Roman Law at Beyrout and Cæsarea. A task of such magnitude cannot be undertaken lightly, nor completed in the course of a single generation.

§2.—*The Schools of Muhammadan Law Prevailing in India.*

Various Schools of Law.

It is unnecessary in this book to refer to the religious and political controversies which arose amongst the Mussulmans, through which Islam became divided into various sects. It will

[1] *e. g.*, the disposition of Cais ibn Al-Khatim's palm-garden mentioned in the *Kitab-ul-Aghani* II, 160, to which Professor W. Robertson Smith refers in his "Kinship and Marriage in Early Arabia" New Ed. (1907) 117 et seqq.

be enough to indicate the origin of the main schools of Muhammadan law that are prevalent in India. "If each sect has its own rule according to Mahomedan law," say their Lordships of the Privy Council [1], "that rule should be followed with respect to that sect." Now every sect does possess its own books, and the books of another sect are generally not recognised as of binding authority.

Sunni and Shiah Sects.

Islam is divided into two main sects: Sunni and Shiah. Both sects are again divided into a number of schools, each of which has its own books of authority. But there is a great deal of resemblance between the laws of the Sunni schools; so that the books of one school of that sect as a rule refer to the points where the others differ. The reason is that the four schools of Sunni Law take their rise from the four great doctors, Abu Hanifa (A. H. 80-150) Malik Ibn Anas (A. H. 95-175). Shafi'i (A. H. 150-204), and Ibn Hanbal (A. H. 164-241) each of whom produced his own exposition of the law without allegiance to the other; but, at the same time, respected the ability and knowledge of his predecessors or contemporaries; though his own views may differ from theirs.

The Schools of the Sunni Sect.
1. Hanafi School.

Of these four Sunni Schools, the Hanafi School came into being sufficiently early to permit of two of the disciples of its founder to acquire a reputation and authority nearly equalling that of Imam Abu Hanifa himself. These two are Imam Abu Yusuf and Imam Muhammad.[2]

Rule when Abu Hanifa and his disciples disagree.

There being three exponents of this school it became necessary to have some principles for acting when they differed in opinion. These rules are stated in the following terms in the *Tabqat-ul-Hanafia* :

"When Abu Hanifa is on one side and Abu Yusuf and Muhammad on the other, the Mufti is at liberty, if he chooses, to follow the opinion of the latter two. But if the one or the other is of the same opinion as Abu Hanifa, the Mufti is obliged to prefer that opinion unless jurists of authority have declared their opinion to the contrary."[3]

Practice of Courts in India.

These rules, as it will be observed by reason of the implication in the last sentence, are not sufficiently clear and precise to be an authoritative guide to the Judge in British India, and the British Indian Courts have therefore assumed the right of

[1] (*Rajah*) *Deedar Hossein* v. (*Rance*) *Zuhooroon-Nissa* (1841) 2 Moo I. A. 441-477.

[2] The designation "Imam" distinguishes the disciple of Abu Hanifa from the Prophet Muhammad:

[3] *Journ. As.* 4 Ser. Tom. XV. cf. Justin 1, 2, 8, 203. See also Morley's Digest I. p. CCLXII.

deciding for themselves which opinion they will prefer[1]—which is in accordance with the following statement of the duties of the Qazi.

"If in any case the Qazi be perplexed by opposite proofs, let him reflect upon the case, and determine as he shall judge right ; or for greater certainty let him consult other able lawyers, and if they differ after weighing the argument, let him decide as appears just. Let him not fear or hesitate to act upon the result of his judgment after a full and deliberate examination."[2]

The plenary powers of the Qazi must however be taken in British India to be subject to the following direction.

"It would be wrong for the Court on a point of this kind (rights of the widow to inherit) to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority"[3] (as the Hidaya and the Fatwa-i-'Alamgiri).

Powers of Qazi and of British Court compared.

Reference in this connection might also be made to the interesting difference of opinion between two members of the Calcutta High Court on the point as to how far the British Indian Courts can exercise the powers of the Qazi ; and the point becomes the more worthy of attention as it involves, in the later of the two judgments (which are cited in the footnote[4]) the consideration of the question, whether the rules defining the powers of the Qazi, are to be considered as rules of substantive law, and as such of full effect in India, or as of adjective law, and as such abrogated by the Civil Procedure Code, and otherstatutes, regulating Procedure.

[1] "In choosing between conflicting authorities the principles of justice, equity and good conscience should be regarded" cf. (*Sheikh*) *Muhammad Mumtaz Ahmad* v. *Zubeida Jan* (1889) 11 All. 460, 16 I. A. 204, 215, and (*Bibi*) *Khaver Sultan* v. (*Bibi*) *Rukhia Sultan* (1905) 29 Bom. 468; 6 Bom. L. R. 983. *Vahazullah Saheb* v. *Boyapati Nagayya* (1906) 30 Mad. 519, 522. There are many cases in India where the question of the relative authority of Abu Hanifa and his two disciples have been considered: (*Sheikh*) *Abdul. Sheik Koar* v. *Ruheem-un-nissa* (1874) 6 N. W. P. (H. C. R.) 94 (Abu Hanifa's opinion followed in preference to that of the two disciples) *Abdul Kadir* v. *Salima* (1886) 8 All. 162. (Abu Yusuf's followed) *Muhammad Azizuddin Ahmad Khan* v. *Legal Remembrancer* (1893) 15 All. 321. *Bikani Mia* v. *Sheik Lal Poddar*. (1893) 20 Cal. 116. In *Daim* v. *Asooha Bibee* (1870) 2 N. W. P. (H. C. R.) 360 ; it was said that as the highest Shiah authorities differed the Court conceived itself at liberty to consider what had been the practice among the Shiahs in India for the last 50 years. See also Baillie I, 564 : "When the Judge has given his decision for the validity of a Wuqf of *Mooshaâ* his decree is operative, *as in all matters on which there is a difference of opinion.*"

[2] "*Badaia*" of Abu Bakr bin Mas'ud al Kashani (d. A. H. 587) quoted in the *Fatawa-i-Alamgiri* translated in Morley's "Digest." Vol. I., p. CCXL. In *Shama Churn Ray* v. *Abdur Rahim* (*1898*) *3* C. W. N. *158*, Ameerali and Pratt JJ. stated that the Civil Court of Superior Jurisdiction in the District is vested, generally speaking, with the powers exercised by the Kazi under the Mahomedan regime p. 160. Woodroffe J. followed that decision in re. *Woozatunnessa Bibee* (1908) 36 Cal. 21. Two years later however Pugh J. declined to follow that case, and refused to assume jurisdiction as extensive as that of the Qazi, unless there was some statutory power to authorize the Court doing so.—Re. *Halima Khatun* (1910) 37 Cal. 870.

[3] *Aga Mahomed Jaffer Bindanim* v. *Koolsoom Bibee* (1897), 25 Cal. 9, 18.

[4] In the matter of *Woozatunnessa Bibee* (1908) 36 Cal. 21; In re. *Halima Khatun* (1910) 37 Cal. 870.

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

Of the three other Schools of Sunni law, besides that of Abu Hanifa *viz.*, those founded by Imam Malik. Shafi'i and Ibn Hanbal, Shafi'i alone has any considerable number of followers in India. It has therefore not been deemed necessary to refer to the law and doctrines of Malik or Hanbal. The followers of the last are, it is believed almost extinct, but there are a number of Malikis in Arabia and Algeria.

II. Shiah Schools.

With the Shiahs the different schools arose as the result of dynastic troubles, and disputes as to the rightful Imam, after the general Shiah Law had already been settled. The result is, that though the four schools of Sunni Law differ from each other perhaps to a greater extent than the Shiah schools, there is very little hostility between the various Sunni schools, whereas the Shiah schools are hostile to each other, owing to their difference on questions of religious succession.

Arrangement of this work.

The course that will be followed in the present work will be to state as a rule in the same place, the whole of the Muhammadan law according to each of the sects or schools, showing where the Hanafi Shafi'i or Shiah Law differs, each from the other. In some cases the law of the different sects is so different (notably with inheritance) that each has to be stated independently of the other. Unless otherwise stated, by "Shiah law" the law according to the *Ithna 'Ashări* School of the Shiah law is meant. The Hanbali system is not referred to, and Malik's doctrines are mentioned only very occasionally. From an absence of separate mention it is not to be assumed that these two Schools, are in agreement with the Hanafi or Shafi'i law on the point.

TABLE

OF ENACTMENTS APPLYING

MUHAMMADAN LAW TO BRITISH INDIA

to follow page 28.

TABLE

OF ENACTMENTS APPLYING

MUHAMMADAN LAW TO BRITISH INDIA

to precede page 29.

CHAPTER II.

THE OPERATION OF MUHAMMADAN LAW IN BRITISH INDIA.

§1.—Subjects on which Muhammadan Law Prevails.

SECTION 1.

Succession and inheritance

1. The Muhammadan law of succession and inheritance is expressly directed by the Legislature to be applied to Mussulmans all over British India, provided that so much of the Muhammadan law and usage as prohibits succession by apostates[1] from Islam will not be enforced in British India.

First recognition of Muhammadan law in British

The steps by which Muhammadan law found recognition in British India, and the Political reasons which actuated the English rulers to leave undisturbed the personal law of the peoples of India, form an interesting part of the history of this country.[2] It need only be stated here that the first step was taken by Warren Hastings, who, in 1772 framed what was adopted as the Regulation of 17th April 1780, section 27 ; which was as follows:—

"In all suits regarding
succession[3]
inheritance
marriage and
caste, and
other religious usages or institutions

[1] It has not been possible altogether to avoid the use of this expression, but though it has an offensive association; etymologically it merely means "one who has withdrawn."

[2] cf. the judgment in *The Indian Chief* (1800) 3 Robinson Adm. Rep.. 28 which is considered to be the *locus classicus* on the subject. "The law of nations applying to the Eastern part of the world" "is different from what prevails ordinarily in Europe, and the Western parts of the world, in which men take their present national character from the general character of the country, in which they are resident. And this distinction arises from the nature and habit of the countries. In the Western parts of the world alien merchants mix in the Society of the natives ; access and intermixture is permitted ; and they become incorporated to almost the full extent. But in the East from the oldest times, an immixible character has been kept up ; foreigners are not admitted into the general body and mass of the Society of the nations ; they continue strangers and sojourners as their fathers were.—*Doris amara suam non intermiscuit undam.*"

[3] The word "succession was added in 1781.

SECTION 1. the laws of the Koran with respect to mahomedans and those of the Shaster with respect to the Gentoos, shall invariably be adhered to."

This regulation, as will appear from the enactments which are given in the table at the beginning of this chapter, forms the basis of most of the Acts under which Muhammadan law is administered by the courts[1] in British India.

Caste Disabilities Removal Act.

The laws depriving apostates of certain rights is abrogated by the Caste Disabilities Removal Act[2], XXI of 1850, which is as follows :—

"An act for extending the principle of Section 9, Regulation VII of 1832 of the Bengal Code, throughout the Territories subject to the Government of the East India Company.

Preamble: Bengal Regulation VII of 1832.

"Whereas it is enacted by section 9, Regulation VII, 1832, of the Bengal Code, that whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasions : or when one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions : the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled ;" and whereas it would be beneficial to extend the principle of that enactment[3] throughout the territories subject to the government of the East India Company ; it is enacted as follows :—

Hindu and Muhammadan Law not to deprive parties of property.

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

"So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or[4] property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from, the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."[5]

"Caste" with reference to Muslims.

It has been held, with reference to Bombay Regulation IV of 1827, that the term, "caste" is not restricted to Hindus.[6] "It comprises any well-defined native community governed for certain internal purposes by its own rules and regulation"[7] Act XII of 1887, section 37 mentions questions regarding "caste" amongst those which have to be decided in accordance with Muhammadan law.

[1] The statutes relating to the High Courts, *viz.* 21 Geo. III c 70 sec. 17, 37 Geo III c. 142 s. 13 are not affected by the Charters of the High Court. See clauses 19, 20 & 21 and the Secretary of State's Despatch accompanying the First Letters Patent or Charter, and dated London 19th May 1862. The despatch was printed in the 1901 edition of the Bombay High Court Rules, and is reprinted in Mr. Mulla's valuable edition of the Civil Procedure Code.

[2] Short Title given by Act XIV of 1897.

[3] "Peacock C.J. has pointed out the "total irrelevance" of the preamble to the enacting part of the Act. (*Srimati*) *Matangini Debi* v. (*Srimati*) *Jaykali Debi* (1869) 5 Ben. L.R. (O.C.) 466, 492 14 W. R. (O.C.) 23.

[4] "Or" is not a misprint for "of"—So held in *Nowroz Ali* v. (*Mussl.*) *Aziz Bibi* (1876) 11 P. R. (Civ. Judgts)—No. 124, p. 255. 264-5. The judgments in this case discuss the effect of the Act, (see pp. 258-263 , and compare it with previous enactments (see pp. 257-8).

[5] See case cited in last footnote and *Kery Kolitany* v. *Mooneeram Kolita* (1873) 13 Ben. L. R. (F.B.) 1, and *Muchoo* v. *Arzoon Sahoo* (1866) 5 W. R. 235.

[6] *Abdul Kadir* v. *Dharma* (1895) 20 Bom. 190 (per Sargent C.J. and Fulton J.) The Court did not follow a previous decision holding the contrary which was cited to them: (*Sayad*) *Hashim Saheb* v. *Huseinsha* (1888) 13 Bom. 429 (N. Haridas and Parsons JJ.) See also *Bai Jina* v. *Kharwa Jina Kalia* (1907) 31 Bom. 366 Chandavarker and Pratt JJ.). Compare *Abraham* v. *Abraham* (1863) 9 Moo. I. A. 195, 239-40 *Kery Kolitany* v. *Mooneeram Kolita* (1873) 13 Ben. L. R. 1, 75-76. (F. B.) 19, W. R. 367

SECTION 2.

2. The Muhammadan law of marriage is expressly directed to be enforced by all courts except the High Courts. The latter courts are however directed to preserve the rights and authorities of fathers of families, and masters of families under the Muhammadan law and also to determine all matters of contract[1] and dealing between party and party in accordance with that law when the parties are Mussulmans.

Marriage.

Marriage. How the Muhammadan law applied.

There has never been any question whether the Muhammadan law of marriage should be administered or not to the Mussulmans; and for obvious reasons: Though marriage is not expressly mentioned in the enactments relating to the Presidency towns, yet "the rights and authorities of masters of families and fathers of families" have to be preserved,[2] and marriage is a matter of contract as regards Muhammadan law: besides there is no other marriage law which is directly applicable to the Mussulmans. The Indian Acts relating to marriage and divorce have not been applied to Mussulmans.

Divorce.

The law of marriage is taken to include the law of divorce, though some of the enactments have specifically mentioned divorce as distinguished from marriage.

Doubtful matters.

There are however three matters which fall under the law of marriage and on which it is by no means clear whether the Muhammadan law has not been altered in British India. These are [1] the law relating to what is called legitimacy in English law but more properly called the establishment of Parentage with reference to Muhammadan law, the law relating to the rights of the husband to chastise his wife and whether the Caste Disabilities Removal Act applies to the legal effects of marriage or not. These matters will be dealt with in the chapters relating to them respectively.

Gifts.

3. The Muhammadan law of gifts has been enforced all over India though the courts have differed in their reasons for doing so.

Muhammadan law of gifts over India.

The law of gifts, though not always mentioned in the enactments applying Muhammadan law to British India, has been enforced in Bengal,[4] North-West Provinces[5] and the Madras Presidency[6]. Section 129 of the Transfer of Property Act, 1882, expressly saves the Muhammadan law of gift from being affected by the provisions of that Act relating to gifts, which may therefore be taken as a legislative recognition[7] of the correctness of the view taken by the courts.

[1] Cf. sec. 18 below.

[2] 21 Geo. III c. 70 sec. 18 and 37 Geo. III c. 142 sec. 12.

[3] See sec. 1 *ante* and comment on it.

[4] *Zohoorooddeen* v. *Baharoolla* (1864) W. R. 185.

[5] *Shumsoolnissa* v. *Zohra Bibee* (1873) 6 N. W P. 2.; Agra F.. B. Ed., 1874, 286.

[6] *Chekkonekutti* v. *Ahmed* (1886) 10 Mad. 196; *Khader Hussain* v. *Hussaini Begum* (1870) 5 Mad. H.. C. R. 114.

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

SECTION 3.

On grounds of justice, &c., or as religious usage and institution.

The judges have however differed in the reasons they have assigned for administering the Muhammadan law of gifts to Mussulmans where the Legislature has not expressly directed it to be so applied. Some hold that that law becomes applicable on the ground of justice, equity and good conscience,[1] and others that "questions as to gifts between Muhammadans are covered by the express provisions as to questions regarding . 'any religious usage or institution'"[2]

Contracts.

4. The Muhammadan law of contracts, so far as not affected by, nor inconsistent with, legislative enactments,[3] is enforceable in British India.

Contract Act sec. 1.

The Indian Contract Act, section 1 contains the following provision: "Nothing herein contained shall affect the provision of any statute or regulation not hereby expressly repealed nor any usage, or custom of trade, nor any incident of contract not in consistent with the provisions of this act."

(1) Interest on mortgages.

A good example of the effect of this is furnished by the rule of damdupat in Hindu law, which has been held to apply, as it is not inconsistent with the Contract Act,[4] but on the other hand sections 86 and 88 of the Transfer of Property Act have abolished all other rules so far as interest on mortgages is concerned.

(2) on other transactions.

In regard to transactions other than mortgages, the Muhammadan law, by which the taking or giving of interest is absolutely prohibited,[6] has been nullified partly by the almost universal practice of Mussulmans to give and take interest, and partly by the operation of the Interest and Usury Acts XXXII of 1839 and XXVIII of 1855 respectively;[7] and it has been held that the custom of taking interset should be recognised by the courts in British India.[8]

(3) on 'mahr.'

Even on a claim based so entirely on Muhammadan law as that of the 'mahr' of a Muslim widow, the prohibition of Muhammadan law has been held not to apply, and interest has been allowed.

Pre-emption.

5. The Muhammadan law of pre-emption is enforced in British India, except in the Madras Presidency, where it

[1] *Alabi Koya* v. *Mussa Koya* (1901). 24 Mad. 513,519-20 (where Benson J. refers to previous decisions). See also (*Mussumat*) *Shums-ul-Nissa* v. (*Mussumat*) *Zohra Bibee* (1873), 6 N. W. P. 2 (F.B.) (law of gifts applied on the ground of justice, equity and good conscience) and (*Mussumat*) *Chundo* v. *Hakeem Alimooddeen*, *ib*, 28 (F.B.) (law of pre-emption applied on the same ground).

[2] *Vahazullah* v. *Boyapati* (1906) 30 Mad. 519, 521 cf. the similar view expressed by Mahmood J. in *Gobind Dayal* v. *Inayatulla* (1885) 7 All. 775 (F.B.) as to pre-emption.

[3] *e.g.* Contract Act, 1872, Transfer of Property Act, 1882, and the Interest and Usury Acts XXXII of 1839 and XXVIII of 1855.

[4] *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781. *Saunalanappa* v. *Shivbasawa* (1907) 31 Bom. 354.

Madhwa v. *Venkataramanjulu* (1903) 26 Mad. 662, 971.

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

[7] *Mia Khan* v. *Bibijan* (1870) 5 Ben. L. R. 500, 14 W. R. 308; *Kuar Lachmansingh* v. *Pirbhupal* (1874) 6 N. W. P. 358 (F. B.)

[8] Per Phear J. *Mia Khan* v *Bibijan* (1870) 5 Ben. L. R. 500, 14. W. R. 308. *Hamira Bibi* v. *Zubaida Bibi* (1910) 33 All. 182 (F. B.) *Contra*: *Ram Lall Mookerjee* v. *Haran Chunder Dhur* (1869) 3 Ben. L R., O. C., 130.

[9] *Soorma Khatoon* v. *Altaffoonnissa Khatoon* (1863) 2 Hay 210, *Hamira Bibi* v. *Zubaida Bibi* (1910) 33 All 182 (F. B.)

has been held to be contrary to justice, equity and good conscience. [1]

SECTION 5.

There is no law of pre-emption, recognised in India, except that based on Muhammadan law ; and even where it is enforced as deriving its authority by the customs and usages of the people, it is "presumed to be founded on, and co-extensive with, the Muhammadan law on that subject, unless the contrary is shown." [2]

Based on Muhammadan law.

The law of pre-emption has, however, been practically codified in sections 9 to 20 of the Punjab Laws Act IV of 1872, and sections 6 to 15 of the Oudh Laws Act XVII of 1876. In those two Provinces, therefore, this branch of the law has to be applied as contained in the Act referred to.

—codification of.

Except these two enactments, the other Acts, laying down the law in accordance with which decisions are to be given by the Courts, do not expressly refer to the law of pre-emption. Mahmood J. was, however, of opinion [3] that as the law of pre-emption is based on the 'Sunna' or traditions of the Prophet's sayings and actions, it must be considered to be a part of "religious usages or institutions" [4] and, as such, must, necessarily, be enforced by the Courts in British India. On the other hand Petheram C.J. and Oldfield J. who sat with Mahmood J., did not agree with him on this point, and said that the Courts are not bound to administer the Muhammadan law in claims of pre-emption, but do so on grounds of equity.[5] The Madras High Court has taken a directly contradictory view ; and Holloway C.J. said that the law of pre-emption was "manifestly opposed" to equity and good conscience, coming to that conclusion after a comparison of the Muhammadan law with the Roman and German law on the same point. Roman law differed from the two others, inasmuch as by it the right arose out of contract, and gave only a personal action against the vendor. The learned judge also refers to the facts that in Germany almost all trace of the law of pre-emption has disappeared, and that the Muhammadan lawyers felt the necessity of "an antidote to its baneful influences," and "found it in subtle devices for its defeat," and "short periods of prescription for its exercise." [6] It may, of course, be adopted by the customs[7] of the people and enforced on that ground—or arise out of contract.[8]

Grounds for enforcing it :
1. As "religious usage or institution."
2. Justice, equity and good conscience.
3. Custom.
4. Contract.

6. Where it becomes necessary, for the purpose of adjudicating upon any civil rights, with reference to status, or property, connected with the religious tenets or beliefs of the

Religious rights or status.

[1] *Ibrahim Saib* v. *Mun Mir Udin Saib* (*1870*) 6 Mad. H. C. R. 26.

[2] *Fukeer Rawat* v. *Shaikh Emambuksh*, (1863) W. R. 143. *Gordhan Das Girdharbhai* v. *Prankor* (1869) 6 Bom. H. C. R. 263 *Rewa* v *Dulabhdas* (1902) 4 Bom. L. R. 811. cf. *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775.

[3] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775. cf. *Vahuzullah* v. *Boyapati* (1906) 30 Mad. 519, 521.

[4] It will be observed, on a reference to the table of Acts, that most of them mention "religious usages or institutions" amongst the matters that have to be decided in accordance with Muhammadan law : see sec. 6 below.

[5] *Gobind Dayal* v. *Inayatullah* (1885) 7 All 775, 815.

[6] *Ibrahim Saib* v. *Mun Mir Udin Saib* (1870) 6 Mad. H. C. R. 26. (Innes J. concurred).

[7] *Gordhandas* v. *Prankor* (1869) 6 Bom. H.C.R. 263.

[8] E.g. in *Rajaram* v. *Krisnasami* (1892) 16 Mad. 301.

SECTION 6. Mussulmans, the Court will consider such religious tenets or beliefs, and give a decision thereupon, without pronouncing on their truth or regulating religious ceremonies.[1]

The same provision is contained in section 9 of the Civil Procedure Code 1908 (corresponding to section 11 of the Code of 1882) to which and the decisions given under it the reader is referred.

§ 2.—*Choice of Law.*

Where parties Mussulmans, Muhammadan law applicable.

7. Where both the parties to a transaction are Mussulmans[2] (of the same sect), the Muhammadan law of the particular sect[3] to which they belong will be administered, in regard to matters hereinbefore mentioned.[4]

See the commentary and notes to the next section. In a suit for inheritance the claimants, or some of them, may be of a different religion from the deceased, but the law governing the case will be that of the sect to which the deceased belonged.[5]

Another and rather a difficult set of questions arises when the parties or some of them have changed their religion See pp. 36-39 below.

When only one party Mussulman

8. Where both the parties are not Mussulmans (of the same sect[5]), the High Courts and the Courts of Burma are required to determine the rights of the parties in accordance with the law of the defendant; and the other Courts to act according to justice, equity, and good conscience.

Example of Defendant's law prevailing.

There can be no doubt as to the effect and application of the rule that the defendant's law should prevail in a case where, for instance, a Shiah has married a Sunni wife, and sues for restitution of conjugal rights, and the wife pleads a defence which is valid only in Sunni law.[6] In some other cases the question becomes a little more difficult; and the decisions point towards various explanations and limitations of the rule: For instance it has been held that the rule is applicable in cases where there have been dealings between parties to the suit, and a suit is brought in respect of that transaction. This opinion was expressed in a case where the plaintiff's title depended

Explanations and Limitations of rule:

1. Only when there have been dealings between the parties to the suit.

[1] *Mokoond Lal Singh* v. *Nobodip Chunder Singh* (1898) 25 Cal. 1881: "The Court judicially administering the law cannot say that one religion is better than another"—per Maclean C. J. *ib.* 885. *Krishna Sami Tata Charyar* v. *Krishnama Charyar* (1882) 5 Mad. 318. The decision of religious questions was involved in *Krishnasami* v. *Krishnama* (1882) 5 Mad. 313, 315. See also *Narasimma Charyar* v. *Sri Kristna Tata Charyar* 6 Mad. H. C. R. 449, which was approved by the P. C. in *Krishnama* v. *Krishnasami* (1879) 2 Mad. 62.

[2] Whether from birth or by subsequent conversion, *Abraham* v. *Abraham* (1863) 9 Moo. I. A. 195, 239. *Jawala* v. *Dharam* (1866) 10 Moo. I. A. 511, 537-539. *Raj Bahadur* v. *Bishen* (1882) 4 All. 343, 350.

" *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-nissa* (1841) 2 Moo. I. A. 441.

[4] This is subject to the fact that certain Mussulmans are governed by non-Mussulman systems of law according to the customs prevailing amongst them. See section 10 below.

[5] *Hayatun Nissa* v. *Muhammad Ali Khan* (1890) 12 All. 290; 17, I. A., 73.

[6] *Nasrat Husain* v. *Hamidan* (1882) 4 All. 205.—Though in this case the Court did not state that they gave the wife the benefit of her own law because she was the defendant.

on a gift of lands, which had taken place "originally between Muhammadans only, and though the donor afterwards dealt with persons not Muhammadans, and not subject to Muhammadan law, the plaintiff was no party to any such dealing" and it was held that the plaintiff could not "by the donor's[1] acts be rendered subject (as regards her property) to any other than the Muhammadan law."[2] Thus the plaintiff's law was applied, and not the defendant's. In 1881 Garth C. J. said, "The concluding words of the section, it is clear, . . . do not mean this, that when a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position than a European purchaser would be"[3]; and Pontifex J. said that the true construction of the section must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. These dicta were referred to with approval by Westropp C.J.[4] (delivering the judgement of a Full Bench consisting of himself, Melville, and Kemball JJ.). In the course of the judgement it was said that 'Govardhan *v.* Sakharam'[5] was open to doubt "in respect of the view there entertained that the validity of a mortgage by a Muhammadan to a Hindu mortgagee, if the latter be the defendant, should be tested by Hindu law—a proposition which seems to involve a serious misapprehension and misapplication of Bombay Regulation IV of 1827, section 26." Again Mahmood J. said in a case that has been already referred to that the word parties "as used in section 24 of the Bengal Civil Courts Act, does not mean parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon."[6] On the other hand the Calcutta High Court[7] expressed a doubt, whether on a Hindu creditor suing the heirs of a Muhammadan debtor the Muhammadan law applied; and the Bombay Hight Court[8] laid down the rule that the Hindu law applied so long as the debtor was a Hindu and the Muhammadan law when the debt was transferred to a Muslim. In the case last cited, the plaintiff sued for redemption; the original mortgagor was a Hindu who had transferred the equity of redemption to a Muhammadan (the plaintiff). The Court held (over-ruling the contention of both parties) (1) that the Hindu law of damdupat should be given effect to, though both parties to the suit were Mussulmans; (2) that that rule applied only so long as the debtor was a Hindu, and that as soon as the equity of redemption was assigned to the plaintiff, a Muhammadan, the applicability of Hindu law ceased.

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2. The question must relate to succession by the defendant.

Parties with reference to inception of right.

4. As between debtors and creditors.

9. Where the question is whether a person is a Mussulman or not, it will be decided in accordance with the tenets of the particular sect to which he professes, or is alleged, to belong,

Persons law.

provided, first, that when a person claims or is alleged to be a Mussulman, and his avowed belief and conduct in the past

[1] The Nawab of Carnatic was the donor.

[2] *Azimunnissa* v. *Clement Dale* (1868) 6 Mad. H. C. R. 454. 474-5.

[3] *Sarkies* v. *Prosonomoyee Dosee* (1881) 6 Cal. 794. 806, 808.

[4] *Lukshmandas* v. *Dasrat* (1880) 6 Bombay 168.

[5] (1861) 8 Harrington S. D. A Rep. 189.

[6] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775. 793 (F. B.).

[7] *Bussuntaram Marwary* v. *Kamaluddin Ahmed* (1885) 11 Cal. 421.

[8] *Ali Sahib* v. *Shabji* (1895) 21 Bom. 85.

SECTION 9. do not conform to those of any recognised sect of the Mussulmans, the Court will apply that law to him which will be in accordance with justice, equity, and good conscience,[1] and that may not be Muhammadan law,

provided, secondly, that the Court will not permit anyone to commit a fraud upon the law by pretending to be a convert to Islam in order to elude the personal law by which he is bound.

Who is a Muhammadan.

Sometimes rather difficult questions come before the Courts, as to whether or not a particular person is to be classed as a Muhammadan for the purposes of the law to be applied to him. These questions may be considered under the following heads :—

1. MUHAMMADANS BY BIRTH.

1. Muhammadan by birth as to the sect of Islam to which parties

When a person is born a Mussulman there is little difficulty in his being recognised as such. The burden of proof would be on those who assert the contrary.

(1) It has also been judicially stated, that where it is not shown, nor alleged, that the parties are Shiahs, there is a presumption that they are Sunnis, "to which sect the great majority of the Muhammadans of this country belong, as has been pointed out by Baillie in the introduction to his Digest of the Imameea Law." [2]

(2) The Sunnis can become adherents of any one of the four schools of Sunni law at their choice, and an adherent of one school may transfer his allegiance to another, by a mere declaration to that effect.

(3) The same does not apply, however, to the different schools of the Shiah sect

2. BELIEF IN OR PROFESSION OF ISLAM

2. Is belief in Islam required ?

In a curious case, decided by the Allahabad Court, the plaintiff sued his father for partition, and the chief issue was whether the family to which the parties to the suit belonged, consisted of Hindus or Muhammadans. The Court held that they were neither the one nor the other ; and said that to be recognised as one or the other under section 24 of Act VI of 1871, not only must one call oneself a Hindu or Muhammadan, but must be an orthodox believer in, and must follow and observe that religion.' "That is to say, their '*status*' before the law depends absolutely on their religious belief, and this in the strict sense of the term." It is submitted that this proposition must be interpreted as referring not to the state of the mind itself, but in so far as that state is externally manifested. For as Brian, C. J., said in

[1] Cf. *Raj Bahadur* v. *Bishen Dayal* (1882) 4 All. 343.

[2] *Bafatun* v. *Bilaiti Khanum* 30 Cal

[3] *Muhammad Ibrahim* v. *Gulam Ahmed* (1864) 1 Bom. H. C. R. 236. cf. *Fazil Karim* v. *Maula* (1891) 18 Cal. 448, 459, 461 (P. C.).

[4] *Raj Bahadur* v. *Bishen Dayal* (1882) 4 All. 343, 347 sqq. See also *Assan* v. *Pathumma* (1897) 1, 506 *Kunhimbi* v *Kandy* (1930) 27 Mad. 77. Similar difficulties might have been encountered by Sir Joseph Arnould in the *Agha Khan Case* (1866) 12 Bom H. C. R. 323 had the evidence as to the origin of the Khojas been less conclusive.

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1478, "It is trite law that the thought of man is not triable, for even the devil himself does not know what the thought of man is;" [1] and another old authority has said, "The intent of man is uncertain and a man should plead such matter as is or may be known to the jury." [2] It is difficult to give any force to the epithet "orthodox" as applied to a "believer." It need hardly be stated that the Courts will decline to pronounce any particular version of a religion the true or orthodox

Profession of Islam enough.

In a case where the Privy Council had to consider the question of conversion, in order to decide whether the marriage of the alleged convert with a Mussulman was valid or not, they substituted, for an enquiry into the state of mind of the alleged convert, an enquiry into the conformity of her acts to an external standard, viz., to the conduct which may reasonably be expected from a person of her alleged religion; and they remarked, that it was a well founded criticism on the part of the appellants, to say that the lower court's ruling was based on a proposition to which exception could be taken, inasmuch as no Court could test or gauge the sincerity of religious belief, and that he should have proceeded on the basis, that, if the alien in belief embraces the Mahomedan faith, profession, with or without conversion, is necessary, and sufficient, to remove the bar to marriage arising from unbelief or difference of creed.[4]

Circumcision as a test of Islam.

In another case the judges said that it was difficult to conceive how the plaintiff (who claimed his inheritance) could come into Court styling himself a Muhammadan when neither he nor his brother had been circumcised.[5] Circumcision can however be only one of the tests for deciding whether a person considers himself, and desires to be recognised, as a Mussulman or not—but the question of his religion cannot be decided without reference to the tenets, beliefs, and customs of the particular sect to which he professes to belong; and applying them to all the circumstances of the case.[6]

[1] Quoted by Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (1877) 2 App. Ca.

[2] (1465) Y. B. 4 Ed. IV. 89. quoted in Holland's "Jurisprudence" (7th Ed.) 105 note.

[3] See *Mokoond Lal Singh* v. *Nobodip Chunder Singh* (1898) 25 Cal. 881. Compare *Thornton* v. *How* (1862) 31 Beav. 14 *O'Hanalon* v. *Logue* [1906] 1, I. R. 247 cited at length in *Jamshed* v. *Soonabai* (1907) 33 Bom. 122, 205-211: 10 Bom. L. R. at p. 485.

[4] *Abdul Razack* v. *Aga Mahomed Jaffer Bindaneem* (1894) 21 I. A., 55. Note that there was no evidence tending to show that the alleged convert made any profession of Islam. "She said she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese," *ib.* p. 64.

[5] *Sahebzadee Begum* v. (*Mirza*) *Himmut Bahadoor* (1869) 12 W. R. 512. The learned judges then go on to state that in accordance with Bail. II, 265, they gave the benefit of the law to the plaintiff, and considered him a Mussulman. The passage from Baillie which is referred to deals with the "impediment of infidelity" and lays down that in considering whether an infant (who cannot declare or choose his religion) should be excluded from inheritance as an infidel, or not, "the construction of the law is in favour of Islam." The provision of Muhammadan law disentitling non-Muslims from inheriting would, in most cases, have no force owing to the Caste Disability Removal Act XXI of 1850. *Quaere*, whether that Act would apply where the propositus was a convert to Islam, and his relatives had retained their non-Muslim religion.

[6] On circumcision, see Hughes's "Dictionary of Islam" *sub verb.* p. 57. As an external test it may be of use, but it can hardly be conclusive one way or the other.

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3. PRETENDED CONVERSION.

Pretended conversion.

Where on the other hand it is shown that the parties to the suit are pretending to be converts to Islam, in order to elude the personal law applicable to them, the Courts will not allow the pretended conversion to affect the rights and liabilities of the pretended converts.[1]

4. HONEST CONVERSION.

Effect of honest conversion on rights already accrued.

Fourthly, as to the effect of honest conversion, on rights which had their inception previous to the change of religion, the Privy Council have said : Whether a change of religion, made honestly, after marriage, with the assent of both spouses without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage is a question of importance, and, it may be, of some nicety."[2] The cases of 'Gobind Dayal *v.* Inayatulla'[3] and 'Ali Sahib *v* Sabhji,'[4] enunciate principles, *which would appear to give a reply to the question, but the difficulty to which their Lordships of the Privy Council refer, consists in applying the principles to the facts of any particular case, especially with reference to a transaction like marriage with its far-reaching consequences.*[5]

Converts and choice of law.

In a Bombay case[6] the following propositions were laid down as governing converts :

1. Muhammadan law generally governs converts to that faith from the Hindu religion.
2. A well-established custom of such converts, following the Hindu law of inheritance, would over-ride the general presumption.
3. This custom should however be confined strictly to cases of succession and inheritance.
4. And if any particular custom of succession[7] be alleged, which is at variance with the general Hindu law applicable to these communities, the burden of proof lies on the party alleging such special custom.

5. RETENTION OF LAW BY CONVERTS ON MATTERS OTHER THAN SUCCESSION.

Whether they retain their original law of

With reference to the third proposition mentioned above, which confines the scope of custom strictly to matters of succession and inheritance, it may be noted :

1. Gifts.

1. As to gifts Tyabji J. has said[8] " Inasmuch as no authority has been cited in support of the proposition that Khojas, in the cases of gifts, are governed by Hindu law, I am not disposed to apply the Hindu law to Khojas, more than in decided cases."

2. Adoption.

2. So also in quite a recent case[9] Chandavarker J. said that the law of adoption is not a part of the law of inheritance or succession, and the presumption in the case of converts being that they have abandoned their original law, a convert to Islam alleging the retention of the Hindu law of adoption, must prove it.

[1] *Skinner* v.*Orde* (1871) 14 Moo, I. A. 309, 10 Ben. L. R. 125, 17 W. R. 77. *Skinner* v. *Skinner* 1897) 25 Cal. 537, 546 ; 25 I. A. 34, 2 C. W. N. 209 *Re Ram Kumari* (1891) 18 Cal. 264.

[2] *Skinner* v. *Skinner* (1897) 25 Cal. 537, 546.

[3] (1885) 7 All. 775.

[4] (1895) 21 Bom. 85.

[5] See e.g. *Zuburdust Khan and his wife* (1870) 2 N.W.P. 370 referred to in p. 39, note 1.

[6] *Bai Baiji* v *Bai Suntok* (1894) 20 Bom. 53, 57 referred to with approval in 23 Bom. 539.

[7] This is taken from the head note which has slighty varied the wording of the judgement.

[8] *Moosabhai* v. *Yacoobbhai* (1904 29 Bom. 267, 276 : 7 Bom. L R. 45, 49.

[9] *Bai Machhbai* v. *Bai Hirbai* (1911) 13 Bom. L. R. 251, 256. See sec. 218 below.

3. On the other hand the Hindu law of joint family firms was applied to Mussulmans in Bombay by Sargent C. J. and Scott J.[1] and (following them) by Russell J.[2]

SECTION 9. 3. Joint family.

6. CONVERSION FROM ISLAM TO ANOTHER RELIGION.

In the case of conversion from Islam to another religion, again, very difficult questions may arise: Thus where a Muslim husband and wife both became converts to Christianity, and the husband afterwards applied for divorce under the Divorce Act IV of 1869, the Court held[3] that he could not do so as the Act applied only to monogamous marriages; and that an application for restitution of conjugal rights would have been similarly dismissed, as the woman had lost her status as a Muhammadan wife by her conversion.[4]

Conversion from Islam to another religion.

§ 3.—Conflict or Absence of Laws and Customs.

10. Where the Legislature has expressly declared[5] that the customs and usages of the Mussulmans are to be enforced, the Courts will enforce them, even though they be opposed to strict Muhammadan law, provided that they are proved to be sufficiently ancient and certain,[6] and they are not opposed to public policy.

Customs and law.

Explanation I—A convert to Islam may carry his original laws and usages with him, and may be governed by them even after conversion to Islam[7]; and it has been held that the

Converts may retain their original laws.

Khojas,[8]
Cutch Memons,[9]
Sunni Bohras of Gujrat,[10] and
Molesalam Girasias of Broach,[11]

Khojas, Kutchi Memons, 3. Sunni Bohras, 4. Molesalam Girasias, governed by Hindu law of succession.

[1] *In re Haroon* (1894) 14 Bom. 189.

[2] *Haji Noor Mahomed* v. *Macleod* (1907) 9 Bom. L. R. 274.

[3] *Zuburdust Khan and his wife* (1870) 2 N.-W. P. 370.

[4] But see Bail. I. 182, Hed. 66 which shows that under Muhammadan law when both parties apostatize together, the marriage subsists, at least to this extent, that if they should both become Muslims again, their marriage continues.

[5] The courts of all places except of Bengal and Eastern Bengal, Assam, and the United Provinces, are required to enforce customs, and the High Courts in their Ordinary Civil Jurisdiction are required to enforce usages. As to Bengal and other excepted places, see notes on pp. 40 sqq. V. Table *ante*.

[6] See *ante*, comment to section 9.

[7] See however *Hirbae* v. *Gorbai* (1875) 12 Bom. H. C. R. 294.

[8] *Hirbae* v. *Sonabai*, known and reported as the "Khojas' and Memons' Case," (1847) Perry, Or. Cas. 110. Morley's Digest II, 431, *Hirbae* v. *Gorbai* (1875) 12 Bom. H.C.R. 294 (Sargent J.) *Gangabai* v. *Thaver Mull.* (1863) Bom H. C. R., 71, 73 (Sausse C. J).

[9] *Khojas' and Memons' Case* (1847) Perry Or. Ca. 110, Morley's Digest. II. 431. *Ashabai* v. *Haji Tyeb* (1882) 9 Bom. 115 (Sargent C.J.) *Abdul Cadur Haji Mahomed* v. *C. A. Turner* (1884) *ib.* 158 (Scott J.) *Mahomed Sidick* v. *Haji Ahmed* 1885, 10 Bom. 1 (Scott J.) Halai Memons are not governed by Hindu law.

[10] *Bai Baiji* v. *Bai Suntok* (1894) 20 Bom. 53 Ranade and Fulton JJ.)

[11] *Maharana Shri Fateh Sangji Jasvant-Sangji* v. *Kuvar Harisangji Fatesangji* (1894) 20 Bom. 181 (Jardine and Ranade JJ.)

SECTION 10. **are governed by the Hindu law of inheritance and succession, though they profess the Muslim religion.**[1]

Explanation II—Hindus or other non-Muslims may, by their customs, be subject to Muhammadan law.[2]

Explanation III—Hindu or other law may be partly or wholly applied to Muslims, even on matters referred to in sections 1 to 6.[3]

Custom: where the Legislature expressly requires it to be enforced.

It will be observed, that the attitude of the British Legislature has not been quite uniform, on the point whether the Courts should be directed to enforce customs prevalent amongst Mussulmans. They are not enforceable[4] in Bengal, North-Western Provinces and Assam, where Act XII of 1887 prevails. And the Allahabad High Court has held that where that Act prevails, evidence is inadmissible to prove a custom of succession at variance with Muhammadan law.[5] See the Table preceding this chapter.

—where otherwise.

It would appear that the mere absence of any express direction to enforce customs, would not prevent evidence of customs being given; for the law adopted by the customs of the people would be held to be that to which justice, equity and good conscience would point, as the law governing the parties. But in the cases last cited, it was pointed out that in Act XII of 1887 it is expressly laid down that the Muhammadan law of succession is to be enforced, and there is no provision in the said Act similar to that contained in other Acts to the effect that if Muhammadan law is modified by customs, it is to that extent not to be enforced. Hence a very curious question may arise—whether the customary or commonly accepted interpretation of the Muhammadan law would be considered binding by the Court,[6] or it would consider itself under the duty to interpret the Muhammadan law for itself, just as it would be under a duty to interpret Acts of the British Legislature.

Importance of custom relatively to other law.

Custom, it has been said, "exists as law in every country, though it everywhere tends to lose its importance relatively to other kinds of law."[7] It has lost much of its importance in Muhammadan law as administered in British India, owing to the fact that the text books to which the Courts[8] refer for

[1] So the Kharwa community of Broach has been held to form a caste of its own and to be bound by the rules of that caste. *Bai Jina* v. *Kharwa Jina Kalia* (1907) 31 Bom. 366.

[2] E.g. the Hindu population of Behar is governed by the Muhammadan law of pre-emption. *Fukeer Rawot* v. *Sheikh Emambuksh* (1863) W. R. (Full Bench Rulings) (Sp. No.) 143, Ben. L. R. SUPP. VOL. 35, (F. B.).

[3] E.g. the Oudh Estates Act I. of 1869 lays down special rules of inheritance, and permits adoption, amongst persons referred to in the Act, though they are Muslims.

[4] The restriction against the recognition of custom, even in these provinces, must be practically limited to matters connected with "succession, inheritance, marriage, or any religious usage or institution," on which subjects Muhammadan law is to be enforced; for in other matters the Court would probably enforce customs under justice, equity and good conscience. cf. Table, of Acts *ante*.

[5] *Jammya* v *Diwan* (1900) 23 All. 20. See also a case decided by the Calcutta High Court: *Hakim Khan* v. *Gul Khan* (1882) 8 Cal. 826, 830. 10 C. L. R. 603.

[6] As in *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9 (P. C.).

[7] Holland's "Jurisprudence" 52; cf. "Usage, or rather, the spontaneous evolution by the popular mind, of rules, the existence and general acceptance of which is proved by their customary observance, is no doubt the oldest form of law-making." *Ib.* 50.

[8] New law books and new editions of the old books are still coming out in Turkey and Persia.

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that law were practical codifications, in which it is not possible to distinguish those portions which are based on custom, from the rest. Custom being thus disguised beyond recognition—clothed as it is in the garb of a canonical exposition of the law—the Courts have been far more averse to recognising any custom which alters the law as laid down in the texts, than they would have been had they known the origin of a considerable portion of Muhammadan law, or had the text books referred to custom in the same manner as (for example), the writers on Hindu law do. The result is also that where these text books have laid down a particular rule of law, such a rule will be enforced though it may be proved that it had its origin in custom, and that that custom was opposed to strict Muhammadan law as laid down, for instance, in the Quran or 'Sunna.'[1] For the Courts will not go behind such commentaries and will not interpret anew the authorities on which the exposition of the law purports or appears to be based; but will consider themselves bound by the prevalent interpretation.[2]

Custom, as a source of Muhammadan law.

Nor is express reference to custom altogether absent from the texts themselves.[3] The place of custom in pure Muhammadan law is discussed in the Introductory Chapter.[4]

Reference to customs in Muslim texts.

Where the Legislature has expressly declared that customs are to be enforced, a new set of considerations comes in. Sir Erskine Perry, Chief Justice of Bombay, in a memorable judgement[5] delivered in 1847, has considered the question from all its bearings. He deals first with the question as to what it is that gives to customs their binding force. Customs, he holds, represent those rules about the various relations of life which the exigencies of man have framed long before written laws, but which have been spontaneously adopted, and with which the legislator in his wisdom or indifference or want of skill has not interfered. When (as in Rome) the mere suffrage of the people can give to rules the force of law, the Chief Justice held, that there might be some ground for holding that customs may have "the validity of a law *per se*," but "according to English law," and "to the sound principle of universal law, the custom would require the sanction of the Court, as representing the sovereign authority, before it obtained any legal validity"[6] (p. 119). He then lays down, that if there exists a custom which is ancient, not injurious to public interests, and not conflicting with any express law of the ruling power, it is entitled to receive the sanction of a Court of law (p. 121). The question still remained whether, if persons who are generally governed by Muhammadan law, set up a custom inconsistent with the law of the Quran, the custom was not invalid, just as in England conflict between a custom and an Act of Parliament invalidated the custom. The conclusion at which the learned Chief Justice arrived, was that Courts have to give decisions in accordance with the law as "delivered to them for administration by their sovereign," (p. 122) and after a consideration of the legislative enactment

When the legislature expressly requires custom to be enforced. Case of Khojas and Memons.

Conflict between the Muhammadan law and custom.

[1] Cf. the *bada'i* or innovated forms of divorce. See sec. 142 (comment) below.

[2] *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18, (P. C.).

[3] See, e.g., Bail. I. 97, 126, 146, 390, 546, 559, 562, Bail. II. 16, 109, 116, 212, 216.

[4] See *ante* pp. 18, 20.

[5] *Hirbae* v. *Sonabai* known as the *Khojas' and Memons' Case* (1847) Perry's Oriental Cases 110, 117, 123, Morley's Digest II. 431.

[6] To the same effect (with an examination of books on jurisprudence) is the judgement of Frere and Holloway JJ. in *Tarachand* v. *Reeb Ram* (1866) 3 Mad. H. C. R. 50, 55-57.

SECTION 10. which requires the customs *prevailing amongst the parties to be enforced, he laid down that the law to be enforced by the Courts subject to such an enactment, is not that law which the Mussulmans ought to observe, in accordance with their religion, nor in accordance with the interpretation that their religious laws would receive from the Courts, but that that law should be enforced, which they are proved to have themselves adopted, and which evidence shows has been prevailing amongst them—subject only to this, that it is not opposed to public policy.* Sir Erskine Perry therefore held that the Hindu law should be administered to the Khojas and Memons, who by their customs and usages had been following the Hindu law, though they professed Islam.

'Optimus interpres legis consuetudo.'

Special custom grafted on the general law.

In the same manner, even a special custom as to a particular right may be engrafted on the general law, or may alter the general law; and such a right may be enforced: as, for instance, a Mussulman widow may, contrary to the law of Islam [1] acquire a life-interest in the whole of the property of her husband,[2] or may altogether lose the right to inherit,[3] or the rule of primogeniture may be held to prevail [4]; and this may happen although in all other respects the parties may be governed by the Muhammadan law of inheritance.

Custom and public policy

Policy of Muhammadan law.

As already stated, [5] though a custom is proved to be prevalant, it will be disallowed any force if it is opposed to public policy.[6] In this connection a case decided by the Privy Council [7] should be noted, in which they held that the customs which were proved in the case, and which would have had the effect, if valid, of varying the "common law of the Muhammadans" relating to inheritance. could not be upheld, because they were immoral; in deciding that they were immoral, their Lordships referred to the terms of reprobation in which the 'Fatawa-i-'Alamgiri' the 'Hidaya' and the Quran refer to 'zina' (illicit intercourse) which was involved in the customs in question. It would therefore seem that public policy, with reference to questions governed by Muhammadan law, must be understood by the standard of Muhammadan

[1] The widow by general Muhammadan law takes a fourth or an eighth of the estate; and as to life-interests see the chapter on Gifts.

[2] *Mahomed Riasat Ali* v. *Hasin Banu* (1893) 21 Cal. 157 (P C.) virtually over-ruling (*Musumat*) *Sarupi* v. *Mukh Ram* (1870) 2 N.-W. P, 227. In *Hub Ali* v. *Wazirunnissa* (1900) 28 All. 496 the custom could not be proved. See also Sir R. K. Wilson's "Anglo-Muhammadan Law," 87 and the quotations given there from Boulnois and Rattigan's "Punjab Customary Law" p. 97, Rattigan's "Digest" (6th ed.) p.20. The Kabyles of Algeria "retain non-Islamic usages formerly embodied in written 'Kanouns' [i.e. *Qanuns* or 'laws'] and guaranteed to them by treaty with the French Government,—one of which is the denial of all rights of inheritance to women"

[3] See *Mahammad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422, 425, (3rd para.) 427 (2nd para.) 9 I. A. 8. A custom excluding females from inheritance was set up, but not held to be proved in *Miravbivi* v *Vellayanna* (1865) 8 Mad. 464

[4] *Muhammad Imam Ali Khan* v. *Sardar Husain Khan* (1898) 25 I. A. 161. 26 Cal. 81. In (*Mirza*) *Mahomed Akul-Beg* v. (*Mirza*) *Kayum Beg* (1876) 25 W. R. 199, a custom of strict primogeniture was set up and enforced by the Calcutta High Court. (Markby J.) See also the Oudh Estates Act I. of 1869, which recognises the rule of primogeniture amongst some of the taluqdars, and empowers the British Government to give sanads declaring that the succession shall be regulated by that rule, ss. 8 and 22.

[5] Sec. 10.

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

[7] *Ghasiti* v. *Umroajan* (1898) 21 Cal. 149; 20 I. A. 196.

lawyers ; or at least, that regard has to be paid to that standard.[1] Similarly referring to the presumptions in Muhammadan law of parentage and marriage from acknowledgement, Dr. Lushington said, in delivering the opinion of the Privy Council, "We apprehend that in considering this question of Mahomedan law, we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question."[2]

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Principles of evidence.

These dicta, showing that the attitude of Muhammadan lawyers should be considered, even in matters which may have been placed beyond the pale of strict Muhammadan law, either by the adoption of customs, or by enactments like the Evidence Act, do not necessarily conflict with the rulings by which customs opposed to Muhammadan law are given effect to ; for in the cases last referred to, the Privy Council were not considering the effect of two opposed provisions, one of Muhammadan law, and the other of custom or of the adjective law of British India, relating to the same subject. What they were dealing with was, in the first decision, a custom which was inconsistent with the rest of the law governing the parties in question, that general law being the Muhammadan law ; and in the second decision, they were really fixing the scope and effect of Muhammadan law, by considering how Mussulman lawyers would themselves deal with the question.

Pleading and customs.

Before quitting the subject of customs, it may be useful to refer to some points connected with the manner in which customs must be pleaded and established in the Courts : Custom[3] has been described by Jessel, M. R.[4] as local common law.[5] It must be reasonable,[6] not opposed to public policy, and certain[7] in respect of its nature generally, as well as in respect to the persons whom it is alleged to affect.[8]

Age of customs.

When any custom or usage relates to a course of dealing or line of conduct, generally adopted by persons engaged in a particular trade or profession, or by persons bearing certain contractual or domestic relationship, it need not, even in England, have existed from time immemorial, and it need not be confined to any definite locality.[8] Almost all the customs and usages relating to matters on which Muhammadan law prevails in British India, come under the above category ; and it is evident that many of the

[1] Thus for instance the Hindu law adopts a very different attitude towards prostitution *Mathura* v. *Naikin* (1880) 4 Bom. 545 *Venku* v. *Mahalinga* (1888) 11 Mad. 393. Hindu law is also more favourable to customs *Tarachand* v. *Reeb Ram* (1866) 3 Mad. H. C. R 50, 56.

[2] (*Khajah*) *Hidayut Oollah* v. *Rai Jan Khanum* (1844) 3 Mad. I. A., 295, 318.

[3] See on customs generally the *Khojas' and Memons' Case* Perry Or. Cas. 100 ; Morley, Dig. II, 431 *Howard* v. *Pestonji* Perry. Or. Cas 535 *Tarachand* v. *Reeb Ram* (1866) 3 Mad. H. C. R. 50, 55-57 *Bhau Nanji* v. *Sundrabai* (1874) 11 Bom. H. C. R. 249. *Mathura Naikin* v. *Esu* (1880) 4 Bom. 545.

[4] *Hamerton* v. *Horney* (1876) 24 W. R. 603, 604. See also *Lockwood* v. *Wood* (1844) 6 Q.B. 50.

[5] Lord Hobhouse speaks of the "common law of the Muhammadans" in *Ghasiti* v. *Umraojan* (1893) 21 Cal. 149, 153 (P. C.).

[6] *Moult* v. *Halliday* [1898] 1 Q. B. 125.

[7] *Returaji Dubain* v. *Pahlwan Bhagat* (1910) 33 All. 196 (F. B.) *Rama Kanta Das Mahapatra* v. (*Chowdhuri*) *Shamanand Das Paharaj* (1909) 11 Bom. L R. 530 (reversing Calcutta High Court). See also *Tyson* v. *Smith* (1838) 9 Ad. and El. 406, 421, *Simpson* v. *Wells* (1872) L. R. 7 Q. B. 214.

[8] *Moult* v. *Halliday* [1898] 1 Q. B. 125 ; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.* [1897] 2 Q B. 93.

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customs held to be proved in India could not have existed from time immemorial. Even in England, if a man of about 50 years comes forward and asserts a certain custom, that constitutes 'prima facie' proof of the custom.[1]

Proof of customs.

Its existence[2] however must be clearly proved,[3] and also that it has been consciously accepted as having the force of law,[4] unless it has been so often proved that the Court takes judicial notice of it.[5] But proof of a custom or usage in one case does not make it judicially noticeable in all subsequent cases.[6] It must be proved in the exact terms[7] in which it is alleged; and if the evidence tends to prove a custom wider than is alleged, the Court will not take it as proof to the extent to which it is alleged, taking the rest of the evidence as surplusage.[8]

"Customs" and "usages" distinguished. Their incidents in English and Muhammadan law.

Customs and usages are distinguishable in English law.[9] The latter, unlike the former, need not have existed from time immemorial,[10] nor be confined to a limited locality, and must be consistent with the general law. The distinction between the two terms is however seldom observed even by eminent authorities in England, and they are used as if they were interchangeable.[11] The customs of Muhammadan law, as prevailing in India, do not correspond exactly either to customs or usages in their strict sense. For it has never been held, that a custom to be valid in British India must have existed from time immemorial,[12] though "antiquity" is required even in India[13]; and, whereas English law requires customs to be confined to a limited locality,[14]

[1] See as to proof of customs Halsbury's "Laws of England," Tit. "Custom and Usage" and "Customs and Customary Law in British India" by S. Roy (Tagore Law Lectures for 1908).

[2] *Ramanand* v. *Surjiani* (1894) 16 All. 221. *Lachman Raj* v. *Akbarkhan* (1887) 1 All. 440 *Gopalayyan* v. *Raghupatiayyan* (1873) 7 Mad. H. C. R. 250 (1876) *Hurpursad* v. *Sheo Dayal* 3 I. A. 259, 285. *Beni Madhab Baneriee* v. *Jai Krishna Mukerjee* (1869) 7 Ben. L. R. 152 *Rama Lukshmi Amal* v. *Sivanantha Perumal Sithurayar* (1872) 14 Moo. I. A. 570.

[3] This does not necessarily imply a great body of evidence,—*Johnson* v. *Clark* [1908] 1 Ch. 303, 309; and see *Hirbai* v. *Gorbai* (1875) 12 Bom. H. C. R. 294.

[4] *Mirabivi* v. *Villayanna* (1885) 8 Mad. 464

[5] *Shivji Hasam* v. *Datu Mavji Khoja* (1874) 12 Bom. H. C. R. 281, *Shambher Nath* v. *Gayanchand* (1894) 16 All. 379, *Gangabai* v. *Thaver Mulla* (1863) 1 Bom. H. C. R. 71, 73. (Sausse C. J.) *Re Chenworth* [1902] 2 Ch. 488 *Re Matthews* (1875) 1 Ch. D. 501. *Edelstein* v. *Schuler & Co.* [1902] 2 K. B. 144, 155, 156. See *George* v. *Davies* [1911] 2 K. B. 145 where the Divisional Court (Bray and Lord Coleridge JJ.) held that the County Court was not in error in taking judicial notice of a custom which twelve years before Hawkins and Channel JJ. had felt unable to notice judicially in *Moult* v. *Halliday* [1898] 1 Q. B. 125. In Roman law the best evidence was to produce the judgments of the courts of law: Dig. I. 3, 34.

[6] *Re Parker ex parte Turquand* (1885) 14 Q. B. D. (C. A.) 636, 645. *Southwell* v. *Bowditch* (1876) 1 C. P. D. 374; *Moult* v. *Halliday* [1898] 1 Q.B. 125—See Halsbury's "Laws of England," X ss. 500-503, pp. 272-4; cf. *Bai Baini* v. *Bai Suntok* (1894) 20 Bom. 53.

[7] *Moult* v. *Halliday* [1908] 1 Q. B. 125, 129 *Hirbai* v. *Gorbai* (1875) 12 Bom. H. C. R. 294 *Sayad Abdulla Edrus* v. *Sayad Zain* (1888) 13 Bom. 562, 566

[8] *Hammerton* v. *Honey* (1876) 24 W. R. 603 (Jessel M. R. at p. 604) but see *Farquhar* v. *Newbury Rural Council* (1909) 1 Ch. 12 (C. A.) (affirming Warrington J.).

[9] See Halsbury's "Laws of England," X. 221 (sec. 422), and Bayley J. speaks of usage being "the legal evidence of custom." *Read* v. *Rann* (1830) 10 B. and C. 438, 441

[10] *Dashwood* v. *Magniac* (1891) 3 Ch. 306, 371. (Kay L. J.) *Crouch* v. *Credit Foncier of England* (1873) L. R. 8 Q. B. 374, 386 (Blackburn J.).

[11] See on this Aske's "Customs and Usages of Trade" (1909) p. 13.

[12] Cf. *Hirbai* v. *Gorbai* (1875) 12 Bom. H. C. R. 294, though that case has reference to the peculiar state of the law governing the Khojas. See *ib.* pp. 316-7, 319-20.

[13] *Ramalakshmi Ammal* v. *Sivanantha Perumal* (1872) I. A. Supp. Vol. 1, 3; 17 W. R. 553; and see *Doe* d. *Jagmohan Rai* v. *Srimati Nimu Dasi* (1831) Montriou's Cas. H. L. 596.

[14] Halsbury, "Laws of England," X. 219, 221, 229.

the Muhammadan lawyers required just the reverse [1]; on the other hand in British India its extent is not local or territorial, but personal, in so far as Muhammadan law is concerned. SECTION 12.

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

Ancient and authoritative interpretation of the law will be adhered to.

New rules of law will not be deduced.

The points involved in the present section were dealt with by the Privy Council in a recent case.[3] They disapproved of the Courts acting upon "logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts," on the ground that in the absence of rules expressly laid down in the ancient texts or commentaries, it is safer to follow the analogy of another branch of the same school of law.[4] See next section.

In the absence of law and custom: analogy.

12. In the absence of an express or implied rule of Muhammadan law, or custom, the Courts will either follow the analogy [5] of the law in similar instances, or act in accordance with justice, equity, and good conscience.

Justice, equity and good conscience.

See the notes on the last section and the cases referred to there.[6]

Justice, equity, and good conscience are generally interpreted to mean rules of English law, if found applicable to Indian society and circumstances.[7] In some Indian Acts [8] the Courts are expressly required to conform to the principles of English law.

[1] See *ante*, pp. 18-20.

[2] *(Aga) Mahomed Jaffer Bindanim* v. (1897) 25 Cal. 9, 18. (P. C.). There is no reference to customs in the judgement. *Baqar Ali Khan* v. *Anjuman Ara Begum* (1902) 25 All 236, 252-255, 30 I. A. 94.

[3] Similarly in the case of the *Khojas and Memons* (Perry Or. Cas. 110, Morley Dig. II. 431) it was held that the law to be enforced by the High Courts under the enactments governing them is the law which has been actually adopted by the parties in question, and not what the Court may logically conclude they ought to adopt. Compare the dicta in England as to introducing in the common law new rights "which ought to exist according to notions of what is just and proper," per Pollock. C. B. in *Jeffreys* v. *Boosey*, (1854) 4 H. L. 815, 936, Bowen L. J. in *Dashwood* v *Magniac* (1891) 3 Ch. 367. Stephens' "History of Criminal Law," III. 359. On the other hand as to equity, see per Jessel M. R. *in re Hallet's Estate* (1879) 13 Ch. D. 696, 710. Lord Cottenham in *Wallworth* v. *Holt* (1841) 4 My. and Cr., 619, 635. Lord Eldon in *Gee* v. *Pritchard* (1818) 2 Swanst. 402, 414.

[4] *Baqar Ali Khan* v. *Anjuman Ara Begum* (1902) 25 All. 236, 252-255.

[5] See also *Braja Kishon Sarma* v. *Kuta Chandra Surma* (1871) 7 Ben., L. R. 19, 25. *Re Kahandas Narandas* (1880) 5 Bom. 154 and the cases cited in the next footnote.

[6] Per Lord Hobhouse: *Waghela Rajsanji* v. *(Shaikh) Masluddin* (1887) 11 Bom. 551, 561; 14 I. A. 89 *In re Kahandas Narandas* (1880) 5 Bom. 154 *Duda Honaji* v. *Babaji Jagushet* (1865) 2 Bom. H. C. R. 36, *William Webbe* v. *William Lester*, (1865) *ib.* p. 52; but see *(Mussamat) F. Barlow* v. *Sophia Eveline Orde* (1870) 13 Moo. I. A. 277, 13 W. R. (P. C.) 41; 5 Ben. L. R. 1. See also First Report of Commissioners for preparing Codes for India p. 9. Second Report p. 10. The Austrian Civil Code sec. 7 requires the courts to decide "in accordance with the principles of natural law." The French Civil Code art. 4 makes a judge "who refuses to render judgement under pretence that the law is silent, obscure, or insufficient" liable to prosecution.

[7] E.g. section 7 of Divorce Act IV of

SECTION 12. The law of pre-emption and equity.

Reference has already been made to the different views taken about the enforceability of the law of pre-emption; and that justice, equity, and good conscience have been invoked both in its support and against it.

Effect in India of Muhammadan law on some matters.

This seems to be the proper place to consider certain matters to which *Muslim books on law give importance, and which refer to subjects, that are not declared to be applicable in British India, or are expressly declared to be inapplicable but which yet deserve attention, either because of the doubt as to their applicability, or on account of their general bearing on branches of the law that do apply, and for similar reasons.*

[1] Law of majority. Age varies for different juristic acts,

(a) Majority Act, excepts marriage dower, divorce, and religion,

(b) No general law as to all matters covered by Majority Act

(c) Special laws as to some such matters

First, as to the age at which Muslims should be considered legally capable [1] of performing juristic acts, doubt arises from a number of considerations. It is, of course, not necessary that the law should be uniform on the matter for all transactions; in other words, the attainment of a certain age may make a person competent to enter into one transaction, and may still keep him incompetent as regards another. Thus the French Civil Code recognises different ages for capacity for marrying, and for entering into other contracts—and the ages for males and females also differ. Even in England an infant, however young, can hold an advowson or patronage of a benefice, and can present to the benefice on an avoidance thereof. [3] In India also a similar want of uniformity in the law arises; and this is partly the deliberate policy of the Legislature, for the enactment dealing with the subject is specifically barred from affecting capacity in certain matters; [4] and again, the Act itself contemplates two different ages of majority, depending on the fortuitous circumstance whether a guardian has been appointed by the Court or not Even as regards matters which are not expressly excepted from the operation of the Act, it does not seem to have been broadly laid down in any enactment, that in the absence of any special law to the contrary, non-attainment of majority shall generally incapacitate him as regards all acts in the law. [5] No doubt in regard to specific juristic acts, the law has laid down attainment of majority as a condition precedent. [6] So that we have this result, that while the Indian Majority Act has no application at all to such matters as marriage, dower, divorce or religion; even as regards other matters, though according to the Majority Act a person may be considered a minor regarding them, yet there is no law stating the effect of his being a minor, or laying down that he is incapacitated from acting in regard to them through non-attainment

[1] The expression *sui juris* which is commonly used by English lawyers to predicate legal competence to act, did not, in Roman law, signify that the person had arrived at any age of legal majority. "A child just born, if not under the *potestas* of the father was *sui juris*." Hunter's "Roman Law," 194.

[4] Artt. 388, 144, 145, 148, 903, 305 and cf. artt. 374, 376-7, 476, 477.

[3] Halsbury's "Laws of England," XVII. 101, sec. 243, and cf. *Brocklebank* v. *Brocklebank Borlase*, (1911) 27 T. L. R. 569 (infant co-respondent without guardian *ad litem*).

[4] See Indian Majority Act IX of 1875, s. 2.

[5] The French Civil Code art. 902 lays down a general rule as to acquiring property: "all persons can dispose of or receive property by donation *inter vivos* or by will excepting those whom the law declares incapable of so doing."

[6] The most important of such provisions being sec. 11 of the Contract Act. On the other hand though the Guardians and Wards Act defines a minor as a person who under the "provisions of the Indian Majority Act is to be deemed not to have attained his majority" it does not anywhere lay down that the effect of being a minor is incapacity legally to act without a guardian.

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of the age of majority. The effect of this is, that the age of capacity to act is left doubtful in regard to acts referring to those matters [1] which are neither expressly excepted from the effect of the Majority Act, nor expressly covered by some such enactment as section 11 of the Contract Act. In regard to such matters, it would seem that the rule of Muhammadan law applies. By Muhammadan law the age of puberty is generally the age of majority, but there are special provisions for various juristic acts, such as marriage and wills, and the different sects do not agree with each other. These will be considered in their proper places.

2 Certain presumptions of Muhammadan law,

The texts on Muhammadan law refer to some classes of matters, connected with the proof of facts, of which the effect in British India is not always easy to determine: for it is not clear whether they are merely provisions as to the evidence [2] required for proving certain transactions, or whether they fall under the head of presumptions of law, and thus are saved by sec. 103 of the Evidence Act; which provides that: "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person." [3]

which depend on declaration of intention, or the like

Secondly it is not easy to appreciate the exact effect in British India of one particular class of presumptions (if we take them to be presumptions of law), with which the Muhammadan law abounds. viz., where the law provides, that a statement on oath [4] of a party to certain specified transactions should be presumed to be a true account of the nature of those transactions, unless the contrary is proved. The presumption does not arise (it will be observed) merely from the existence of the facts making up the transaction in question, but from those facts coupled with the statement of the favoured party. Thus, for example, if we consider the presumption of English law, by which when a wife commits certain crimes (as burglary, receiving stolen goods, etc.) in the presence of her husband, she is presumed to have acted under his coercion, and therefore not liable to punishment,[5] this presumption arises merely from the fact of the wife having committed the crime in the presence of her husband; and the English law does not require a statement on oath by the wife that she was coerced, as a condition precedent to the presumption arising, whereas in Muhammadan law, a presumption of a like nature is frequently made to depend on, and to arise only after, such a statement has been made. Now the Evidence Act does not refer to any presumptions of this conditional nature. There are presumptions as to the correctness of documentary evidence, but not as to the truthfulness of a statement referring to specified facts—though there is one presumption well recognised in the law of

[1] E.g. capacity to make wills, or 'waqfs.'

[2] Even on matters of mere evidence a consideration of the principles which Muhammadan lawyers would apply may be of assistance. See (*Khajah*) *Hidayut Oollah* v. *Raijan Khanum* (1844) 3 Moo. I. A 295, 318 noted *ante* p. 43, footnote 2.

[3] On the distinction between burden of proof as a matter of substantive law, and of adducing evidence see *R.* v. *James Stoddart* (1909) 25 T. L. R. 612, 616-17 (C. C. A.), *Pickup* v. *Thames Insurance Co*, (1878) 3 Q. B. D. 594, 599, 600 (C.A). *Wakelin* v. *London and S. W. Ry. Co.* (1886) App. Ca. 41, 52.

[4] The word "affirmation" should apparently be substituted in British India. See Oaths Act 1873 sec. 6 and General Clauses Act, sec. 3. (36), (55).

[5] Halsbury's "Laws of England," IX, 244, sec. 519.

SECTION 12. evidence against the truthfulness of a certain class of witnesses, viz., the presumption against an accomplice's evidence [1] unless corroborated.

But presumptions of the nature referred to, are of frequent occurrence in Muhammadan law; and one particular species of them is of some general importance, viz., where the act is of such a kind that it is possible for different legal results to flow from it, and the nature of its effect depends upon the intention with which it was done. With reference to such acts, the pure Muhammadan law frequently is to the effect that if the person says that he acted with a particular intention, he is to be presumed to have acted with that intention. Are these presumptions of Muhammadan law nullified by operation of section 106 of the Evidence Act ? A consideration of illustration (*a*) to that section seems to show that it is only when a person does an act with some intention "other than that which the character and circumstances of the act suggest, that the burden of proving that intention is on him." [2] So that where the overt acts of the party show a different intention from that which is alleged, the onus is placed on the person making the allegation. But there is no provision for the class of acts to which we are referring, viz., where the acts are capable of being interpreted as indications of an intention equally one way or the other.

Effect of such presumptions in British India.

There seem to be three possible ways in which presumptions of Muhammadan law of the kind in question may be considered :—

(1) It may be that they are to be taken as mere rules of evidence, and as such of no application in British India, either because the Evidence Act supersedes them, or because presumptions of such a nature are unknown to the law of evidence prevailing in India.

(2) On the other hand, they may be taken to consist of presumptions of law, which are saved under section 103 of the Evidence Act.

(3) They may be taken as rules partly of substantive law, and partly of evidence; and it may be considered that, in so far as a statement on oath is required for proof of the intention, the rule of Muhammadan law is replaced by the Evidence Act, and that the existence of the intention one way or the other may be brought to the notice of the Court in any manner authorized by the Act, and the mode of doing so does not affect the presumption in question.

Option to fix nature of acts.

The question does not appear to be merely of academic interest, inasmuch as the rule of Muhammadan law really gives in many cases an option to the actor to determine the character of equivocal acts—an option that may be

[1] See Evidence Act, sec. 114, ill. (6).

[2] The procedure in a Qazi's court should be borne in mind. It is as follows: (1) The plaintiff orally states his facts not on oath. If a cause of action is disclosed (2) the defendant is asked either to admit them or to deny them on oath. (3) If he does the latter, the plaintiff produces witnesses who can swear to his statement, and their testimony is taken ; if they are trustworthy witnesses (4) the defendant is asked to produce his evidence, if any. The presumption is alternately in favour of the plaintiff and defendant, after each of the first three stages. If all four stages are complete, the Qazi decides whom to believe. The function of the witnesses is analogous to that of a jury in the early English system, when the jurymen were chosen from amongst persons who knew the circumstances of their own knowledge, and swore to them. See Pollock and Maitland's "History of English Law." I, 117, 119; II. 619.

See also sec. 14 of the Evidence Act and the illustrations thereto.

of great importance in such matters as gift and divorce. Nevertheless it is not a question on which the Courts would be likely to pronounce an opinion, inasmuch as it cannot often happen that the decision of a case should depend solely on the distinction between presumptions of law and the inferences that may be drawn from facts proved. The distinction however does exist [1]; and it has therefore been deemed best to state in the appropriate places, the presumptions which Muhammadan law recognises, even though their force may be questioned in British India, for reasons, some of which are stated above.

Verbal explanations and rules of law

There is another subject to which reference should be made in this place, viz., to the examples which are given in the law books and particularly in collections of 'fatawa' and which apparently explain the effect to be given to the use of certain words. These examples are often merely in the nature of guides to the interpretation of Arabic words, in which case they are generally of little assistance in India, where the language is not Arabic, and when Arabic words are used in this country, they are apt to be used with significations acquired in India, which are not necessarily the same that they had at the time when, and in the country where, the books were written. Besides, translations of such examples are very likely to be misleading. On the other hand, there are many examples, where, for the sake of brevity or clearness, the statement of facts is put in the mouth of the actor, and these words have then to be considered as recitals of what has occurred, in order to show the operation of law on the facts recited, rather than as mere words uttered at the time, irrespective of previous events. To distinguish examples of one kind from those of the other is not always as easy as the importance of doing so is obvious.

4. Forms in Muhammadan law

The next subject which requires attention is allied to the last one. The books on Muhammadan law are full of references to the "form" to which the legal transactions in question must comply. The authorised form or forms are generally given immediately after the definition, at the beginning of each chapter. As most of the transactions take, in Muhammadan law, the shape of contracts, the form mostly consists of the words of "declaration and acceptance," 'Ijab o qubúl,' which give effect to the juristic act. Coupled with these forms of declaration and acceptance, are statements of the result of disregarding the technical phraseology of the law, and this is frequently followed by a consideration of the effect of the intention with which the forms are used: as for instance whether the use of the strict form technically required, is effective without any intention on the part of the speaker to give to the words the effect they have in law, and conversely, whether the intention itself without the use of the exact words, is effective.

5. Formal terms and expressions.

English writers on Muhammadan law have been apt to pay too little attention to these forms; but this attitude has been based, it is submitted, on a total misconception of the real importance of the subject. For the disregard of the forms is grounded apparently on the principle, familiar to them in modern English law, that the intention is all in all and that the words are

[1] It has been characterised by Lord Alverstone C. J., as very important. *R.* v. *Stoddard* (1909) 25 T. L. R. 612, 616.

SECTION 12. of no importance. Now, except in regard to marriage, divorce and pre-emption it may be said at once, that the Muhammadan law usually agrees with the rule of English law on this point. This fact however goes a very little way towards proving that attention to the forms mentioned by the Muslim jurists would be labour spent fruitlessly. The decisions of the English Courts given at a time when the Common Law Courts were steeped in formalities, are still consulted for the purpose of discovering the exact ambit of legal rights and liabilities, and it is for this purpose, that the forms of declaration and acceptance should similarly be consulted, to arrive at an accurate conception of the nature of the transactions dealt with by the Muslim jurists, and the terminology they employed.

5. Intention and motive; their importance in Muhammadan law; conflict between religious and secular effect of the same words or acts.

Still greater misconception prevails as to the rules governing the effect, in Muhammadan law, of the intention and motive with which the formal words are used. These have been generally treated as mere surplusage, apparently as having no force whatever in British India : whether that is so or not, is a question that must be considered by itself. But it must, in the first place, be realised that in pure Muhammadan law they are a very important factor, and the intention and motive of the agents frequently determine which one or more of various possible legal results, follow from the same acts. Modern systems of law are, it is true, opposed to such rules, which give uncertainty to the legal results of transactions—uncertainty which cannot be easily determined by a reference to overt acts. But Muhammadan law, which is merely an offshoot of Islam as a religion, could not be affected by such considerations : for just as in secular matters intention (except as expressed in overt acts) is relegated to the background, so in religious matters, ceremonies and formalities, when divorced from pious intentions, are under most systems of no effect. When, for instance, a text of Muhammadan law states, that a document in a specified form and words, gives effect to a 'waqf,' if made with the intention of creating a 'waqf,' but, if executed in the same form and words, with the intention of making a gift, it is totally inoperative, because a gift cannot be validly made in such form and terms : such a text refers primarily to the effect of the document "between the man and his God" or "in conscience."[1] Then it comes to be recognised by the Muslim jurists themselves (as will appear from the examples cited in the footnote) that secular courts may be unable to find out the real effect of certain acts, according to the law of God, and that the courts may even be under the necessity of giving decisions in conflict with what "conscience" might dictate to the parties. But this, it is submitted, is not enough to alter the substance of the law, which is, that the determining factor, in regard to the effect of certain transactions, is the intention and motive of the agent : the means by which the Courts endeavour to discover the intention or motive, or their inability to do so adequately, is a matter of adjective law, or the result of the limitations under which all human investigations are made. They do not necessitate a conscious disregard of the substantive law ; though they may operate so as to give imperfect effect to it.

[1] These expressions are used in antithesis to the expressions "as before the judge," "judicially" or "in law": Bail. I. 208 (para. 2,) 213 (paras. 1, 2 and 3), 217 (para. 3), 231 (para. 2), 404 (ll. 5-8), Bail. II. 109 (ll. 4-7), 116 (ll. 17-19), 211 (ll. 8-11) *et passim*.

SECTION 12.
6. Slavery.

A few remarks must now be made as to slaves,[1] who form a valuable portion of property in places where the law permits them; and, as may be surmised, a great many provisions of the law in the Muhammadan text books apply to them, or are illustrated with reference to them. Of course the law of slavery was never made applicable in British India[2]; and by the Indian Slavery Act V of 1843, it is provided that slaves shall not be sold in execution of decrees or orders or enforcement of any demand of rent or revenue (sec. 1), that no rights arising out of alleged property in slaves shall be enforced by the Courts (sec. 2), that no slave shall be dispossessed of or prevented from taking possession of property acquired by him by his own exertions or by inheritance or gift etc. (sec. 3), and that any act which would be a penal offence if done to a free man, shall be equally an offence if done to any person on the pretext of his being in a condition of slavery (sec. 4).

Indian Slavery Act.

"It is the general intention of the legislature in passing this Act to relieve all persons then subject thereto from all the disabilities arising out of the status of slavery . . . . In construing this remedial statute, the Courts ought to give to it the widest operation which its language will permit."[3]

Scope of the Act.

Questions may, however, arise in British India as to the effect of slavery, the slave being in a country where slavery is recognised. The determination of the law which would be applicable in such a case would be a question of private international law. Again it may not be easy to say how far the Slavery Act must be taken to affect not disabilities arising from the status of slavery, but rights arising therefrom.[4] No cases are to be found on these subjects in the reports, and it has seemed unnecessary to introduce into the following pages any reference to slavery, except where the illustrations given by the original texts refer to slavery and when it has not seemed possible or advisable to omit, or to alter the form of, the illustration.[5]

Rights of Slaves.

Slavery was not abolished in England till 1834, though the slave trade had been abolished in 1807.

[1] Macnaghten has a concise chapter on slavery. See "Moohummadan Law," p. 312 "Precedents of Slavery," Case II. for an "enumeration of different modes by which slavery is created."

[2] It will be observed that there are no means by which the status of slaves as known to Muhammadan law could arise in British India.

[3] (*Sayad*) *Mir Ujmuddin Khan* v. *Zi-ul-Nissa's Begam* (1879) 3 Bom. 422, 429, 430; 6 I. A. 137.

[4] See cases on the Caste Disabilities Removal Act, Act XXI. of 1850 on a similar distinction, *ante*. See *ante* p. 30.

[5] It may be noted here that a contract to serve one's whole life a particular master is allowed by English law. *Wallis* v. *Day* (1837) 2 M. and W. 273; see Smith's Leading Cases (1903. 11th Ed.), I, p. 430.

CHAPTER III.

MARRIAGE.

§ 1.—Preliminary.

SECTION 13. Marriage.

13. Sexual intercourse between a man and a woman who are not husband and wife[1] is unlawful and prohibited absolutely.[2]

"The intercourse of a man with a woman, who is neither his wife nor his slave[3] is unlawful and prohibited entirely."[3]

Or illegitimate intercourse and offspring.

14. Sexual intercourse, without either the reality or semblance of the right to have it, is termed 'zina'[4] and the offspring of such intercourse is necessarily illegitimate.[5]

"Semblance of right."

Semblance of right arises, when the parties have purported to marry, but the marriage is irregular or invalid; or when a husband purports to revoke a divorce which is in law irrevocable, or a 'khul'' or when there is a mistake as to the identity of the wife; or she is by error supposed to be unmarried, or a widow, or a divorced woman. If the irregularity or invalidity of the acts in question is known to the parties, it does not give rise to "semblance of right."[6]

Regular and irregular, permanent and temporary marriages.

15. Marriages are in Sunni law divided into regular and irregular[7]; both of which are permanent.

In Shiah law they are divided into permanent (which correspond to the regular marriages of the Sunnis) and to temporary or 'mut'a' marriages.[8]

[1] So that intercourse after dissolution of the marriage is also prohibited. Bail. I, 397.

[2] *Himmut Bahadoor* v. *Shahebzadi Begum* (1870) 14 W.R. 125, affirming on review S. C. (1869), 12 W.R. 512; 4 Ben. L.R. (A.C.) 103.

[3] Bail, I. 1, citing *Hidaya* II 658. See Indian Slavery Act. 1843, and *ante* pp. 50, 51,

[4] *Zina*, i.e. fornication or adultery is in Islam punishable by stoning to death, or scourging with 100 or 50 stripes. Bail I. 1, 2; see Bail. I. 151-154 on *Zina*, cf. Indian Penal Code s. 494.

[5] Bail, I. 3.

[6] Bail, I. 397, 402, 411, 413; II. 93 (paras. 3 and 4).

[7] The Arabic word for regular is *sahih*, i e., correct: Baillie translates it "valid."

[8] Bail, II. 1.

SECTION 16. Permanent marriage.

16. In this work the words "marriages," "husband" and "wife," refer respectively to a permanent marriage, and person permanently married, unless there is something in the subject or context showing that a 'mut'a' or temporary marriage, or persons temporarily married, are referred to or included, in the said words or expressions.

§ 2.—Form of the Contract of Marriage.

how contracted.

17. Marriage is contracted, when a man and woman (between whom prohibition to marry is not established), consent, as hereinafter provided, in unequivocal terms, to a permanent[1] and absolute union,[2] to commence from the time of the contract, for the purpose of intercourse, and the procreation of children.[3]

Form of Consent.

18. Consent to a marriage contract must be given by means of a declaration and acceptance expressed at one meeting.[4]

Marriage purely a civil contract in Muhammadan law.

Marriage in Muhammadan law is a purely civil contract.[5] The significance of the fact that agency is so freely recognised for purposes of marriage and divorce is well illustrated by the remarks of Dr. Hunter in connection with the characteristic absence of agency from every department of ancient Roman law: after showing that this absence was partly owing to the fact that it was not necessary in informal transactions, he proceeds: "It is not difficult to understand how the idea of agency or representation should appear incongruous in respect of formal transactions. The old forms of 'mancipatio,' 'cessio in jure,' 'stipulatio,' 'legis actiones' were highly solemn and dramatic. They possessed, in the eyes of the Romans, a species of sacramental efficacy. How then could the benefit of one of these ceremonies be given to a person who had taken no part in them, had repeated none of the sacred words nor performed a single act in the ceremony?"[6]

Significance of agency in marriage.

Roman law.

Christian Marriages—"Consensus facit matrimonium."

The following words of Professor Holland may be appropriately quoted here:[7] "The Christian Church adopting from Roman law the maxim that 'consensus facit matrimonium,' though it stigmatised such marriages as irregular, because not made in 'facie ecclesiæ,' nevertheless upheld them as valid till the Council of Trent declared all marriages to be void unless made in the presence of a priest and witnesses. Before the time of the Council, and after it in countries such as France and England, where the decree in question was not received, either of the parties to a clandestine

[1] As to *mut'a* or temporary marriage, see below sec. 25.

[2] An option to cancel a marriage is void. Bail. I. 21; II. 5, 76.

[3] Bail. I, 10, 18, 16; Hed. 33; Bail. II. 1.

[4] Bail. I. 237; and see Hed. 38, 87; "declaration" is the English for *ijab* and acceptance for *qubul*; cf. the definitions of "proposal" and "promise," in the Indian Contract Act, sec. 2 (*a*) and (*b*).

[5] The statement of Boulnois J. *Nowroz Ali* v. (*Mussummat*) *Aziz Bibi* (1876) 11 P. R. (Civ. Jmts.) No. 124, p. p. 253, 259, that "the legal mode of establishing the status of marriage is connected with a religious ceremony," is hardly correct with reference to Mussulmans.

[6] Hunter's "Roman Law," 610.

[7] Holland's "Jurisprudence," 257-258.

SECTION 18. marriage 'per verba de praesenti,' could compel the other, by a suit in the ecclesiastical court, to solemnise it in due form. It has been judicially stated that the English common law never recognized a contract 'per verba de praesenti '[1] as a valid marriage till it has been duly solemnised[2], although it recognised it under the name of 'pre-contract of marriage,' a term which covered also promises 'per verba de futuro' down to the middle of last century[3], as giving either of the parties a right to sue for a celebration and as impeding his or her marriage with a stranger to the contract."

Marriage in Muslim form with English woman in England.

In a recent case[4] before the English Courts where the Nawab Nazim of Bengal, having other wives, had married an Englishwoman in the Islamic form of marriage, Chetty J. observed that "such a marriage was not binding on any spouse of English domicile, the reason being that it was not intended to be a marriage; for the notion of 'marriage' in England implies a monogamous connection."

The requisites of a valid marriage according to the law of England are: (1) that each of the parties should, as regards age, mental capacity, and otherwise be capable of contracting marriage; (2) that they should not by reason of kindred, or affinity, be prohibited from marrying one another; (3) that there should not be a valid subsisting marriage of either of the parties, with any other person, (4) that the parties, understanding the nature of the contract, should freely consent to marry one another, (5) that certain forms and ceremonies should be observed.[5]

of

and acceptance":

In and Shafi'i law

(b) in Hanafi law.

19. In Shiah and Shafi'i law it is necessary that the declaration and acceptance of a contract of marriage[6] should be made by the use of the Arabic word 'tazwij' or 'nikah'[7] meaning marriage, unless the parties are unable to use the Arabic words, in which case, equivalent words in the language of the parties are necessary.[8]

Explanation I—In Hanafi law words of sale ('bai'), gift ('hiba') transfer of ownership ('tamlik') and other expressions implying a permanent union, are sufficient for the contract of marriage.[9] In Shiah and Shafi'i law they are not sufficient.

[1] *R.* v. *Millis* (1843) 10 Cl. and Fin. 534, 655.

[2] See Ameer Ali's Mahommedan Law II, 282.

[3] These consequences were removed by 26 Geo. II. c. 33.

[4] *Re Ullee; the Nawab Nazim of Bengal's Infants* (1885) 53 L. T. 711, affirmed 54 L. T. 286.

[5] This is taken from Halsbury's "Laws of England," XIV. 278, sec. 512.

[6] By the contract of marriage is always to be understood the marriage itself (*matrimonium*) as distinguished from betrothal (*sponsalia*) or the mere engagement to marry.

[7] (*Sheik*) *Moneeroodeen* v. *Ramdhun Bajeekur*, (1872); 18 W. R. Cr., 28 speaks of the "*nikah* form of marriage." The term *nikah*, according to a footnote in Bail. I. 1, "is in Bengal restricted to what is deemed an inferior kind of marriage, in apposition to 'Shadee' which properly means joy or festivity, but is commonly applied to the first or principal marriage, usually celebrated with festivities and a good deal of expense." In Bombay the term *shadi* includes both the *nikah*, or actual contract, and the celebration of it. The *nikah* is also spoken of as the *aqd*, which means "contract." In the case of a widower remarrying, it is usual to dispense with the celebrations.

[8] Bail. II. 1-3 Hed. 26. *Sharh-i-Viqayah*, vol. II., Book on *Nikah* (*ad init.*).

[9] Bail, I. 23, Hed. 26.

Explanation II—Words implying a mere hiring or lending or permitting, do not give rise to a valid marriage.[1] SECTION 20.

Explanation III—Words implying marriage at a future time, or depending on an uncertain future event or condition, do not constitute a valid marriage.[2]

Explanation IV—An illegal condition in a marriage contract is void, and does not invalidate the marriage.[3]

Explanation V—An agreement implying a temporary marriage is void except under the Shiah 'Ithna 'ashari' law.[4]

Illustration.

If one of the parties to a marriage stipulates that the other is free from blindness or paralysis, the stipulation is void, and the marriage valid absolutely. But a stipulation that the husband should not be impotent is unnecessary, and would be valid, if expressed.[5]

See also sec. 24 below.

20. (1) Where the parties are competent to contract, the consent must be given

either by themselves[6] ; or

by their agents or proxies for marriage;[7]

provided that by the Shafi'i and Maliki law a woman can never contract herself in marriage.[8]

Persons who must consent.
(1) If parties are 'sui juris'
(a) they themselves or
(b) their proxies

(2) Where either of the parties to a marriage

has not attained puberty ; or

is of unsound mind ; or

being governed by Shafi'i law, is a virgin (whether she has attained puberty or not),[9]

(2) If not 'sui juris' : guardians for marriage.

then such party cannot contract marriage by himself or herself, and the consent on his or her behalf must be given by at least one of his or her guardians for marriage.[10]

The word "minor" is liable to be interpreted in the sense laid down by the Indian Majority Act ; but when it occurs in connection with the

Puberty majority.

[1] Bail. I. 16.

[2] Bail. I. 17, II. 5 ("*fourth*").

[3] Bail. I. 19, 79, II. 79. Cf. Contract Act, sec. 3.

[4] Bail. I. 18. Hed. 33. The Shiah Ithna 'Ashari law recognises it, if it is a 'mut'a' marriage. See sec. 25 below.

[5] Bail. I. 21, 345, II. 60, 61.

[6] *Sobrati* v. *Jungli* (1898), 2 C. W. N. 215. *Muhammad Ibrahim* v. *Gulam Ahmed* (1861). 1, Bom. H. C. R. 236. So in *Asghur Ali* v. *Muhabbat Ali* (1874), 22 W. R. 403, the plaintiff failed in a suit for restitution of conjugal rights, as his alleged wife, though a major, had not consented to the marriage; but her father had purported to contract her in marriage without being authorized to do so. Cf. Bail, I. 58-59.

[7] Hed. 34.

[8] See below, ss. 51 sqq.

[9] *Muhammad Ibrahim* v. *Gulam Ahmed* (1864). I. Bom. H. C. R. 236 and see sec. 66 below.

[10] Bail. I. 46, 59, II. 4, 6, 8, 10. *Sharh-i-Viqaya, Nikah*, Ch. II "On *Wali* and Equality" (*ad init.*). On guardians for marriage, see below, ss. 59 sqq.

SECTION 20 Muhammadan law of marriage, it must be remembered that attainment of puberty with soundness of mind is enough for competence to marry.[1] Thus in the 'Fatawa-i-' Alamgiri' it is stated that "understanding, puberty, and freedom in the parties" are requisite for a marriage contract, and the translator explains, "puberty, which is majority according to Moohummudan law,"[2] and in the 'Shara'ya-ul-Islam' it is stated, "when a child has attained to puberty and discretion, the powers of the parents are at an end."[3] And the 'Sharh-i-Viqaya'[4] implies the same with reference to the marriage of a 'baligha', i. e., a girl who has attained puberty.[5]

Illustrations.

(1) H says, in the presence of A and B, "I have married myself to W," who is absent. On the information reaching *W*, *W* says "I have accepted." This does not constitute a lawful marriage, even though A and B be present when *W* accepts.[6]

(2) H sends a messenger, or writes a letter to *W*, offering her marriage. *W* receives the messenger, or reads the letter, in the presence of two witnesses, and declares her acceptance of the offer in their presence. This constitutes a lawful marriage.[7]

(3) H appoints A his agent for marriage, who contracts a marriage on behalf of H. Then there is a doubt as to whether H was married to *W*, or to another woman, but H and *W* both say and believe that they were married. The marriage between H and *W* is established.[8]

Age of competence to marry.

21. When the question is whether or not, for the purposes of section 20, a person has attained puberty, or as to the time when he or she has done so, in the absence of direct evidence, it is presumed in Sunni law that persons of either sex attain puberty at the age of fifteen years, and in Shiah law that males attain it at the age of fifteen years, and females at the age of nine years:[9]

provided that in Hanafi law no male can be held to have attained puberty under the age of twelve years, and no female under the age of nine years.[9]

Quaere, whether the rules contained in this section are rules of evidence, and as such repealed by the Indian Evidence Act.[10]

[1] See *ante* p. 46.

[2] Bail. I. 4 note 5, Hed. 529 footnote by the translator.

[3] Bail. II 96. This is said in connection with the custody of infants.

[4] Book on *Nikah*, ch. 1, last 3 lines, and see Bail. I. 431.

[5] See also footnote in Bail II. 96 and Hed. 529. (Book XXV. ch. 2.)

[6] Bail. I. 10. The messenger need not be of full age nor a Muslim.

[7] Bail. I. 11.

[8] Bail. I. 83-84, "And this case is a precedent that marriage is established by mutual belief." And cf. sec 81, first proviso below.

[9] Bail. II. 96, citing Sir William Jones's "Imamia Digest." *Shara'ya-ul-Islam* 193, *Kafi* as cited in the *Kifaya*, III. 845 and adopted in the *Fatawa-i-'Alamgiri*, V. 93. "Macnaghten p. 62 is (as pointed out by Sir R. Wilson, 'Anglo-Muhammadan Law' p. 169) clearly wrong in fixing the age of majority at the end of the *sixteenth* year."

[10] See below, sec. 66.

SECTION 22 under

22. According to Hanafi law a contract of marriage is effectual, even though it has been made under compulsion, or the declaration or acceptance is pronounced without any intention to contract a marriage.

Quaere, whether the rule contained in this section is enforceable in British India, or is void, as being against public policy.[1]

The rule of Hanafi law is based on the following tradition: "The Apostle of God said: 'There are three things, which whether done in joke or earnest, shall be considered as serious and effectual; one marriage; the second divorce; and the third taking back.'"[2] But there is also a tradition: "Aysha said: 'I have heard the Prophet of God say there is no divorce and no emancipating by compulsion': that is to say, for one man to say to another free your slave and divorce your wife."[3]

"The Hanafis are, on this point, opposed by a formidable array of great jurists like Shafi'i, Malik, Hanbal, 'Umar ibn 'Abdul 'Aziz, Ibn 'Umar and Qadi Shuraih."[4]

So also in Shiah law there must be an intention to marry, and it must be demonstrated without any sort of ambiguity.[5]

Witnesses

23. The declaration and acceptance of a contract of marriage must be uttered[6] by the parties entering into the contract[7] (either for themselves, or as proxies or guardians)

(1) in the presence and hearing of each other, and

(2) according to Hanafi and Shafi'i law in the presence and hearing[8] of at least two witnesses.

[1] A similar rule prevails in regard to divorce under compulsion. See below sec. 123, and *Ibrahim Moolla* v. *Enayet-ur-Ruhman* (1869), 12 W. R. 460, 4 Ben. L. R. (A.C.) 13 (divorce under compulsion held good). In Ameer Ali's Mahommedan Law II. 419 it is suggested that a Hanafi husband, having been coerced to divorce his wife, should declare himself a Shafi'i, and that thus the divorce would be invalidated: As to this suggestion, it is true that a Sunni can change the sect to which he belongs without any difficulty (see *Muhammad Ibrahim* v *Gulam Ahmed* (1864), 1 Bom. H C.R. 236) but would it alter rights created before the change? And assuming, as this suggestion does, that a divorce pronounced under compulsion is held to be otherwise valid, would not such a change be what the P. C. calls a fraud on the law, in *Skinner* v. *Skinner* (1897), 25 Cal. 537, 546: and see *Skinner* v. *Orde* (1871), 14 Moo. I. A. 309, and *ante* s. 37. The Court would no doubt be astute to declare against a marriage brought about by compulsion.

[2] *Mishcat-ul-Masabih*, Book XIII. ch. 12, part 2. (Matthew's transl. I. 119.) So according to the common law of England a man was bound by his seal although it was affixed against his will: Holmes's "Common Law" 272; citing Britton, Glanville, etc.

[3] *Mishcat-ul-Masabih*, *ib.*

[4] A. Rahim, "Muhammadan Jurisprudence," 337, citing *Hidaya* III. 344, *Fathul-Qadir* III. 344.

[5] Bail. II. 1.

[6] The contract may be made by signs in the case of dumb persons, Bail. I. 14; but not by merely writing the words (in the case of persons who are able to speak) Bail. I. 15. Cf. the decision under the Indian Limitation Act, ss. 19, 20, that there is no valid acknowledgment when a person who can write merely signs an endorsement written by another, *Santeshwar Mahanta* v. *Lakhikanta Mahanta* (1908) 35 Cal 813. A divorce may however be given either orally or in writing.

[7] Who need not be the parties intermarrying. Cf. sec. 20, *ante*.

[8] Hence deaf persons cannot be witnesses. Bail. I. 7.

SECTION 23.

Qualifications of witnesses to a marriage contract.

(*a*) who are present simultaneously at the time of the contract [1], and

(*b*) who are themselves sane, of full age and Mussalmans,[2] and

(*c*) according to Hanafi law, one of whom at least is a male; if only one witness is a male, then there must be two female witnesses besides him;[3]

(*d*) According to Shafi'i females cannot be witnesses to a marriage, and both witnesses must be males.[4]

Explanation—In Shiah and Maliki law no witnesses are necessary at the marriage contract.[5] According to Imam Malik it is necessary that the marriage should be made known,[6] but according to the Shiah law even a positive injunction to secrecy does not invalidate it.[7]

Presence of Mulla or Qazi at the marriage.

It is usual in India for a Mulla or Qazi to be present for officiating at the marriage contract and to recite benedictions, etc.; and it may be an interesting question, whether custom might, and has, altered, or added to the simple requirements of pure Muhammadan law on the points [8].

Registration of marriages and divorces.

Certain acts of the Indian Legislature which have, or had, the effect of partially regulating the formalities and ceremonies, or preserving evidence, of a Muslim marriage, may be referred to here :—

1. Bengal Act I of 1876 provides for the voluntary registration of Muhammadan marriages and divorces. It extends to districts to which the Lieutenant-Governor may by his order extend it. [9]

Bombay regulation XXVI of 1827 relating to Qazis.

2. Bombay Regulation XXVI of 1827 (repealed by Act XI of 1864) was passed " for the appointment and removal of Kazees and ensuring an efficient and regular discharge of the functions of their office." Its object was to establish rules for the " Kazees authenticating, and recording marriages, attesting divorces, assisting in religious rites and ceremonies amongst Mussulmans, furnishing means of settling questions of inheritance." (Preamble.) The Kazee was to be appointed by the Governor in Council and was to have a " sunnud " and a seal (s. 1). Misconduct and vacancies were to be reported to Government by the Zilla Judge with recommendations (ss. 2 and 3). The Kazees then acting under competent authority were to be considered as duly appointed (s. 4). The Kazees might appoint and remove naibs (assistants) (s. 5). " The duties of the Kazee comprised: the attending, presiding at, or performing such ceremonies or forms relating to marriage and divorce and to doctrinal and religious rites, as may be inculcated by Mahomedan law " (s. 6). They were entitled to fees fixed by the Zilla Judge with the sanction of the Suddur Adawlat (s. 7).

[1] Bail. I. 5.
[2] Bail. I. 6.
[3] Bail. I, 6, 7.
[4] Bail. I. 7.
[5] Bail. II. 4-5.
[6] *Sharh-i-Viqaya*, Vol. II. Book on *Nikah*, Ch. I.
[7] Bail. II. 5.
[8] See *Badal Aurat* v. *Q.-E.* (1892), 19 Cal. 79, 81, and *Alimuddin* v. *R.* (1906), 10 C.W.N. 982, 984.
[9] Act VII of 1905.

They had to record in a book, under penalty, marriages and divorces. "On the death or dismissal of a Kazee the said book shall be delivered by him or his heirs to the Superintendent of the Register of the Zilla for the purpose of being deposited with the general register." SECTION 23.

3. Act XI of 1864 repealed the said regulation,[1] but its second section was as follows:—"Nothing contained in this Act shall be construed so as to prevent a Cazee-ool-Coozat or other Cazee from performing, when required to do so, any duty or ceremonies by the Mahomedan law.[2] Act XI of 1864.

4. Then by the Kazis' Act XII of 1880,[3] it is provided "Whenever it appears to the Local Government that any considerable number of the Muhammadans resident in any local area desire that one or more Kazis should be appointed for such local area, the local Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area" (s. 2 para. 1). The decision of the local Government is conclusive as to whether any person has been rightly appointed or not, and Kazis may be removed, or suspended, for misconduct, absence, insolvency or on his own application, or refusal, or unfitness, or incapacity (s. 2). Kazis may appoint naibs (s. 3). Kazis' Act XII of 1880.

Sec. 4 is as follows:—"Nothing herein contained, and no appointment made hereunder, shall be deemed—

(*a*) to confer any judicial or administrative powers on any Kazi or Naib-Kazi appointed hereunder; or

(*b*) to render the presence of a Kazi or the Naib-Kazi necessary at the celebration of any marriage, or the performance of any rite, or ceremony; or

(*c*) to prevent any person discharging any of the functions of a Kazi."

§ 3.—Legal Effects of a Contract of Marriage.

24. The legal effects of a contract of marriage are the following:

(1) it permits[4] sexual intercourse, and the procreation of children[5]; provided that in the case of a wife who has not attained puberty,[6] it is a question of fact, to be decided by the Court, whether she has reached an age when the husband should be permitted to consummate marriage.[7] Legal effects of marriage: intercourse.

[1] It also repealed Regulation II of 1827, which had provided for the appointment of Hindu and Muhammadan Law Officers.

[2] Act XI of 1864 was itself repealed by Act VII of 1868. See *Muhammad Yussub* v. *Sayad Ahmed* (1861), I. Bom. B. C. R. APPX. p. xviii.

[3] The Act extended, in the first instance, only to the territories administered by the Governor of Fort St. George in Council, but has been extended to the Bombay Presidency, Sindh and various other places. See Acts of Governor in Council (4th Ed.) II. 106.

[4] The husband does not become *entitled* to have sexual intercourse until the rights of the wife to *mahr* are satisfied, see below ss. 106, 107. So again during 'Iddat the right to intercourse is suspended: if there is intercourse the divorce is revoked, sec. 151 below.

[5] Bail. I. 4, 10, II. 88.

[6] Cf. The Age of Consent Act. X of 1891.

[7] Bail. I. 54,

SECTION 24. restraint

(2) in the absence of an agreement to the contrary, it gives the husband the right to restrain the wife from going out, and showing herself in public[1];

'mahr'

(3) it imposes upon the husband the obligation of giving *'mahr' (or dower) to the wife, (in Sunni law even though she has expressly agreed to marry without 'mahr')*[2];

maintenance

(4) it entitles[3] the wife to maintenance from the husband[4];

inheritance

(5) it gives rise to mutual rights of inheritance[5];

prohibitions by affinity

(6) it prevents each from marrying the relations of the other within degrees of prohibited affinity[6];

agreed terms

(7) such other rights and duties arise between the husband and wife as may have been agreed to between the parties at the time of the marriage[7] (or subsequently thereto [for a valid consideration]), provided that such agreement is not inconsistent[8] with clauses (1), (3), (5) and (6) of this section, nor with the definition of marriage[9] contained in section 17, nor is forbidden by any other law.

Husband's custody of wife: Wife's personality not merged in husband's.

It will be observed that the Muhammadan law recognises nothing like the 'manus' of Roman law, nor the merger of the wife's personality in the husband's. Previous to Islam women were in no better condition than slaves; but the Quranic[10] alterations in the law did for them what the Married Women's Property and similar Acts did in England and in British India, for women governed by English law.[11] Hence, for instance, the rule of English law that in divorce proceedings the husband is prima facie liable for the costs of the wife, except when she has sufficient property of her own, cannot apply to Muslims.[12]

[1] Bail. I. 449-450, II. 83, 85. and see comment below pp. 62, 63.

[2] Bail. I. 91.

[3] Even though she purports to release the husband from the liability: Bail I. 446; but see Cr. Pro Code. 488 and chapter VIII. below.

[4] Bail. II. 83-5, cf. sec. 88 below; and Alimony under Divorce Act. IV of 1869, ss. 36-38.

[5] Cf. Bail. II. 44 ll. 9-10. "Inheritance is not established except by the law."

[6] Bail. I. 13.

[7] *Poonoo Bibi* v. *Fyez Buksh* (1874) 15 Ben. L. R. *appx.* p. 5.

[8] *Quaere*, whether a stipulation that the wife shall reside with her parents is always and necessarily inconsistent with clause (1) See *Hamidunnessa Bibi* v. *Sheik* (1890) 17 Cal. 670; and Sir R. Wilson refers to the Hindu case of *Tekait Mon Mohini Jamadai* v. *Basanta Kumar Singh* (1901) 28 Cal. 751 with the remark "the spirit of the two systems is so different that this will not help us much."

[9] See *ante*, sec. 17; hence there cannot be an option to cancel the marriage nor unless the marriage is in the form of a *'muta* (which is valid amongst Shiahs only) can persons be married for a definite period only.

[10] See Quran Sura IV. 33.

[11] Act. III of 1874 and Divorce Act IV. of 1869, Sec. 24, 25, 31, and 33 and 34 Vict. c. 93, 45, 46 Vict, c 72.

[12] See *A*. v. *B*. (1896) 21 Bom. 77. *Contra* where parties are governed by English law *Mayhew* v. *Mayhew* (1896) 21 Bom. 77; cf. sec, 202 below.

1. MATRIMONIAL INTERCOURSE.

Matrimonial intercourse

With regard to matrimonial intercourse, there are various rules regulating it in the texts to which it is not necessary to refer in detail, as they are not likely to come before the Courts. They will be found in the Hedaya and in Baillie's Digest.[1] It may however be stated that strict equality must be observed amongst the wives, if there are more than one.[2]

Question of wife's attaining puberty, how determined.

When the question arises, whether the wife has attained puberty or not, in order that it may be determined whether the father or other guardian of the girl ought to be compelled to part with her to the husband, the 'Fatawa-i-'Alamgiri' suggests, that if the girl goes abroad, the Judge should compel her to appear before himself, and determine himself as to her competency, but if not, he should direct women in whom he can confide to inspect her.[3] Sir Roland Wilson remarks on this: "It seems however that this course cannot be taken in British India, it having been laid down by the High Court of Calcutta that no Court or Magistrate in British India has any right to order the medical examination of a (female) witness, and that such an examination is an illegal and unjustifiable assualt, for which damages may be recovered; 'Q E. *v.* Juran Charan Dusadah' (not reported but referred to by Sir Andrew Scoble in his speech in the Legislative Council on the Age of Consent Bill 1891)."[4]

What great respect, it is submitted in the first place that the 'Fatawa-i-'Alamgiri' does not refer to any such inspection as could come under the denomination of "medical examination," or of an illegal or unjustifiable assault; all that it suggest is, presumably, the same kind of inspection that every witness undergoes when the Judge is watching his demeanour in the box. It cannot be supposed that the Muhammadan law could empower a Judge to hold a "medical examination" of a female, and it will be observed that the 'Fatawa-i-'Alamgiri' mentions the inspection by women, as an alternative, in cases where the wife does not come before the Court. The rule in the 'Fatawa-i-'Alamgiri' is really a counterpart of the Civil Procedure Code s. 132 and O. XXVI. r. 1 and Section 6 of the Lunacy Acts XXXIV and XXXV of 1853 in the case of parda nishin women: "The women in whom the Qazi can confide" take the place of the jury of matrons in English law, in regard to the writ 'de ventre inscipiendo,' and the reprieve 'in favorem prolis'[5]; so that the adjective law of British India is practically the same as that mentioned in the 'Fatawa-i-'Alamgiri'; for, in a case where, in the opinion of the Judge, medical examination is necessary, and the girl refuses to be examined by lady doctors, the point would have to be decided by the Court on the materials before it, and it would no doubt take into

[1] Referring to these Sir R. Wilson says: "Such treatises as the Hedaya or Shara'ya-ul Islam were intended quite as much to serve the purpose of what a Romanist would call manuals for the confessional, as of guides to forensic practice. . . . Thus . . one should compare them not with an English treatise on the law of husband and wife, but rather with such a book as that of the Jesuit Sanchez *De Sancto Matrimonio Sacramento*, and they will not suffer by comparison." "Anglo-Muhammadan Law," 25.

[2] Bail. II. 85, etc.

[3] Bail. I. 54 and cf. Bail I. 345 last 3 lines.

[4] "Anglo-Muhammadan Law," 170.

[5] Stephen's "Commentaries" (1886, 10th Ed,), II. 307, IV. 482.

SECTION 24. consideration sec. 114 of the Evidence Act and illustration 9 thereto.[1] If she does not so refuse, no doubt, "the women in whom the Judge can confide" would consist of lady doctors, and their opinion would be the evidence of experts under the Evidence Act.

2. RESTRAINT OF WIFE'S MOVEMENTS.

Husband's right to restrain wife's movements.

The right of restraining the wife's movements is really an extension of the marital right 'in rem' of the husband according to the common law of England, not be deprived of his wife's society, and to prevent any person being criminally intimate with her; with which again the interdict 'de uxore exhibenda et ducenda'[2] of Roman law may be compared.[3] This right of the Muslim husband does not come into conflict with the criminal law of British India relating to false imprisonment[4]; for the Muhammadan law only entitles the husband to direct and guide his wife's movements with reference to visits to strangers, and going in public. By the "right of restraint" he is not given magisterial powers to imprison her, should she disobey or disregard his lawful directions just as, on the other hand, the wife does not, in the absence of a provision to that effect, become entitled to a divorce by the very fact that the conditions incorporated in the contract of marriage are broken by the husband.[5]

Husband's right to chastise wife.

In accordance, however, with the Quran[6] and the 'Sunna'[7] and the Muslim law books,[8] the husband is allowed (after warning the wife) to chastise her moderately for repeated acts of disobedience. That privilege is however not to be exercised in British India except with great circumspection; for he would be liable to be prosecuted for voluntarily causing hurt or grievous hurt under s. 319 or 323 of the Indian Penal Code and then he would have the onus of proving that he was "justified by law" under s. 79 of the Penal Code; or in the Presidency towns he may try and show that such a right to cause hurt or grievous hurt, is included amongst the right and authorities of fathers of families and masters of families[9] which are safeguarded by the statute applicable to the High Courts in their original jurisdiction.

But such "rights and authorities" might carry the husband a much shorter distance than he may be inclined to claim, and the distance would depend "on all the circumstances of the case" including the discretion of the magistrate.

[1] Which is as follows: "the Court may presume ... that evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it."

[2] Digest XLIII. 30, 2.

[3] In the United States the abduction of a husband from the wife has been recognised as an actionable wrong: Holland's "Jurisprudence," 154 citing decisions.

[4] Indian Penal Code sec. 339, 342. Bail. I. 449-50, II. 83-85.

[5] *Badarunnissa Bibee* v. *Mafiatalla* (1871), Ben. L. R. 442, 15 W. R. 555. (*Sheik*) *Mohabuth Ally* v. *Sureemutty Mymonnissa* (1863) Marshall 361.

[6] "But those whose perverseness ye fear, admonish them, and remove them into bed-chambers and chastise them.' Qur. IV. 30, 33. On the other hand the Prophet said: "Those who beat their wives do not behave well," and "he is of the most perfect Mussulmans whose disposition is most liked by his family." *Mishcat-ul-Masabib* XIII. xi. 2.

[7] Admonish your wives with kindness; for women were created out of a crooked rib of Adam; and therefore if ye wish to straighten it ye will break it and if you let it alone it will always be crooked." *Ib.* XIII. xi. 1.

[8] Bail. II. 87-88.

[9] See 21 Geo. III., c. 70, s. 18; 37 Geo. III. c 142, s. 13, given in table preceding ch. II.

SECTION 24
English law.

It will be remembered that the common law of England gave the husband the right to chastise his wife. The English Courts decided quite recently against the husband's right to restrain the personal liberty of the wife.[1]

BREACH OF CONDITIONS CONTAINED IN MARRIAGE CONTRACT.

Rights arising through marriage contract:—effect of their breach.

The breach of a valid condition in a marriage contract will not necessarily give the wife a right to be divorced[2]; nor except by the Shafi'i law, even his inability to maintain her,[3] and it is said that a separation ordered by the Court on the ground of such inability on the part of the husband is not valid.[3] On the other hand, the breach of a condition may raise the amount of the 'mahr' to her "proper dower," though it has been specified at a lower figure;[4] or, conversely, the specified 'mahr' may be decreased when a stipulation in favour of the husband has been broken by the wife;[5] or when the wife is discovered to have been unchaste before marriage;[6] or it may be pleaded as a defence to a suit for restitution for conjugal rights.[7] While again the marriage contract may reserve an option to the wife to divorce herself[8] or provide that the breach of any specified condition (e.g. not to marry a second wife) will 'ipso facto' operate as a cancellation of the marriage.[9]

Avoidance of marriage 'ipso facto' if second wife taken.

Where the husband has stipulated not to marry a second wife, is the agreement in restraint of marriage, and thus void under the Contract Act sec. 26? It is submitted, however, that the fact that "section is borrowed from the English Law" and that by that law marriages in contravention of monogamy are not permitted, cannot affect the question. On the other hand "the policy of the law is to be considered not from a detached portion of it but from its whole body."[10]

Suckling child.

The wife's duties do not include the obligation of suckling the child, and according to Shiah (but not Sunni) law she may demand hire for it. On the other hand if she is divorced she is entitled to claim to nurse the child and to get hire for doing so.[11]

The rights and liabilities regarding 'mahr' inheritance and children will be considered later under their respective heads.

'Marriage.

temporary marriage.
Form.

25. (1) By the Shiah 'Ithna'ashari' law a 'mut'a' marriage, or a marriage for a fixed term may be validly contracted.

(2) The contract of 'mut'a' must be made by the use of the words 'tazwij' or 'nikah' or 'mut'a.'

[1] *R.* v. *Jackson* 1891, 1 Q. B. 671.
[2] (*Sheikh*) *Mohabuthally* v. (1862) Mar. 361.
[3] Bail. I. 443, Hed. 142.
[4] Hed. 49.
[5] Bail. II. 65, (para. 2).
[6] Bail. II. 35 second.
[7] *Buzloor Ruheem* v *Shumsoonnissa* (1867) 11 Moo. L. A. 551, 615.
[8] *Badarunnissa Bibee* v. *Mafiatalla* (1871) 7 Ben. L. R 442. and see below, ss. 128 sqq.
[9] See sec. 144 below, as to the effect of such a stipulation, also sec. 125 and comment.
[10] (*Nawab*) *Umjad Ally Khan* v. (*Musst.*) *Mohumdee Begum* (1867) 11 Moo. 517, 547. Cf. ss. 23 and 26 of the Contract Act. *Charleton Bracey* v *Sherrom* decided by Joyce J. on 24th Feb. 1911. *Solicitors' Journal*, 11 March 1911, p. 330.
[11] Hed. 146, Bail. II. 94.

SECTION 25. Religion of wife.

(3) (*a*) A man may contract a 'mut'a marriage with a Muslim, Christian, Jewish or fire-worshipping woman but not with a woman following any other religion.

Religion of husband.

(*b*) A woman may not contract a 'mut'a' marriage with a non-Muslim.

'Mahr.'

(4) 'Mahr' must be specified in a contract for a 'mut'a' marriage, otherwise the contract is void. The 'mahr' must consist of something that is actually owned, and possessed, and specified by measure,[1] weight, inspection, or description.[2]

term.

(5) The term for which a 'mut'a' marriage is contracted must be specified: otherwise a permanent marriage will be effected.[3]

Commencement of.

(6) The term for which a 'mut'a' marriage is contracted need not commence immediately from the contract.[4]

Disclaimer of children.

(7) The child of a 'mut'a' marriage may (apparently) be disclaimed in some cases without 'li'án.'[5]

Divorce.

(8) A woman married by 'mut'a can, according to those whose opinion is best founded on traditional authority, be divorced only by 'zihar.'[6] She cannot be divorced in any other form.[7]

Inheritance

(9) In the absence of express agreement, neither the husband nor the wife married by 'mut'a,' is entitled to mutual rights of inheritance. The more approved doctrine is, that where the parties to such a marriage have stipulated that they shall inherit from each other, the agreement is lawful and effectual.[8]

Subsequent conditions.

(10) All stipulations must be entered into at the time the contract of 'mut'a' is made and none can be added thereafter; nor is any stipulation effective that was agreed upon previously, but not expressly mentioned in the contract of 'mut'a.'[9]

Expiration of time.

(11) At the expiration of the term contracted for, or on the death of either party, a 'mut'a' marriage is dissolved.

[1] The *res fungibiles* of Roman Law: Hunter, "Roman Law," 939

[2] Bail. II 41.

[3] Bail. II. 42, 43.

[4] Bail. II. 42.

[5] Bail. II. 43.

[6] Bail. II. 43, 118. *In the matter of the Petition of Luddan Sahiba: Luddan Sahiba* v. *Kamar Kudar* (1882) 8 Cal. 736, 11 C. L. R. 237, where the doubt as to whether a divorce even by 'zihar' is valid, was left unsolved.

[7] However it was held (by Prinsep and Beverley JJ. that a *mut'a* marriage may be dissolved by the husband releasing the wife from the unexpired portion of the term of the marriage, and the wife's consent or acceptance is not necessary for the dissolution of the marriage. *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (1886) 14 Cal. 276.

[8] Bail. II. 44. But see Bail. II. 345

[9] Bail. II. 43.

SECTION 25. 'Iddat' on expiration after consummation.

(12) If a 'mut'a' marriage is dissolved by expiration of its term, ''iddat' is not incumbent unless there has been sexual intercourse; and, in that case, it must be observed during two menstrual courses, or if the wife has no courses, during forty-five days.[1]

'Iddat' of 'mut'a' widow.

(13) If a 'mut'a' marriage is dissolved by the death of the husband, ''iddat' must be observed during four months and ten days; provided, that if the widow is pregnant at the expiration of that period, ''iddat' is prolonged until delivery.[1]

Maintenance.

(14) Maintenance is not due to the 'mut'a' wife unless expressly agreed upon.[2]

'Mut'a' and permanent marriages.

For a comparison of some of the incidents of a 'mut'a' marriage with those of a permanent marriage see sec. 51 below and comment.

No 'mut'a' marriages amongst Isma'ilis,

'Mut'a' marriage is not recognised amongst the 'Isma'ili' Shiah Mussulmans, to which school the Khojas and Bohras of Bombay belong.

Mu'tazalas.

Mr. Ameer Ali, in his learned book on "Mahommedan Law,"[3] mentions that the 'Usuli' and 'Mu'tazala' Shiahs agree with the Sunnis in permitting a permanent marriage with a non-Muslim from which it would appear that those schools of Shiah law recognise 'mut'a' marriages. See sec. 51 below.

Probationary marriage of Egyptians.

Amongst the ancient Egyptians (who were strictly monogamous), the woman seems regularly to have been taken on probation for a year; after which she was "established as a wife."[4] The temporary marriage of the 'Ithna 'ashari' Shiahs is not in the nature of a marriage on approval.

Origin of 'mut'a' marriage.

The late Prof. W. Robertson Smith[5] has shown that amongst the Arabs before Islam one form of marital relationship consisted in the woman entertaining the man in her own tent, that by her doing so neither party acquired any right over the other; and the children belonged to the woman, who could dismiss the man at any time she chose. There was thus absolute freedom on either side to terminate the relationship (if such it may be called) at any time. The 'mut'a' marriage differs from the pre-Islamic institution in the following main points: (1) the period of the term must be fixed at the time that the 'mut'a' contract is entered into; and there can be no dissolution of the tie within the period; (2) there must be a 'mahr' fixed in the contract. On the other hand the features of the old relationship are preserved in the fact that (1) there is no right of inheritance from 'mut'a'; (2) that the child may be disclaimed without much formality; (3) as, originally the woman entertained the man in her own tent, and in the midst of her own tribe, and did not go to live with the man; so now

Compared with permanent marriage.

[1] Bail. II. 44.

[2] Bail. II. 97. See *In the matter of the Petition of Luddun Sahiba* (1882) 8 Cal. 736 and *Mahomed Abid Ali Kumar Kader* v. *Ludden Sahiba* (1886) 14 Cal. 276, where the Court held that the husband may be ordered under the Criminal Procedure Code s. 488 to give maintenance to his *mut'a* wife unless he had validly released her of the term by a *hiba-i-muddat*, i.e., gift of the term. See below s. 288.

[3] II. 320 (1908, 3rd Ed.).

[4] Holland' "Jurisprudence," 155 citing, Revillout Chrestomathie Demotique (1880) CXXXII.

[5] "Kinship, and Marriage in Early Arabia" (New Ed. 1907), 83.

SECTION. 25 the 'mut'a' wife cannot claim maintenance; (4) the restriction in the husband's power to divorce her is, no doubt, a survival of the fact that the man had less power over a woman whom he could not bring to his own tent.

5. -*Persons Prohibited from Intermarrying.*

Prohibitions to

26. Muslims are prohibited from intermarrying with each other for reasons depending on the following circumstances which are hereinafter more fully considered :—

consanguinity,[1]
affinity,
unlawful conjunction,
fosterage,
'iddat,'
divorce,
religion of the parties,[2]
supervening illegality,
pilgrimage.

(1) *Prohibition by Consanguinity.*

Marriage : prohibited relations by blood.

1. ascendants or descendants.
2. brothers or sisters and nephews or nieces
3. uncles or aunts.

27. Prohibition by consanguinity is established between every Mussulman and the following of his blood relations :—

(1) his (or her) own ascendants how-high-soever, or descendants how-low-soever ;

(2) his (or her) father's or mother's descendants how-low-soever :

(3) the sisters or brothers of any ascendant how-high-soever.[3]

(2) *Prohibition by Affinity.*

Prohibition by affinity.

1. spouse's ascendants or descendants.
2. spouse of ascendant or descendant.

(Sunni law): descendant of

28. Prohibition by affinity is established between every Mussulman and the following classes of persons :—

(1) ascendants or descendants of his or her husband or wife [4] :—

(2) the husband or wife or any ascendants or descendants ; provided that according to Sunni law, marriage is lawful with the descendants [5] of a husband or wife, with

The expression "relationship by blood' might have been preferable to "consanguinity,' as the latter word has acquired in the Muhammadan law of Succession the more restricted meaning of relationship through males. It has however been considered unadvisable to alter a familiar term. It may be pointed out that the Parsi Marriage and Divorce Act sec. 3 and the Marriage Act III of 1872 sec. 2 both speak of consanguinity as synonymous with relationship by blood

[2] These are not cases of Muslims intermarrying with each other; but have been included here for convenience.

[3] Bail. I. 23-24 ; Hed. 27 ; Bail. II. 13-14.

[4] Bail I. 24, II. 22.

[5] But not with the ascendants. Bail. I. (where only the daughter is mentioned) and Bail. I. 322, (II. 22-24.) The Shiah law is more explicit on the point.

SECTION 28. with whom no intercourse.

whom the marriage has not been actually consummated,[1] and

(b) according to Shiah law, a man may intermarry with the descendants of a woman who is, or has been, his wife, but with whom he has not consummated marriage, but he may not marry her ascendants, nor may she marry either his descendants or ascendants.

of wife with whom no intercourse.

Explanation I—Marriage is prohibited with a woman who has been the wife of a son,[2] though the son has not consummated his marrige with her.[3]

Explanation II—In Sunni law an irregular marriage, which has not been consummated, does not make the parties husband and wife, for the purpose of establishing prohibition by affinity.

Acts having same effect for establishing prohibition as consummation of marriage.

29. For the purpose of establishing prohibition by affinity, the following acts, whether done lawfully or unlawfully, shall have the same effect as the consummation of a lawful marriage:—

(1) according to the Hanafi, and Hanbali, and Shiah law[4] illicit intercourse.[5]

1. illicit intercourse.

(2) (*a*) according to the Hanafi and Hanbali schools (but not according to those of Malik and Shafi'i nor according to the Shiah law)[6] undue familiarity[7] between persons of the opposite sexes,

2. undue familiarity.

(*b*) the Shiah authorities are divided as to the effects acts of such undue familiarity ;[7]

(i) according to the majority of the Shiah authorities such acts[7] render marriage abominable, but do not (like the consummation of a valid marriage) establish prohibition to intermarry ;

[1] Bail. I, 24, 322. For this purpose "valid retirement," is not equivalent to consummation; see sec. 82 below.

[2] I.e., after the marriage with the son has been dissolved by death or divorce or other

[3] Bail. I. 21.

[4] Malik and Shafi'i do not consider illicit intercourse as having any effect in establishing prohibition. *Sharh-i-Viqaya* Book on *Nikah*, ch. II. (*ad init.*).

[5] Bail. II.23 and see sec. 52 below.

[6] As to which see the next clause.

[7] Undue familiarity is defined as touching with the hand any part of the person of one of the opposite sex, even inadvertently, or kissing him or her, or looking on his or her nakedness, or lying together, or embracing—provided that neither of the parties are below the age when desire first arises, and that the act is done with desire on the part of one of them. Bail I. 25, 26, II. 24. Touching implies that there is no cloth or other substance between the parties of sufficient thickness to prevent the warmth of the body being felt. Bail. I. 26.

SECTION 29.

(ii) according to a minority of Shiah authorities such acts establish :

prohibition to marry (and not mere abomination) between the woman and the father or the son of the man ; but

only abomination (and not prohibition to marry) as *regards all relatives of the* woman, and all the relatives of the man, other than the son and father [1];

3. Statements.

[a statement[2] by a person to the effect that he or she has himself or herself done an act which establishes prohibition by affinity—even though the statement be subsequently retracted.]

Valid retirement.

(4) in Sunni law "valid retirement."[3]

5. Unnatural offence.

(5) in Shiah law, an unnatural offence between two males.[4]

(3) Prohibition by Unlawful Conjunction.

Prohibition by unlawful conjunction.

30. Prohibition[5] by unlawful conjunction is established by the breach of the following rules :—

Number.

(1) A Mussulman cannot be lawfully the husband of more than four wives at the same time,[6] nor the wife of more than one husband.[7]

Quaere, whether a 'Mu'tazala' Shiah is prohibited by his law from marrying more than one wife.[8]

Relationship between co-wives.

(2) (a) According to Sunni law, a man cannot lawfully be the husband, at the same time, of women any of whom are related to each other by consanguinity, affinity[9] or fosterage, in such manner that they

[1] Bail. II. 24.

[2] *Quaere* whether this is a rule merely of evidence. The strict Muhammadan law so strongly abhorred such marriages, that it did not permit a statement of this nature to be made even in jest without the same consequences as would result if the statement was true, Bail. 26. Cf. the effect of acknowledgement of marriage, sec 81 below. See also pp. 47, 48 *ante*.

[3] See sec. 82 below. "Valid retirement" pre-supposes a marriage between the parties

[4] Bail. II. 27.

[5] It would perhaps be more correct to say that in Sunni law unlawful conjunction establishes irregularity of marriage, and not prohibition to marry. See sec. 83. below.

[6] Bail. I. 30-31 : Hed. 31, Bail. II. 27, 28.

[7] Cf. the *Fatwa-i-'Alamgiri*, Vol. II. Book on *Nikah*, Ch. III on the 4th class of prohibitions, citing *Muhit-i-Surukhsi*, and adding that if a woman marries two men in one contract, and one of the men has already four wives, then the marriage is valid as to the other husband.

[8] See Ameer Ali, "Mahommedan Law," II, 21, 158 cited and commented upon by Sir R. Wilson, "Anglo Muhammadan Law," sec. 493, pp. 467-469.

[9] Bail. I. 31 does not mention affinity ; but affinity is expressly mentioned in Hed. 29. It would be extraordinary if affinity between two women within the prohibited degrees, were not enough to make the conjunction unlawful ; for under prohibitions by fosterage is included a prohibition against intermarriage with persons bearing foster relation by marriage.

could not lawfully have intermarried with each other, if they had been of different sexes.[1] SECTION 30

(b) according to Shiah law a man may not lawfully marry in conjunction with his wife, his wife's sister, nor may he lawfully marry, without his wife's permission, his wife's niece;[2] Wife's sister. Wife's niece.

but he may lawfully marry, without his wife's permission, his wife's aunt.[2] Wife's aunt.

Some Shiah authorities are of opinion that a marriage with a wife's niece without the wife's permission, is not void, but voidable at the option of the (first) wife. But the better opinion seems to be that it is void.[2]

Illustrations.

(1) H, having one wife, marries four more by one contract. The whole of the latter contract is void.[3]

(2) H cannot lawfully be the husband at the same time of *W*, and of *W*'s sister or *W*'s paternal or maternal aunt.[4]

(3) A Shiah may lawfully be the husband, at the same time, of *W*, and of *D* the daughter of *W*'s former husband (as the prohibition between *D* and *W* is by affinity and not consanguinity or fosterage).[4]

Contract not to marry second wife.

It is stated in the 'Shara'ya-ul-Islam'[5] that a stipulation in the marriage contract "that the husband shall not marry another wife during the lifetime of the party with whom the contract is made, nor privately entertain a woman as his concubine" is void, inasmuch as it is contrary to the law that the husband may marry four wives. But, no doubt, the British Courts would lean in favour of such a stipulation, on the ground that the rule of Shiah law making it invalid is itself against public policy.

Restraint of polygamy and public policy.

Assuming that the Court would be desirous of upholding a contract restricting bigamy or polygamy, would sec. 26 of the Contract Act[6] prevent the Court from doing so? The question becomes difficult by three conflicting considerations being involved in it: first there is the principle underlying sec. 26 of the Contract Act that marriages should not be restrained, secondly the general recognition of the fact that polygamy should be restricted as far as possible, and thirdly the fact that the rule of Muhammadan law premitting polygamy, has never been challenged in the Courts on the ground of its being opposed to public policy.

Such stipulations were set up in two cases,[7] and in the earlier case nominal damages were awarded to the wife. The passage from the

[1] Bail. I. 31, Hed. 28. 29.

[2] Bail. II. 23, 40 (para. 3.).

[3] Bail. I. 31.

[4] *Shureefoonissa* v *Khizooroonissa* (1823) 3 S. D. A. 210. *Aizunnissa Khatoon* v *Karimunnissa Khatoon* (1895) 23 Cal. 130.

[5] Bail. II. 76.

[6] Which is as follows: "Every agreement in restraint of the marriage of any person other than a minor is void."

[7] (*Beebee*) *Hurron* v *Sheik Khyroollah* (1838) Fulton 361, (*Sheik*) *Mohabuth Ally* v. *Mymoonnissa* (1862) Marsh 361.

SECTION 30. 'Shara'ya-ul-Islam' referred to above does not appear to have been cited, and if the parties were Sunnis, as was probably the case, it would not have been authority binding on them. All that the Court decided, however, was that the breach of such a contract did not entitle the wife to a divorce. But of course the wife may, by contract, have an option reserved to herself, to pronounce a divorce, and such an option may be conditioned on the husband taking another wife,[1] or it may be unconditional.

Effect of contract establishing unlawful conjunction

31. *The whole of a contract is void*[2] *which has the effect of establishing unlawful conjunction,*[3] *but a marriage contracted* previous to the contract by which unlawful conjunction is established remains valid. Where it cannot be determined which of two contracts of marriage was the earlier, and the two conjointly have the effect of establishing unlawful conjunction, both such contracts are avoided.[4]

Explanation—For the purpose of determining whether unlawful conjunction is established deceased wives are not taken into consideration ; nor wives who have been divorced, and whose ''iddat' for divorce[5] has elapsed ;[6] nor (according to Shafi'i and the Shiah authorities) wives who have been divorced irrevocably, notwithstanding that the period of ''iddat' has not elapsed.[7]

It is unusual nowadays to come across a person in British India with more than one wife, unless there are special reasons for marrying a second wife, such as illness or barrenness of the first. It is still rarer, of course, for a man to marry more than one wife by the same contract. It may however be mentioned as a point of academic interest, that the whole of the contract by which more than one wife is married, does not become invalid if he is prohibited from marrying one of the women but the cause of prohibition is other than unlawful conjunction : as for instance if one of them is already married.[8]

(4) Prohibition by Fosterage.

Foster children and foster parents defined.

32. Where a child under the age of two years, has been nursed (in accordance with the rules mentioned in section 33) by a woman other than its mother, it is called the "foster child" of

[1] As it was in *Badarunnissa Bibee* v. *Mafiatulla* (1871) 7 Ben. L. R. 442, and in *Poono Bibi* v. *Fyez Buksh* (1871) 15 Ben, L.R. App. 5. *Beebee Huron* v. *Sheik Khyrollah* (1838) Fulton 361, (*Shaikh*) *Mohabuth Ally* v. *Mymonissa* (1862) March 1361.

[2] According to Hanafi law "irregular" rather than void See sec. 83 below.

[3] Bail. I. 31.

[4] Hed. 28. 29. Bail. I. 31-27, II. 24-25, 28 (para. 3).

[5] See ss. 36 and below. 38

[6] Bail. I. 32, 34.

[7] Hed. 30 ; Bail. II 28 and see Bail. II. "When a man absent from his wife has repudiated her, and desires to marry her sister, or a fourth wife, he must wait for nine months, for the possibility of his wife's being pregnant." Some doctors recommend waiting for a full year. "But if he knew that she was not pregnant at the time of repudiation, three courses and three months are sufficient." Cf. Bail. II 162 (para. 1).

[8] Bail I. 35, 36.

the woman: the woman is called its "foster mother" [1] and the husband of the foster mother is called the "foster father" of the foster child.[2] SECTION 32.

Two years is the period of suckling in the opinion of Abu Yusuf, Imam Muhammad, Shafi'i and the Shiah lawyers. Abu Hanifa, however, fixes the at 30 months.[3] Child must be under two years when

Cf. "The Prophet said in the presence of all his women, the rules of sucking the same women are in infancy, and not in those of riper years." [4] For the reason of the rule, cf. "prohibition is not established by any fosterage, except such as is the cause of growth and increase, which are obtained only by the fosterage within its proper period; since a grown-up person would not find any effectual nourishment from sucking."[5]

33. For the purpose of establishing prohibition by fosterage, a child is to be considered as having been nursed by a What Hanafi law.

(1) According to the Hanafis where the milk from the breast of the woman has reached the stomach [6] of the child, whatever be the quantity of the milk, and whether it has been taken by the child directly from the breast, or it has been poured down its throat, or administered medicinally, and whether the nurse was living or dead at the time that milk was taken from her breast.[7]

(2) According to Shafi'i where the child has been suckled at least five times from the breast of a living woman.[8] in Shafi'i law.

According to the Shiahs, where in Shiah law.

(*a*) the milk has not proceeded from illicit intercourse,[9] and

(*b*) the child has been nursed direct from the breast of the same woman, either fifteen times [10] or during one whole day and night; in either case without being suckled

[1] It is considered possible by the Muslim authors that an unmarried virgin should have milk in her breasts, and that a woman may have milk by intercourse, without bearing a child: and the rule stated in strict accordance with the authorities, would be as follows. "When the milk is produced in the breast of the foster mother by intercourse with a man, and then if she has borne a child to that man, he is called the foster father."

[2] Bail. I. 193, 195, (para. 3), 196 (para. 2): II. 17.

[3] Bail. I. 193, II. 17; Hed. 68.

[4] *Mishcat* XIII. v, 1. (Matthew, I. 92).

[5] Hed. 68-9.

[6] If it is poured through the ear or other cavities it does not establish nursing; nor (Imam Muhammad *dissentiente*) if administered through a clyster Bail. I. 169.

[7] Bail. I. 193, 196.

[8] Hed. 67, 70.

[9] Bail. II. 15.

[10] According to some Shiah authorities ten times is enough. Bail. II.

SECTION 33.

during the same period by any other woman, and

(*c*) all the acts of suckling have been completed before the child has attained to two years, and during the lifetime of the nurse, and

(*d*) the milk has been in its natural state, and not diluted even in the mouth of the child.[1]

Foster father when foster mother is divorced [or widow].

34. Where a divorced woman [or a widow][2] nurses a child, her late[2] husband is in law the foster father of the child, unless she has borne a child to a second husband[3] after her marriage with her late husband has been dissolved.

Prohibition by fosterage between whom established.

35. Prohibition by fosterage is established between every Mussulman and

(1) his foster mother;

(2) the descendants by fosterage of his father[4] or mother,[4] and of his stepfather[4] or stepmother;[5]

(3) his foster father's or foster mother's ascendants how-high-soever, and their descendants how-low-soever, and whether by blood or by fosterage;

provided that in Shiah law prohibition is not established between foster children of the same foster mother unless their foster father is also the same person,[6]

Explanation—Neither by the Sunni nor by the Shiah law is it lawful for a person to marry the child[4] of his foster mother;[7]

(4) the sister[8] of any foster ascendant how-high-soever[9];

provided that where the milk is ascribed to the foster mother as the result of illicit intercourse the foster

[1] Bail. II. 15-17.

[2] The authorities refer only to a divorced wife.

[3] Bail. I. 195 (para. 2); II. 15.

[4] Relationship by blood must be understood in this section unless the epithet "foster" or an expression implying fosterage qualifies the terms.

[5] Bail. II. 18-19.

[6] Bail. II. 17, 18. The reason of this exception seems to be that prohibition by fosterage is based on the ground that fosterage "gives increase to the flesh and bones" (Bail. II. 15); and that persons who have participated in such increase from the same source, bear to each other a relationship analogous to that of persons naturally descended from the same parents; and that the milk is to be ascribed entirely to the man, intercourse with whom has produced it. See next footnote.

[7] Bail II. 17. In accordance with the theory referred to in the last footnote, the prohibition should be restricted amongst Shiahs to intermarriage between A and *B*, when *B* is the natural born child of A's foster mother and also of his foster father.

[8] I.e. by blood.

[9] I.e (*a*) the ascendant by blood of a foster father or foster mother, or (*b*) the foster father or mother of an ascendant by blood.

child may lawfully marry the paternal and maternal aunts of his (illegitimate) foster father ; [1] SECTION 35.

(5) the ascendants or descendants by fosterage of his wife ; [2]

(6) the wife of a foster parent or a foster child.[3]

(7) In Shiah law : [4]

(*a*) the child by blood or by fosterage of his own child's[5] a foster father ; [6]

(*b*) the child of the foster mother of his mother.[5]

Similar prohibitions are established in the case of females ; and the rules given in this section apply to females with the necessary changes.

See Illustrations pp. 76, 77, and also Illustrations to s. 52 below.

The Muhammadan law differs from most other systems in the prominence it gives to fosterage[7] as a cause establishing prohibition to marry.

Reason for prohibition by fosterage.

The reason[8] for the prohibition by fosterage is thus stated in the 'Hidaya' : "Prohibition by fosterage is founded solely in an apprehension of a participation of blood (or rather of bodily substance, causing two persons to partake of one nature) on account of the growth and increasing bulk of the body, moreover it occurs in traditions that fosterage is the source of a child's growth."[9] Allusions are made more than once in the 'Hidaya' and the 'Fatawa-i-'Alamgiri' to the same reasons, in order to elucidate the rules of law relating to prohibition by fosterage, and in considering the validity of rival opinions, where the various exponents dissent from each other.

Quranic prohibition by fosterage.

The rules of prohibition by fosterage are based on the effect given to the verse of the Quran[10] which deals with prohibitions,[11] and which, so far as material at present, is as follows :—

> "Unlawful for you are your mothers . . . and your foster mothers, and your foster sisters and your wives' mothers, and your step-daughters." Quran VI. 27.

[1] In Shiah law fosterage is not established when the milk proceeds from illicit intercourse. See s. 33 *ante*.

[2] Hed. 70.

[3] Bail. I. 194-95 ; Hed. 69.

[4] It will be noticed that this is the only case where the prohibition by fosterage is established between persons neither of whom is the foster child, nor a lineal ascendant or descendant, of the foster child.

[5] Relationship by blood must be understood in this section unless the epithet "foster" or an expression implying fosterage qualifies the terms.

[6] Bail. II. 18.

[7] Fosterage as distinguished from adoption does not seem to be known to Hindu law: Mayne's "Hindu Law" (7th ed. 1907) 236-7. In Roman law fosterage was one of the grounds for manumission (Justin. bk. I. tit. 6, sec. 5. Gai I, 19) but had apparently on other legal effects.

[8] Fosterage is discussed at greater length than its practical utility would demand in order to justify the statement of the law as given in s. 35 which differs from that of Sir R. Wilson in many material points.

[9] Hed. 68; see also Bail. II. 15.

[10] The traditions on the subject are, according to the Hanafis, superseded by, or inconsistent with, the Quran, see *ante* p. 3.

[11] Quran IV. 27.

SECTION 35. In interpreting this verse the expression "foster mothers" is generalised, and taken to include all ascendants, so that foster parents of all degrees are prohibited. Thus we get sec. 35 clause (1) and part of clause (3).

Similarly the prohibition against the foster sister in the Quran includes the prohibition against the foster brother, thus covering the portion of sec. 35 clause (3) not already covered, and the whole of clause (4).

Finally, in the expression "Your wives' mothers," the term "mothers" is interpreted to mean both classes of mothers mentioned in the verse, i. e., including foster mothers. Hence arises the rule which is stated in clause (5): and by analogy from clause (5) clause (6).[1]

The 'Hidaya on fosterage.

The following definition of 'riza' or fosterage is given in the 'Hidaya': "A child sucking milk from the breast of a woman for a certain time which is termed the period of fosterage." The general statement that "whatever is prohibited by consanguinity is so likewise by fosterage," comprehensively includes clauses (1), (2), (3) and (4) of section 35 which correspond with prohibitions by blood. In other respects the 'Hidaya' corresponds with the 'Fatawa-i-'Alamgiri' in which the statements of a general nature about the prohibitions by fosterage are very short, and may be given in full with the omissions of the examples and discussions :

'Fatawa-i Alamgiri.

"It is not lawful for a man to marry his mother[2] by fosterage, nor his sister by fosterage,[3] . . . Illegality is induced by sucking . . . provided it takes place within the proper period . . . (which) the two disciples have said . . . does not extend beyond two years . . . when the full period has expired the illegality by fosterage is not established by sucking after it.[4] Illegality by fosterage is also established on the part of the father.[5] To the suckling both his foster parents and their ascendants and descendants either by natural descent or fosterage are all prohibited[6] . . . ; and the brother and sister of the man (i.e. the foster father) would be his paternal uncle and aunt, and the brother and sister of the nurse would be his maternal uncle and aunt ; and in like manner as to his grandfather and grandmother[7] . . . The illegality of affinity is also established by fosterage, so that the man's (i.e. the foster father's) wife would be unlawful to the suckling, and the wife of the latter (i.e. the foster child) would be unlawful to the man and by the same analogy in all cases[8] except two." [These two exceptions consist of the first four cases tabulated below, p. 76.]

Relationship by fosterage arises if the nursling is under 2 (or 2½) years.

Observe that the words "When the full period has expired, the illegality by fosterage is not established by suckling after it," immediately follow the

[1] See *ante* pp. 15-17 as to interpretations of the Quran and Analogy.

[2] Sec. 35 (1) *ante*.

[3] Sec. 35 (2) *ante*.

[4] Bail. I. 194.

[5] Bail. I. 194. After this follow instances showing that the foster mother's children by descent become that child's foster sisters and brothers, and also that all the real or foster children of the foster father become the child's foster brothers and sisters, and are therefore prohibited. No instances are mentioned of the foster children of the foster mother, but these are included in the statement immediately preceding that "descendants of foster parents by fosterage are prohibited to the foster child." It will be observed that by the Shiah law the foster children of the foster mother (by another foster father) are not prohibited.

[6] S. 35 (4). Bail. I. 194.

[7] S. 35 (5).

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prohibition against marrying the foster mother as well as the foster sister, and cannot be taken to refer only to the sister [1] ; so that the rule of the law is that unless the suckling takes place under the age of 2 (or 2½) years, it does not create relationship by fosterage at all. On this point reference might be made to the tradition that the Prophet said that if the child has sucked once or twice it is not thereby prohibited to the nurse.[2] This tradition (in so far as it refers to the quantity of the milk required to establish fosterage) is held by Abu Hanifa to be superseded by the verse of the Quran (IV. 27) which speaks of "the mother that has given you suck" without any reference to the quantity of the milk. Shafi'i and the Shiahs, on the other hand, give effect to the tradition. But in any case, the tradition shows that when that which the law requires to establish fosterage is not present, the prohibition does not arise even between the nurse and the child.[3]

Not otherwise.

Fosterage does not take the place of procreation for prohibitions to marry

Sir R. Wilson [4] has, it is submitted, given to the rule of prohibitions by fosterage undue extension by saying that "the act of suckling in all cases takes the place of an act of procreation." A reference to the authorities that he cites for the proposition [5] and especially to what he terms "the general statement," [6] viz. "To the suckling both his foster parents and their ascendants and descendants either by natural descent or fosterage are all prohibited," shows that Sir Roland has apparently not realised that the "general statement" merely involves the propositions in clauses (1), (2) and (3) of s. 35, and that under the said statement prohibition can only be established when one of the parties is the foster child. The instances that Sir Roland gives as "recognised exceptions to the general rule of prohibition" are not really exceptions, if the rules are stated as they are stated in the 'Hidaya' and 'Fatawa-i-'Alamgiri.' They are given in those books as examples, to show the difference between the incidence of the very similar rules applying respectively in the case of blood-relationship and of fosterage. In order to show that this is the case, all the cases mentioned in the books and quoted by Sir Roland as exceptions, are given below.[7] It will be found on examination that none of them comes within any of the first six clauses of s. 35 of this work. With reference to the first two cases the following passage is important :

"It is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage ; for the former must be either his own daughter or his step-daughter while the latter is neither," [8] and then an instance is given which can only occur when slavery is recognised ; viz., when a sister (by consanguinity) of a man's son is neither his own daughter, nor his step-daughter, [9] in which case it woud be lawful for him to marry the girl.

[1] Sir Roland Wilson in the *Explanation* to s. 37 of his valuable book apparently restricts it to prohibition between the foster brother and sister.

[2] *Mishcat-ul-Masabih*, book XIII. ch. v. part . (Matthew's translation, I. 92).

[3] Cf. also Bail. II. 17 "There is no fosterage after the age of weaning."

[4] "Anglo-Muhummadan Law," s. 37, p. 113

[5] Viz. Bail. I. 193-203 ; Hed. 67-72.

[6] Bail. I. 194.

[7] See next page.

[8] Bail. I. 194.

[9] "Daughter-in-law" in Bail. I. 194.

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Persons[1] not coming within the rule of prohibition by fosterage, who would be prohibited from intermarrying if they had been related by blood or affinity :—	Sections and clauses of this work under which prohibition would be established if the relationship were by blood or affinity, instead of fosterage .—
1. Sister's foster mother	27 (1) or 28 (2).
2. Foster sister's mother	,, ,,
3. Foster mother's foster sister	27 (1) or 28 (1).
4. Foster son's sister	27 (1) or 28 (2).
5. Foster brother's mother ; Brother's foster mother ; Foster brother's foster mother.	27 (2) or 28 (2).
6. Mother of paternal or maternal foster uncle	27 (1) or 28 (2).
7. Nephew's foster mother	Not prohibited, she would be a brother's wife.
8. Foster child's grandmother	27 (1) or 28 (2).
9. Foster child's aunt...	27 (3).
10. Mother of son's foster sister	This would be his own wife.
11. Daughter of child's foster brother	27 (1) or 28 (1).
12. Sister's foster father	27 (1) or 28 (2).
13. Son's foster brother	27 (1) or 28 (1).
14. Niece's foster father	27 (2) or not prohibited if he is either brother or sister s husband.
15. Child's foster grandfather	27 (1) or 28 (1).
16. Child's maternal uncle.....	27 (1).

Illustrations.

Explanation of the geneaiogical table.

N.B. *Slanting* letters refer to females. Letters in parentheses refer to persons who are prohibited from marrying C.

(1) C and *K* are natural-born son and daughter of A and *B*.

(2) C has been nursed by *E* on milk produced by intercourse with D. Therefore *E* is the foster mother and D is the foster father of C.

(3) D has another wife *G*, who has borne to him a daughter *F*.

(4) *G* has nursed a girl *H* on milk produced by intercourse with D.

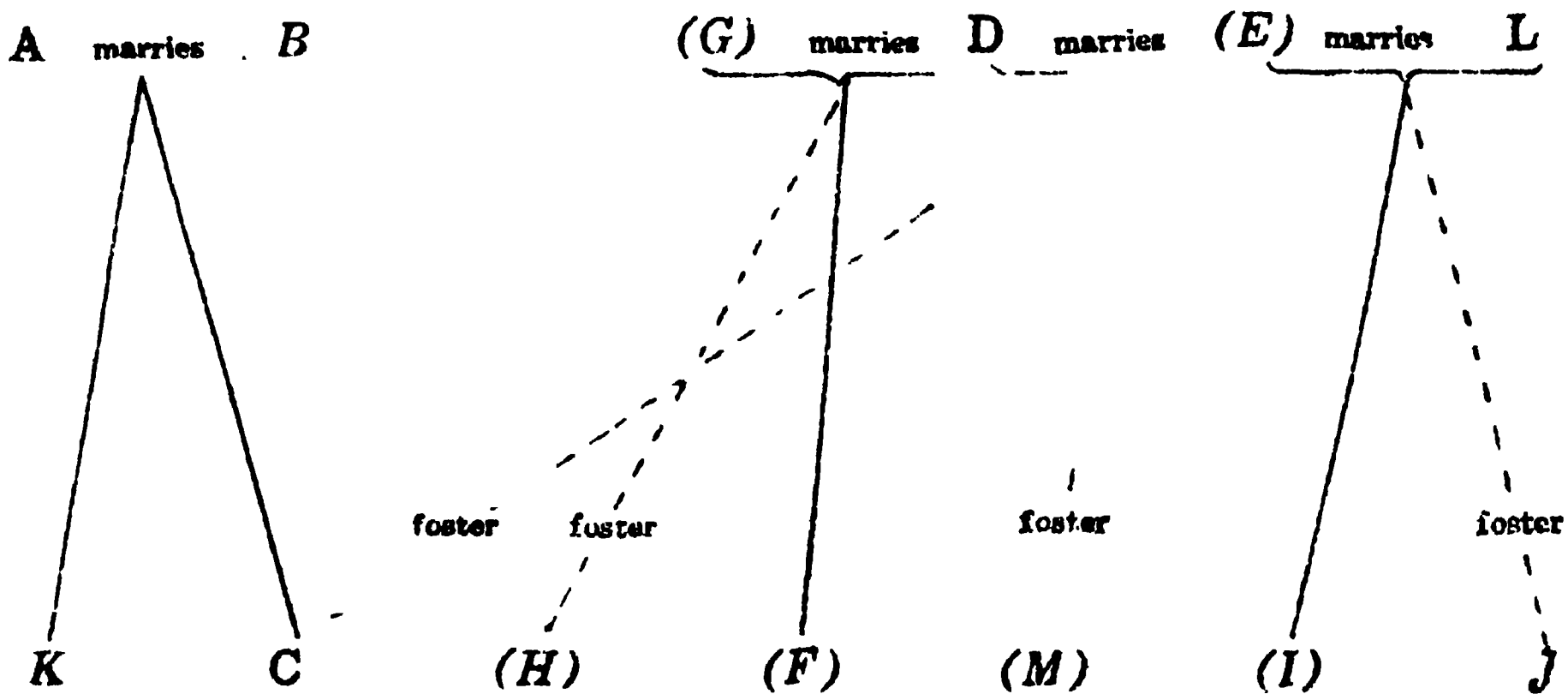
(5) *E* also has married another husband L,

(6) and has borne to him a girl, *I*, and

(7) has nursed a girl *J* on L's milk.

(8) *M* is the foster-daughter of D and *E*.

[1] *Ante*, p. 76 Bail. I. 194 *et*



C cannot marry

Prohibitions by fosterage.

(1) *E* his foster mother—clause (1)

(2) nor the mother of D, his foster father—clause (3)

(3) nor the mother of *E* his foster mother—clause (3)

(4) nor *F* (his foster father's real child)—clause (3)

(5) nor *I* (his foster mother's real child)—clause (3)

(6) nor *H* (his foster father's foster child by another woman)- clause (3)

(7) nor *M* (his foster father's foster child by his foster mother) -clause (3)

[According to Shiah law, but not Sunni law :
C may marry *J* (his foster mother's foster child by another husband—clause (3)—proviso]

(8) nor the sister of D his foster father—clause (4)

(9) nor the sister of *E* his foster mother—clause (4)

(But C may marry the sister of L or G, i.e., the sister of the husband or wife of his foster mother or foster father).

(10) nor the foster mother or foster daughter of his wife—clause (5)

(11) nor *G* the wife of his foster father—clause (6)

(12) nor any foster child of his own—clause (5)

(13) nor any foster child of his wife—clause (5)

(14) nor the wife of any foster child of his own—clause (6)

(15) nor the wife of any foster child of his wife—clause (6)

In addition to the above, according to Shiah law

(16) A,[1] the father of the foster child C, cannot marry *H* nor *M* who are the children of C's foster father—clause (7)

(17) nor can A [1] marry *I*, the real child of his son's foster mother.

According to Sunni law A [1] may marry *H*, *F*, *M*, *I* or *J*.[2]

A [1] may marry *J* by either school of law.

[1] Note that we are now referring to the foster father and not to C the propositus.

[2] Bail. I. 194, II. 18.

SECTION 36.

(5) Prohibition by 'Iddat.'

Prohibition to marry during 'iddat.'

36. Prohibition [1] to marry may also be established by the fact that the woman is under one or both of the following disabilities to marry :—

(1). That the period of 'iddat' has not elapsed, which (as mentioned in section 39) is required to elapse after the dissolution of a previous marriage.[2]

(2). According to Abu Yusuf [3] and the Shiah authorities, that she is pregnant by illicit intercourse.[4]

Though 'iddat' primarily affects the right of the woman to marry, yet it may prevent the husband of a divorced wife from marrying another wife who would be prohibited by reason of unlawful conjunction ; i.e., he may not marry a fifth wife, while one of his four wives is observing her 'iddat' for divorce, nor may he, during the said period, marry that wife's sister.[5]

Perpetual prohibition in Shiah law.

37. According to Shiah law, if a man marries a woman knowing her to be in her 'iddat' the marriage is void, and if they have sexual intercourse with each other after a marriage so contracted, they can never lawfully intermarry ; but if they do not have sexual intercourse with each other, they may lawfully intermarry after the woman has completed her 'iddat.'[6]

There is no such provision in the Sunni law.

'Iddat' defined.

38. (1) 'Iddat'[7] is the obligation on a widow or divorced woman to refrain from marrying another person during the period mentioned in section 39 below.

Mourning during 'iddat.'

(2) According to Abu Yusuf (but not according to Abu Hanifa nor Imam Muhammad) 'iddat' is also incumbent on a woman during pregnancy by illicit intercourse.[8]

The woman is also required during 'iddat' to observe 'hidad,' i.e. mourning, by abstinence from rich clothes, perfumes, and other objects for beautifying her person.[9]

[1] According to Hanafi law it would be more accurate to say that *'iddat* makes marrying irregular rather than prohibited. See below s. 83.

[2] Bail. I. 37, 38, II. 27.

[3] Abu Hanifa and Imam Muhammad are of opinion that marriage during pregnancy by illicit intercourse is valid, but the husband must refrain from intercourse with her until she is delivered, and the *fatwa* is in accordance with their opinion.

[4] Bail. I. 37-38, Bail. II. 164 (second para.), 165 (third para.). T *Shahr-i-Viqaya* (a Sunni authority) explains that according to Abu Yusuf the persons who have themselves been guilty of illicit intercourse may intermarry while the woman is pregnant. The Shiah authorities do not permit it if the woman is observing the *'iddat* of divorce or as a widow. Bail. II. 164, 165.

[5] See s. 31 *ante*, p. 70 *n.* 7.

[6] Bail. II. 26 (first), 27 (third)

[7] *'Iddat* means counting from *'ad*, number.

[8] Bail. I. 37-38, 350-351.

[9] Bail. I. 357, II. 165. Hed. 132.

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According to Shafi'i and the Shiah authorities 'hidad' is not incumbent on a divorced woman.[1] No legal results follow from the observance or breach of the rules as to 'hidad.'[2]

Parallel to ''iddat' in Civil and English law

The Civil Law ordained that no widow should marry 'inter annum luctus,'[3] and the rule was established in England under the Saxon and Danish Governments;[4] but it seems to have fallen into desuetude by the time of Coke.[5]

Duration of ''iddat.'

39. The period of ''iddat' extends as follows:

1. for a widow

(1) For a widow who has been regularly married it extends during four months and ten days from the death of her husband, provided that if at the end of the said period she be pregnant, ''iddat' is to be prolonged until she is delivered of the child.[6]

2. for divorced wife or widow by irregular marriage

(2) In the cases of

a divorced woman with whom the marriage has been consummated, or there has been valid retirement[7]; or

of a widow who is irregularly married,[8]

it must be observed,

(*a*) if subject to menstruation.

(*a*) if the woman is subject to menstruation,

(i) in Sunni law until three monthly courses expire,

(ii) in Shiah law until the expiration of three 'tuhrs' (or periods of purity after menstruation);[9]

(*b*) if pregnant.

(*b*) if she is pregnant then until she is delivered;

(*c*) if not subject to menstruation

(*c*) if she is not subject to menstruation for some reason other than pregnancy, then,

(i) in Sunni law, during three lunar months,

(ii) in Shiah law, during 78 complete days,[9]

provided that in Shiah law, according to the more generally received tradition, if the menstruation is irregular or absent owing to a

[1] Bail. 11. 165, Hed. 132.

[2] They might perhaps be applicable in deciding whether articles supplied to a minor or lunatic observing *'iddat* are necessaries suited to her condition within s 68 of the Indian Contract Act.

[3] Cod. V. ix. 2.

[4] *Sit omnis vidua sine marito duodecim menses*, Wilk. Leg. Anglo-Sax. Ll. Ethel. A. D. 1008, Ll. Canut. c. 71 quoted Stephens' Commentaries (10th Ed. 1886.) II. 308.

[5] Co. Litt. 8a. – *ibid.*

[6] Hed. 128-129, Bail. I. 27, 350-355, II. 164-165. Delivery of a child by a pregnant widow does not terminate the *'iddat* before four months and ten days are over. *Ilahut* v. *Imam Din* (1909) Punjab Record Civ. Case 29. p. 77 (Rattigan J.).

[7] The Shiahs do not recognise "valid retirement" as equivalent to consummation; but it is said that where retirement has taken place, if the husband states that the marriage was consummated, his statement will be presumed to be true. Bail. II. 160, cf. *ante*, pp. 47, 48.

[8] Dissolution of an invalid marriage, though brought about by the death of the husband, is put upon the same level as separation caused by a divorce pronounced by the husband, or by the Court.

[9] Bail. II. 161; cf. sec. 31 *ante*.

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woman being past the age of child bearing, or under puberty, no ''iddat' is necessary.[1]

Explanation—The reckoning of the period of ''iddat' must be either by months or by courses, and the two cannot be combined, nor can a period during which there has been menstruation, be reckoned as part of the three months.[2]

3. ''Iddat' illicit intercourse.

According to Abu Yusuf a woman who is pregnant by illicit intercourse may not lawfully marry during her pregnancy any person other than the person who has caused her to be pregnant. Abu Hanifa and Imam Muhammad permit marriage with any person, but forbid intercourse during pregnancy (except, *semble*, when the person causing the womam to be pregnant, marries her). See *ante* s. 38 (2). For ''iddat' in case of 'mut'a' see *ante* s. 25.

Period of ''iddat' if husband dies during ''iddat' of divorce.

40. Where the husband, having divorced his wife, dies before her ''iddat' for divorce has expired, and

(1) the divorce was revocable, or

(2) was pronounced by the husband in his death illness,

the woman is under the obligation of observing ''iddat' from his death, for the period that would have been obligatory on her as his widow if she had been undivorced;

provided that where the divorce was irrevocable or triple, such period must, according to Abu Hanifa and Imam Muhammad, include three menstrual courses (if she is liable to them), and, if necessary, it must be prolonged so as to include them. According to Abu Yusuf it must consist of three courses, but has not to be prolonged beyond them.[3]

Illustrations.

(1) H divorces his wife *W*, before she has reached puberty. One day before the three months elapse, *W* begins to menstruate. The ''iddat' will require three menstrual courses for its completion.[4]

(2) H gives a revocable divorce to *W*. *W* has observed the ''iddat' for three courses except one day, and then H dies. The ''iddat' is prolonged to four months and ten days from the death of H.[4]

(3) H divorces his wife *W* who observes ''iddat' during two courses and then they absolutely cease. She must observe a fresh ''iddat' during three months [4].

(6)—Prohibition by Divorce.

Thrice divorced wife.

41. Where a husband has pronounced three divorces against his wife, their marriage is irrevocably dissolved, and prohibition is established against their remarriage, and the prohibition is

[1] Bail. II. 162.
[2] Bail. I. 27, 350-355; Hed 128. 129.
[3] Bail. I. 355; Hed. 129.
[4] Bail. I. 355.

not removed until she has been lawfully married [1] ***to a second husband, and the second marriage has been dissolved, after having been actually*** [2] ***consummated.***[3] SECTION prohibition removed.

Illustrations.

(1) In 1900 H divorces his wife, *W*, twice. In 1901 *W* marries HA, and is divorced by HA. In 1902 *W* again marries H, and is again divorced by him once or twice in 1903. The two divorces which H had pronounced against *W* in 1900 (before *W* had married HA) are not to be added to the divorces given by H to *W* in 1903, and so after the two divorces of 1903 H and *W* may remarry without *W* marrying another husband.[4]

(2) H divorces his wife *W*, and then revokes the divorce by resuming cohabitation (or remarries her,) and then divorces her a second time, and again revokes or nullifies the second divorce in the same manner; and then divorces her a third time. The third divorce cannot be revoked; and there can be no fresh marriage between H and *W* till *W* has married another husband HA, and *W* and HA marriage has been consummated.[5] If the same process goes on till there are nine divorces of which the 1st, 2nd, 4th, 5th, 7th, and 8th, have been revoked by A's resuming cohabitation, then H and *W* are in Shiah law perpetually prohibited from remarrying. But such perpetual prohibition does not take place when after the last mentioned divorces, *W*'s periods of ''Iddat' have been allowed to expire, and H and *W* have been remarried each time.[6]

By "three divorces" is meant three (or triple) pronouncements of divorce not necessarily three dissolutions of marriage.

The word "divorce" is ambiguous and is used by writers on Muhammadan law sometimes to denote the dissolution of marriage [7] and at other times the formula or pronouncement of divorce, viz. the words which are uttered, or written, for the purpose of effecting a dissolution of marriage. These words may be validly uttered, and thus effective; or may be invalid for want of some legal requirement, and so of no effect; again, they may be recalled before the dissolution of marriage is effectuated, by which means "the divorce" may be "revoked," and hence no actual dissolution of marriage may take place. When, however, it is said that a man is not permitted,[8] to remarry his thrice-divorced wife, what is meant is that after he has uttered three pronouncements of divorce, remarriage is not permissible.[8] It is not meant that there should be three actual dissolutions of marriage, nor three occasions when the wife leaves the husband's society. For instance, the husband may (under Hanafi law) utter the three pronouncements in one

[1] Permanently, not by *mut'a* marriage, Bail. II. 124.

[2] And lawfully, i.e. not during a pilgrimage or an obligatory fast, Bail. II. 126; and not by more valid retirement.

[3] Bail. I. 43, 44, 205, 200, 292 II. 124. Cf. *Akhtaroonnissa* v. *Shariutoollah Chowdhry* (1867) 7 W. R. 268. From the fact of remarriage with the first husband the Court will not presume that all the requirements of the law (i.e. marriage and consummation with another husband) have been fulfilled. *Sed quaere*, see footnote [6] to s. 49, p. 83, below.

[4] Bail. II. 124.

[5] Bail. II. 119.

[6] Bail. II. 220 (first).

[7] Then again it may be used either to denote one special method of dissolving marriage, i.e. *talaq* or any dissolution of marriage, viz. including e.g. *zihar*, *li'an*, etc.

[8] Viz. unless the wife marries a second husband intermediately.

SECTION 41. breath, when there is no time for any separation to take place, between the first and subsequent pronouncements. In such cases the moment after the three pronouncements have been made, the bar against the parties remarrying comes into effect. While again, there may be two single pronouncements of divorce, each allowed to remain unrevoked so as to cause a dissolution of marriage, and each followed by a complete severance of the relationship of husband and wife, and still the parties, if they choose, may remarry immediately after the second dissolution of marriage.

"Divorce"—its two meanings.

In this work, where it has seemed necessary, the two meanings of "divorce" have been distinguished by speaking of "divorce" to refer to the formula; and in other cases the expression "dissolution of marriage" has been used.

Object of the rule in Sec. 41.

The justification for the rule of Muhammadan law in the present section cannot be understood, unless it is remembered that its object was to do away with a great engine of oppression in the hands of the pre-Islamic Arabs, who could keep their wives in a kind of perpetual bondage, pretending to take them back after repeated divorces, merely for the purpose of preventing the wives from remarrying, and from seeking that protection which was an extreme necessity for women in those days.

The second marriage must be consummated.

Mere "valid retirement" without consummation with the second husband, is not enough to legalise remarriage with the first husband. As the husband must be adult to be able to divorce, when the second marriage has taken place with a boy over ten years old, but under puberty, it must await his arriving at puberty before it can be dissolved. See s. 48 below.

Whether 'khul'' is a divorce within s. 41.

42. (1) According to Shafi'i law a 'khul'' or 'mubarat' is not reckoned as a pronouncement of divorce, for the purpose of establishing prohibition[2] by divorce under section 41 above.[3]

(2) The Shiah authorities are divided on the question whether a 'khul'' or 'mubarat' must be so reckoned or not.[4]

law) cancellation of marriage not divorce.

43. According to Shiah law the cancellation of a marriage for a physical blemish[5] does not count as a pronouncement of divorce for the purpose of establishing prohibition by divorce under section 41.[6]

After zihar, expiation necessary.

44. Where a man has made 'zihar'[7] with reference to his wife, and the marriage has been subsequently dissolved, they cannot again lawfully intermarry[8] with each other, until the man has made expiation.[7]

[1] Bail. I. 290.
[2] See s. 41 *ante*.
[3] *Sharh-ul-Viqaya, Nikah*, ch. on *khul'*, (*ad. med.*)
[4] Bail. II. 129.
[5] See ss. 191-199 below.
Bail. II. 61.
[7] *Zihar* is practically a statement that he will not touch his wife, because she is like a mother to him. Ss. 178-181 below.
[8] It would be more accurate to say that they may intermarry, but cannot have conjugal intercourse, Bail. I. 232.

SECTION 45. (Shiah law) after 'li'an' marriage prohibited.

45. Where a man has made 'li'an' [1] against his wife, and they have been separated accordingly, prohibition to marry is by Shiah law perpetually established between them.[2]

(Shiah law) persons between whom nine divorces have taken place cannot intermarry.

46. According to Shiah law, if a woman is divorced nine times, being intermediately married to two other men, then the prohibition to remarry the husband who has divorced her nine times, becomes absolute, and incapable of being ever removed.[3]

law) sec ria stipulation that it is valid only for legalising remarriage, void.

47. According to Shiah law, where a marriage is contracted with the second husband, on the express understanding that the second marriage is contracted simply for the purpose for legalising (in accordance with section 41) a remarriage of the wife with the first husband (who has divorced the wife three times) and with a stipulation that the second marriage shall be effectual only for the said purpose, then both the second marriage and the stipulation are void.[4]

Age of second husband.

48. For the purposes of section 41, the second husband must, according to Sunni law, be at least ten years old ; and according to Shiah law he must have attained puberty before the dissolution of the marriage with him. He need not be of sound mind.[5]

P ... second husband.

49. Where the question is whether the second marriage referred to in section 41 has been consummated or not, the assertion or denial of the wife is to be presumed to be correct.[6]

(7) *Prohibition by Difference of Religion.*

Muslim may not marry fire-worshipper nor idolatress.

50. Prohibition to marry [7] is established in Sunni law between

(1) a Mussulman and a fire-worshipping woman, or an idolatress.[8]

[1] *Li'an* is an accsuation of adultery in a special form: ss. 182-4 below. Bail. II. 28, 35-6, 119, 120.

[2] Bail. II. 20.

[3] Bail. II. 28, 35 36, 119, 120. p. 81 *ill.* (2) *ante.*

[4] Bail. II. 36. Neither will a mere *mut'a* marriage do. Bail. II. 124.

[5] Bail. I. 290. II. 124.

[6] Bail. I. 291. On presumptions of this nature see *ante*, pp. 47, 48, and cf. *Akhtaroonnissa* v. *Shariutoollah Chowdhry* (1867) 7. W. R. 268. There the Court refused to order restitution of conjugal rights at the suit of the husband, who merely proved the second marriage after the three divorces. There was no evidence of an intermediate marriage of the wife with another husband, and the Court refused to presume it in favour of the husband.

[7] In Hanafi law it would be more accurate to say that irregularity is established rather than prohibition. See ss. 88

[8] Bail. I. 40 ; Hed. 30.

SECTION 50.

(2) Between every Mussulman woman and all persons not following the Muslim faith.[1]

Explanation I—A woman is considered a 'Kitabia,' if one of her parents is a 'Kitabia' though the other parent may be a fire-worshipper or idolator, provided she does not herself become a fire-worshipper or idolatress.[2]

Explanation II; to clause (*1*)—A Muslim[3] may by Sunni law marry a 'Kitabia,' i.e. a woman who believes in a heavenly or revealed religion, with a 'Kitab,' or book that has come down to the followers of that religion.

Explanation III; to clause (*2*)—A Mussulman woman may not lawfully marry any non-Mussulman even though he be a 'Kitabi.'[4]

Who is a 'Kitabi.'

Believing in the Book of Abraham or of Seth or the Psalms of David makes a person a 'Kitabi,'[4] i.e. a Jew or a Christian is a 'Kitabi.' The question has been raised whether a Buddhist is a Kitabi but has been left undecided.[1]

Apostasy 'Nowroz Pali *v.* Aziz Bitr.'

It has been held[5] that the use of blasphemous language against the Prophet by a Mussulman husband amounts to apostasy, and dissolves the marriage; and in another case,[6] between Hindu parties it was said that "it would be extreme violence to the religious opinions and social feelings of a wife" to force her to live in the society of a husband who had renounced her religion, and that in such cases the Court may refuse to order restitution of conjugal rights.

51. (1) According to Shiah law a woman may not lawfully marry a non-Muslim husband.

(Shiah law) with

(2) The majority of the 'Ithna 'ashari' Shiah authorities hold that a Muslim can marry a 'Kitabia' wife only by a 'mut'a' marriage.[7]

[1] Bail. I. 42; *Himmut Bahadur* v. *Shaheb-Zadi Begum* (1870) 14 W. R. 125; affirming on Review, S. C. (1869) 12 W. R. 512, 4 Ben L. R., A. C., 103 *Bakhshi Kishen Prasad* v. *Thakur Das* (1893) 19 All. 375. (holding that a Christian cannot marry a Shiah woman).

[2] Bail. I. 41. *Quaere* whether Buddhism is a *Kitabi* religion. In *Abdul Razak* v *Aga Mahomed* (1893) 21 Cal 666, 21 I. A., 56 the P. C. held that the question was taken at too late a stage in that appeal, and did not decide it

[3] In such a case, of course, the law by which the woman is governed in British India would also have to be considered, e.g. Act XV of 1872 for Christian women, which requires that when either of the parties is a Christian, the marriage shall be solemnised in accordance with section 5 of the said Act, otherwise it is void. Cf. *Re Ulli* (1885) 35 L.T. 711 noted *ante* p. 54 See also the Special Marriage Act, III. of 1872 which requires a renunciation of Islam before a marriage can take place in accordance with its provisions. A bill for the removal of that requirement has recently been introduced in the Legislative Council by Mr. Basu.

[4] Bail. I. 41.

[5] *Nowroz Ali* v. (*Mussummat*) *Aziz Bibi* (1876) 11 P. R. No. 124 (CIVIL JMTS.) p. 258, see as to apostasy having the effect of cancelling the marriage of its own force *ib.* pp. 253-257, 263-264. Cf. (*Bai*) *Jina* v. *Kharwa Jina* (1907) 31 Bom. 366 (excommunication of husband sufficient defence to wife in husband's suit for restitution of conjugal rights).

[6] *Muchoo* v. *Arzoon Sahoo* (1866) 5 W. R. 235.

[7] Bail. II. 29.

SECTION 51.

'Usuli' and 'Mu'tazala' Shiahs permit permanent marriage with 'Kitabia.'

Mr. Ameer 'Ali in his valuable book[1] mentions that the Usuli Shiahs and Mu'tazalas agree with the Sunnis in permitting a Mussulman to marry permanently a wife who is not a Mussulman but a 'Kitabia.' The 'Isma'ili' Shiahs do not recognise 'mut'a'[2] marriages at all and their law on this point agrees with that of the Sunnis ; see sec. 50 *ante*.

Quaere **even about 'Ithna 'asharis.'**

Even as regards the 'Ithna 'asharis' the rule is not free from doubt ; for though the 'Shara'ya-ul-Islam'[3] mentions the view referred to in the second para. of this section as the most notorious, or generally received opinion, still in other places the author of that book seems to assume that a Shiah may be permanently married to a 'Kitabia' wife. Thus a 'Zimmia' (or non-Muslim) wife is expressly stated to be entitled to maintenance[3] (which right a woman contracted by 'mut'a' does not have[4]), and to be subject to being divorced,[5] (which is not possible when the marriage is in the 'mut'a' form[6]). Again, one or two opinions are referred to in accordance with which a marriage "even though the contract were a permanent one" can be cancelled (subject to certain conditions) if the husband learns that the wife is not a Muslima but only a 'Kitabia.'[7]

Mrs. Meer Hassan 'Ali's instance.

Sir R. Wilson considers that proof is furnished of the fact that some Indian Shiahs take the view that a Shiah may marry a 'Kitabia' wife permanently, by the case of Mrs. Meer Hassan 'Ali, the authoress of "Observations among the Mussulmans of India," (published in 1832) "who lived for 12 years with a Shiah husband in Oudh, then a protected Native State, all the time openly professing the Christian religion; unless indeed we assume her to have been a mere 'mut'a' wife which the general tone of her narrative renders very unlikely."[8]

Some incidents of 'mut'a' marriage compared with those of permanent marriage.

The case of Mrs. Meer Hassan 'Ali does not really help us very much. For even if she were married by a 'mut'a' marriage, there is no reason to suppose that her external relations would indicate that fact, or the term for which she had been married, any more than they would indicate any other condition that may have been included in the marriage contract. Sir Roland Wilson assumes that 'mut'a' is considered a lower form of marriage than the permanent one. But (as has been already pointed out in the comment on section 25) 'mut'a' marriage originates from a connection which was characterized by greater freedom and power in the woman than the ordinary marriage gave her. From that point of view, therefore, the 'mut'a' form may rightly be considered a "lower" form for the husband, but Mrs. Meer Hassan 'Ali (if she ever considered the matter) could hardly have objected to a marriage in this form on the ground that her husband would have so much less power over her. Apart from this consideration, it may appear as a very adaptable form of marriage, for if the term is fixed at say 100 years, the marriage is as good as permanent, and it cannot be dissolved like the ordinary marriage by divorce at the will of the husband,[9] and as regards maintenance, inheritance, etc, the parties can

[1] Ameer 'Ali's "Mahommedan Law" (3rd Ed. 1908), II. 320.
[2] See s. 25 *ante*.
[3] Bail. II. 99.
[4] See s. 25 (15) *ante*.
[5] Bail. II. 125, 148.
[6] Sec. 25 (8) *ante*.
[7] Bail. II. 65, (third para.).
[8] "Anglo-Muhammadan Law," 426.
[9] See however notes to s. 25 (8). The power of the husband to release the term may be restricted by agreement.

SECTION 52. agree to the terms that they choose. In regard to inheritance, even apart from agreement, the husband might provide for a 'mut'a' wife by his will.

'Isma'ili' The 'Isma'ili' Shiahs do not recognise 'mut'a' and their law agrees with that of the S

(8) Prohibition by Supervenient Illegality.

Prohibition supervening by fosterage, change of religion, etc.

52. Supervenient prohibition[1] is established between persons already married, when one of them comes to acquire, after marriage, a relationship by fosterage[2] within the prohibited degree, to the other; or becomes a fire-worshipper,[3] or an idolator,[4] provided that in the Courts of British India no person can be held to have forfeited any rights or property, or to have his right to inheritance impaired, or affected, by reason of his or her renouncing, or having been excluded, from the communion of any religion.[5]

(1) F has married his infant son H, to the infant daughter *W* of F's brother FB. H is then suckled by *fM* the mother of F and FB; and thus H becomes the foster son of *fM* and consequently prohibition is established between the marriage of H and *W* under section 35 (3).[6]

(2) In the last illustration if H had been suckled by *W*'s mother, or sister, or by FB's wife, or by the wife of *W*'s brother, prohibition would have been equally established.[7]

(3) Where a person has two wives, and one of them, being an infant, is suckled by the other,[8] prohibition is established, if the marriage has been consummated, against both; otherwise only against the adult wife.[9]

(4) H marries two infant wives, and they are both suckled by a stranger *N*. Prohibition is established by unlawful conjunction between H and both his wives, but he may remarry either of them at pleasure.[10]

[1] As to supervening illegality after a contract has been made, in England see *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180 (also see *Newby* v. *Sharpe* (1878) 8 Ch D 39, 49, 52). Persons have been convicted in England of what was made an offence only after the act was done, by a subsequent Act of Parliament; as Acts of Parliament used to have effect from the first day of the Sessions in which they were passed— which rule is altered now; *Latless* v. *Holmes* (1792) 4 T. R. 660; *R.* v. *Thurston* (1663) Lev. 91. Cf *R.* v. *Bailey* (1800) Russ. and Ryan's Cr. Ca. 1.

[2] This can only happen of course, if one of the parties is within the period of suckling, i.e. less than two years old according to the opinion of the majority of lawyers, or 21 years according to Abu Hanifa.

[3] Bail. II. 18.

[4] Bail. I. 41. II. 30.

[5] Caste Disabilities Removal Act XXI. of 1850, and see *ante* p. 30. Bail. I. 41, II. 18, 30, 41 : *Nowroz Ali* v. (*illegible*) *Aziz Bibi* (1876) 11 P. R. No. 124 p. (*illegible*) *Jina* v. *Kharwa Jina* (1907) 31. Bom. 36

[6] Bail. II. 19.

[7] Bail. I. 198, II. 18, 19.

[8] Even though the adult wife has been divorced (provided, according to Shiah law, that the milk on which she has nursed the other wife proceeds from the first husband), Bail. II. 15. 20. According to Sunni law it does not matter from whom the milk proceeds, Bail. I. 200.

[9] Bail. I. 198, II. 19.

[10] Bail. I. 198. *ll.* 10-12.

Illicit intercourse with a relation of the husband or wife does not render the existing marriage unlawful, though where such illicit intercourse has already taken place before the marriage, it has the same effect as consummation of a marriage, for establishing prohibition by consanguinity.[1] SECTION 52.

(9) Prohibition during Pilgrimage.

53. According to Shiah and Shafi'i law a man cannot lawfully enter into a contract of marriage after he has come within the sacred territory on a pilgrimage to Mecca, and put on the pilgrim's dress;[2] and in Shiah law if he enters into a contract of marriage under such conditions, knowing[3] that it is unlawful for him to do so, then absolute prohibition is established between him and the woman whom he has purported so to marry, and the two can never lawfully become husband and wife.[4] during pilgrimage.

Compare the perpetual prohibition which the Shiah law imposes between persons who marry when the woman is known by the husband to be in her 'iddat,' and after nine divorces *ante* ss. 37, 41. According to the Hanafis the abovementioned circumstances merely forbid intercourse.[5]

§ 6.—Agents or Proxies for Marriage.

54. No person who has not attained puberty, or is of unsound mind, can validly act as agent or proxy for marriage; and in Shafi'i and Maliki law, no woman can validly act as such agent or proxy.[6] Who may be

See *ante* p. 46. The age of competence for this kind of agency is not affected by the Indian Majority Act, sec. 2 of which is as follows: "Nothing herein contained shall affect (*a*) the capacity of any person to act in the following matters (namely), Marriage, Divorce, Dower, and Adoption . . ."

55. An agent or proxy may be authorised to contract a marriage Nature of authority

(1) with a specified person only; or

(2) with a person answering to a specified description; or

(3) generally, with any person whatever.[7]

An agent for marriage must be authorised before he acts as such, and the present section does not apply to a 'fuzuli,'[8] i.e. an unauthorised person acting on behalf of another without the knowledge or authority of that other. 'Fuzuli' or unauthorised person.

See s. 57 and illustration thereto.

[1] Bail. II. 23. Cf. s. 29 *ante*.

[2] The pilgrim's dress is called *ihram* in Arabic, and the pilgrim dressed in it *muhrim*.

[3] If he is not aware of the marriage being unlawful the marriage is still void, but prohibition between the parties is not established.

[4] Bail. II. 27, *Sharh-i-Viqaya* Book on *Nikah* ch. 2, *Mahrimat*.

[5] Bail. I. 33.

[6] Bail. I. 6. 46. II. 4.; Hed. 43 (Col. I.).

[7] *Fuzuli* means "busybody, meddler, impertinent fellow."

[8] Bail. I. 75, 78; Hed. 43.

SECTION 56.

56. One person can act in a marriage contract as proxy or guardian for both parties; or as proxy or guardian for one party, and principal on his own behalf; or as proxy for one party, and guardian for the other.[1]

both sides.

Marriage by one person on behalf of another without authority, except under Shafi'i law.

57. (1) Where a marriage is purported to be contracted by one person on behalf of another without the knowledge or authority of that other, the latter may, except under Shafi'i law,[2] elect either to ratify or to disown the marriage. If he ratifies it, the same effects will follow as if the marriage had been contracted by his authority.[3]

(2) According to Shafi'i law a marriage so purported to be contracted is null and void.[4]

(3) The Shiah authorities are not unanimous on this point: According to some, such an unauthorized contract is void and cannot be ratified; but the view of the majority is that it may be validly ratified.

(4) The ratification may be expressed or implied,[5] provided that it is made before the death of the other party to the marriage.[6]

Illustration.

F contracts his daughter *D*, who is of age, in marriage to H, and it is not determined till the death of H, whether *D* assented to, or rejected the marriage. H's heirs allege that there was no assent, and that *D* is not H's widow. If *D* alleges that she had authorized F to contract the marriage she can inherit, but not if she alleges that the marriage was contracted without her authority and that she ratified it.[7]

be expressly authorised to marry principal to himself or

58. An agent or proxy for marriage cannot, without being expressly authorized, marry his[8] principal, either to himself or to any person who is his ward for marriage; nor, where the principal is a woman, to a person not her equal in respect of matters mentioned in section 80. Where the agent is expressly authorized to do so, he may marry his principal.[9]

[1] Bail. I. 84; Hed. 42.
[2] Hed. 42.
[3] Bail. I. 76. 85. 87; II, 8, Hed, 42.
[4] Hed. 42.
[5] As to sale by *fuzuli* cf. Hed. 296 and Contract Act, ss. 9, 197.
[6] Bail. I. 60, 85.
[7] Bail. I. 60 and see (*Newab*) *Mulka Jehan Sahiba* v. *Mahomed Ushkerree Khan* (1873) L. R., I. A., Sup. Vol., 192; 26 W. R. 26.
[8] The masculine includes the feminine gender in this section.
[9] Bail. I. 76, 77, Bail, II. 9; see also Hed. 288 (col i.).

There is dissent on this point amongst the Shiah authorities, but according to the 'Shara'ya-ul-Islam' the more approved doctrine agrees with the Sunni law.[1] SECTION 58.

§ 7.—*Guardians for Marriage.*

(1) *Qualifications for Guardianship for Marriage.*

59. A guardian for marriage is a person who is authorised by law [2] to make a valid contract of marriage [3] on behalf of a minor, or of a person of unsound mind. Guardians for marriage defined.

The expression "guardian for marriage" is generally used to translate the Arabic word 'wali,' which seems to have a wide connotation, ranging between, and partly including, the notions of guardianship and of agency.[4]

"Guardians for marriage" would be what Prof. Sohn calls "tutelary representatives" in Roman law, i.e., where the principal himself is incapable of performing the juristic act in question.[5]

It has been held [3] that a suit can be brought by a minor wife on an agreement between her father and the father of her husband, to the effect that she would be paid a specified sum as soon as she entered her husband's house, and that the principle that one who is not a party to an agreement [3] cannot sue on it [6] has no application to such a case.

60. No person who is under the age of puberty, or of unsound mind [or who does not profess Islam as a religion] can be a guardian for marriage of a Mussulman. [7] Who may be guardian for marriage.

Illustration.

A Muhammadan female is married in her infancy by her mother against the consent of her father, who has become a Jew; the marriage is valid, and the husband may sue for restitution of conjugal rights.[8]

The following are translations of extracts from a book of authority on Sunni law bearing on guardians for marriage : The 'Durr-ul-Mukhtar' on

"From the definition of a guardian, a minor, an insane person and an executor are absolutely excluded. Unless a minor or insane person ceases to be under the disqualification of minority or insanity, and unless an executor is also an heir, he cannot be a guardian for marriage, whether the father has appointed him guardian by his will or not. And, since it is necessary for Exclusion of minors, lunatics and non-Muslims.

[1] Bail. II. 9 (first).

[2] Guardians for marriage cannot be appointed by will (s. 68 below). *Quaere*, whether the appointment of a guardian by the Court under the Guardians and Wards Act affects the right of the guardian for marriage, see ss. 251, 254, below.

[3] (*Nawab*) *Khwaja Muhammad* v. (*Nawab*) *Husaini Begum* (1910) 12 Bom. L. R. 638

[4] Cf. Limitation Act s. 21 (1) by which a guardian, committee, or manager of a person, is included in the terms "agent duly authorized."

[5] Institutionem s. 32. Transl. p. 145 referred to in Holland's "Jurisprudence," 108.

[6] *Tweddle* v *Atkinson* (1861) 1 B. & S. 392.

[7] Bail. I. 47, 49. Bail. II. 10.

[8] *In the matter of Mahin Bibi* (1874) 13 Ben. L. R. 160 ; see however cases cited in the footnotes to the comment on this section.

SECTION 60. for the guardian to be an heir, so a non-Muslim and a slave also cannot be guardians for marriage. . . . . Guardianship for marriage may arise in four ways : (1) by 'qarabat' (i.e. blood relationship) as a father may contract his daughter in marriage ; (2) by ownership, as a man can contract his slave in marriage ; (3) by the 'wila' of emancipation ; (4) by 'imamat,' as the ruler or the Qazi may contract one who has no heirs for marriage." [1]

"The general rule is that the person who can deal with his property, can deal with his person ; and one that cannot deal with his property, cannot deal with his person ; hence, as a sane woman, who is of age, can deal with her property, she can also deal with her person by way of marriage." [2]

"Bukhari and Yahya bin Mu'ayyan have said that on this point, that is on the conditions of guardianship, not a single tradition is correct." [2]

The absence of authentic traditions on the point will explain the striking divergence amongst the four Sunni schools, and even amongst the three exponents of the Hanafi school—not to mention the difference between the Sunnis and Shiahs.

Effect of Caste Disabilities. Removal Act on claim to act as guardians for marriage

1. **made by a convert from Islam.**

The Caste Disabilities Removal Act XXI of 1850 refers to those who have "renounced or have been excluded from the communion of any religion." Will it therefore entitle a person to act as guardian for marriage, though, having been a Muslim, he has apostatized ? The Act will apply and will remove the disqualification imposed by Muhammadan law, if it is held that prevention from being a guardian for marriage, is "forfeiture of a right." It has been held that the appointment of a guardian to a minor even for general purposes, is not a matter of such a private right, as can be the subject of arbitration.[3] On the other hand, a Hindu mother [4] (and following that decision) a Mussulman father [5] have been held not to have forfeited, by change of religion, their right to the custody and education of their children. But the right to custody is more likely to be held as a class of right contemplated by Act XXI of 1850 than the power to act as representatives for marriages ; for the latter "authority" is given, as was said by Imam Abu Hanifa, "out of regard for the interest of the child,"[6] words that might have been taken out of our law reports of to-day.[7] Besides, in many such cases, the difficult question is involved relating to the religion in which the child should be brought up.[8] In a Bombay case [9] a convert to Islam from Hinduism was held not to have lost his authority to give his son in adoption to a Hindu, and it was assumed that the authority to give in adoption was a right within Act XXI of 1850—the only question that was considered being whether adoption was in its nature such an act as could be performed only by a Hindu. The last cited case seems to bear closely upon the present question ; if the power to give in adoption is held to be a

[1] *Durr-ul-Mukhtar*, Book on *Nikah*, ch. on *Wali* (*ad init*).

[2] *Ibid.*

[3] *Mahadeo Prasad* v. *Bindeshri Prasad* (1908) 30 All. 137.

[4] *Muchoo* v. *Arzoon* (1866) 5 W. R. 235.

[5] *Gul Muhammad* v. (*Mussummat*) *Wazir Begam* (1901), 36 P. R. p. 191. No. 60. see *contra* illustration to this section.

[6] Hed. 39.

[7] E.g., *Mahadeo Prasad* v. *Bindeshri Prasad* (1908) 30. All 137.

[8] See *Re Saithri ; Jamoo* v. *Abram* (1891) 16 Bom. 306 *Re Joshy Arsam* (1895) 23 Cal. 290. *Mokoond Lal Singh* v. *Nobodip Chundir Singh* (1898), 25 Cal. 881.

[9] *Shamsing* v. *Santabai* (1901), 25 551, 554.

right falling within the Act, it would seem to follow that the power to give in marriage would also be so held. Still, the Courts would, no doubt, consider the present question on its own merits, and would probably prefer to decide each case on a consideration of all the circumstances, without fettering their discretion. SECTION 60.

The Caste Disabilities Removal Act does not apply, of course, to a person who has never been a Mussulman ; and as by Muhammadan law such a person cannot be a guardian for marriage, apparently that rule of Muhammadan law is enforceable in British India. The question may arise where the minor has been converted to Islam from another religion ; in which case its relations would be non-Muslims but Muhammadan law would apparently be applicable to the child. 2. made by one who is not and has never been a Muslim.

Where the person who is entitled to act as guardian, neglects his duty wilfully or otherwise, and refuses a good offer of marriage, the Muhammadan law seems to indicate proceedings similar to what would probably be the easiest course in British India, namely an application for the appointment of guardian to the minor under the Guardians and Wards Act, s. 7[1]. The proceeding may have to be in the form of an application to remove the existing guardian on the ground of his refusal to accept the offer of marriage, or a suit may have to be filed for the purpose. Neglect of duty by guardian for marriage.

(2) *Persons Entitled to be Guardians for Marriage.*

(a) *Hanafi Law.*

61. According to Hanafi law the following persons are entitled, in the order of precedence in which they are mentioned below, to be guardians for marriage of a minor or insane person : Order in which persons are entitled to be guardians for marriages in (Hanafi law)

(1) the nearest male agnatic descendant ;[2] 1. male agnatic descendants.

(2) the nearest male agnatic ascendant ;[3] 2. ascendants.

(3) the nearest male agnatic collateral ;[4] 3. collaterals.

(4) According to Abu Hanifa (and contrary to the opinion of Imam Muhammad[5]) cognates and female agnates[4] 4. cognates and female agnates.

[1] It is set out in comment to s. 25 below *q. v.*

[2] **Hed.** 37. The *Durr-ul-Mukhtar*, Vol. II, book on Marriage, ch. on Guardianship (first three lines) mentions that being an heir of the minor or insane person, is one of the qualifications for being a guardian, from which the author of that book deduces that an executor is not a guardian. See Bail. I. 47, 48. In the *Sharh-i-Viqaya*, Vol. II. book on *Nikah*, ch. II (*ad med.*) it is stated that a "guardian is he alone who is an *'asaba* in his own right, that is a male who is related to the deceased without the intervention of a female." Then follows a list of the *'asaba* (agnates) in order of precedence. This will be found in the law of Inheritance. See chapter on Inheritance, *infra*.

[3] Where there is competition between a descendant and an ascendant (and it cannot arise in the case of a minor, for such a person can have no descendants), Imam Muhammad prefers the ascendant to the descendant, contrary to the view of Abu Hanifa and Abu Yusuf. The *Fatawa-i-'Alamgiri* suggests that both should exercise the power jointly. Bail. I. 45, 49, Hed. 39. Cf. "A son is the guardian of his insane father for marriage, but not of his property."

[4] See *Explanations* to the section.

[5] "There is some confusion about the opinion of Abu Yusuf on this point." Bail. I. 46, i.e. whether he agreed with Abu Hanifa or Muhammad. It is generally believed that he agreed with Hanifa (Hed. 39)

SECTION 61.

are next entitled to be guardians for marriage in the following order :

(*a*) the mother ;

(*b*) [*semble*, failing the mother, the nearest ascendant amongst the cognates,[1] whether male or female, is entitled, subject to the same priorities as the descendants] ;

(*c*) next the nearest descendant, other than male agnates[1] ; provided that a female agnate is preferred to a female cognate in the same line ;

(*d*) next the nearest collateral other than male agnates, subject to clause (*b*) above and to *Explanations I* and *II* below ; and provided that they are within the prohibited degrees of relationship.[2]

5. 'Maula.'

(5) According to Imam Muhammad, in the absence of male agnates, and according to Abu Hanifa in the absence of all relations by blood, the 'maula'[3] or successor by contract, is the person entitled to be guardian for marriage.[4]

Ruling authority or Court.

(6) The person next entitled to be guardian for marriage is the Sultan or ruler and then the judge[5] and a person appointed by him.[6]

Explanation I—(1) Amongst collaterals, the descendant (how-low-soever) of a nearer common ancestor, is considered nearer than the nearest descendant of a remoter ascendant ; (2) the collateral having both ancestors, in common with the minor, or lunatic is preferred to a collateral in the same line, who has only one ancestor in common.[7]

[1] Agnates come higher up in the order of precedence.

[2] So in Hed. 38. This prudent limitation does not seem to be contained in the *Fatawa 'Alamgiri*, *Durr-ul-Mukhtar* or *Sharh-i-Viqaya;* nor does it seem to apply to agnates : and see s. 251 below.

[3] See *Explanation III* to this section. He is also called more explicitly the "*maula* of friendship" to distinguish him from the "*maula* of emancipation" or the emancipator of a slave.

[4] Hed. 39.

[5] It is stated in Bail. I. 47 and the *Sharh-i-Viqaya* that the judge has no authority unless he is specially authorised in that behalf ; but the "Sultan's" authority would probably come within the inherent jurisdiction of the Courts in British India, even without any such provision of the Muslim law. Cf. *Mahadeo Prasad* v. *Bindeshri Prasad* (1908) 30 All. 137, 139 per Karamat Husein. J. See also *Gurdeo Singh* v. *Chandrikah Singh* (1907) 26 Cal. 193, 203 sqq., *Hukumchand Boid* v. *Kamalanand Singh* (1905), 33 Cal. 927, 931. *Re H.'s Settlement H.* v. *H.* [1909] 2 Ch. 260.

[6] Bail. I. 46-7 ; Hed. 39.

[7] Thus (*a*) the full brother is preferred to the half-brother, and (*b*) the son of the father's full brother, to the son of the father's half-brother.

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Explanation II—For the purposes of this section, (1) collaterals related from the father's side are preferred to those related on the mother's side: (2) amongst collaterals on the father's and mother's sides respectively, a male is preferred to a female.[1]

Definition of "maula" or "successor by contract."

Explanation III—Where a person (in this paragraph referred to as the "declarant") who is not a minor, or insane, and who has no heirs except a husband or wife, declares that another person shall have the right to inherit the declarant's estate (subject to the rights of the declarant's husband or wife, if any), and such other person agrees, in consideration[2] thereof, to pay any fine to which the declarant may become liable, then such other person becomes the 'maula' of the declarant.[3]

Unanimity as to male agnates being first entitled. Difference of view between Abu Hanifa and Imam Muhammad as to females and cognates.

It will be seen from section 61, that the three exponents of Hanafi law are unanimously of opinion that male agnates are entitled in the first instance to be the guardians of minors. When, however, these are absent and the question is who are next entitled, then out of the three exponents two differ from each other and the view of the third is not known. Abu Hanifa's view is that in the absence of the male agnates the right to guardianship is in "cognates and female agnates." The expression used in the texts (e.g. in the 'Fatawa-i-'Alamgiri') is 'zavil arham,' which means "persons connected through the womb" or "through females," i.e. cognates. In the law of inheritance the term 'zavil arham' is used to denote the group of persons designated "distant kindred" in English books, and includes all cognates (except "true grandmothers") together with all female agnates remoter than the sister. It is a misnomer to include any agnates in the term 'zavil arham.' Such a use of the term is, however, justified by convenience in treating of the law of inheritance. But the term 'zavil arham' is not used in connection with guardianship for marriage in the same sense as in the law of inheritance. This is obvious from the examples given in Bail. I. 46, which include the mother, daughter and son's daughter, none of whom fall within the class designated 'zavil arham' or "distant kindred" in regard to inheritance. It may be noted that the nearest male cognate mentioned in Bail. I. 46 is the maternal uncle; but it must be a mere accident that a daughter's son, or other male cognate nearer than a maternal uncle is not mentioned, for it is expressly mentioned that a daughter's daughter (i.e a female cognate from amongst the descendants) may be a guardian. The 'Sharh-i-Viqaya' instances both the daughter's son and granddaughter's son, as eligible for guardianship.

[1] Bail. 1. 45-46, *Sharh-i-Viqaya, Nikah*, Ch. II. *ad fin.* The persons entitled are as follows: (*a*) the full brother; (*b*) consanguine half-brother; (*c*) son of full brother; (*d*) son of consanguine half-brother how-low-soever; (*e*) the full uncle; (*f*) half uncle by the father's side; (*g*) son of the full uncle; (*h*) son of the half-uncle by the father, and their descendants; (*i*) the father's full paternal uncle; (*j*) father's paternal half-uncle by the father's side; (*k*) and (*l*) sons of (*i*) and (*j*) in the same order; (*m*) grandfather's full paternal uncle; (*n*) grandfather's paternal half-uncle by the father's side; (*o*) and (*p*) the sons of (*m*) and (*n*) in the same order.

[2] The consideration for the contract can hardly arise in British India except under circumstances which would make the contract void as being against public policy. Whether the contract would be supported apart from its consideration, may be a question of some nicety. The *maula* figures also in the law of succession.

[3] Bail. I. 387-8.

SECTION 61. Thus the rule for priority amongst those entitled to be guardians is perfectly clear. Sir R. Wilson however refers to the passage in the 'Fatwa-i-'Alamgiri,' which is translated in Bail. I. 46, as "very strange" and as containing "numerous unexplained gaps."[1] There are no gaps except the one accidental gap mentioned above (viz. that no cognate from amongst the descendants is mentioned—the nearest male cognate referred to in the examples being the maternal uncle). Nor, it is submitted with great respect, is the passage at all strange, for the list is a hypothetical one, given for the purpose of explaining the order in which the right accrues ; the authors do not suggest the possibility of the existence of all the persons mentioned as being entitled to be guardians. For instance, it is obvious that a minor can have no children, for in Muhammadan law minority means an age under puberty—a point which Sir R. Wilson thinks the Arabic authors have not always borne in mind—but this can hardly be the case, inasmuch as the legal term for a minor most usually employed in this connection is 'ghair baligh' (i.e. one who has not attained puberty). The authors of these old texts had to carry most of the law in their minds, and they were less apt to overlook points or to make mistakes of this nature, than we are, who take the aid of books and libraries much more often than was possible for them.

(Hanafi law) Any one of several joint guardians for marriage may act.

62. Where more than one person are by Hanafi law equally entitled to be the guardians for marriage, then any one of them may contract the minor or insane person in marriage.[2]

According to the statement of the 'Zahir Riwayat' if one of the guardians agrees to the marriage before it is contracted, it is as efficacious as if all had consented after the marriage.[3]

(Hanafi law) In absence of primary guardian, next in order may act.

63. Where the person primarily entitled by the Hanafi law to be guardian for marriage is precluded[4] from acting as such guardian, the person next entitled may act in that capacity.

Explanation.—A person is considered to be precluded from acting who is at such a distance, or in such a place, that there is danger of a good offer of marriage being lost if his approval has to be obtained.[5]

(b) Shiah and Shafi'i Law.

(Shiah and Shafi'i law) Father and "true grandfather" alone are guardians.

64. According to the Shiah and Shafi'i law, the father and the agnatic grandfather are alone entitled to be guardians for marriage, either of whom may contract a valid marriage on behalf of the minor[6] or lunatic, the authority of the grandfather having precedence over that of the father.

[1] "Anglo-Muhammadan Law," (3rd ed.) p. 171.
[2] Bail. I. 49; Hed. 698.
[3] *Durr-ul-Mukhtar*, book on *Nikah*, ch. on guardianship. (*Babul-wila.*)
[4] (*Sheik*) *Kaloo* v. (*Sheik*) (1868) 13 Ben. L. R. 163 *note*; 10. W. R. 12.
[5] Bail. I. 49; Hed. 39.
[6] Bail. II. 9, 12.
[7] Bail. II. 7, 10 (5th and 8th); Hed. 36. *Badal Aurat* v. *Q.E.* (1891) 1 79, 82.

Illustration.

H and *W*, both being minors, are contracted in marriage by their fathers or grandfathers. The marriage is valid, and if either dies, the other is entitled to share in the deceased's estate. If, however, the marriage had been contracted by any other persons on behalf of the minors, the contract would, in Shiah law, be in suspense, and if either died during minority, the other would not be entitled to inherit unless and until, on reaching puberty, he or she ratified the marriage.[1]

Thus by the Shiah, Shafi'i and Maliki law,[2] a marriage contracted on behalf of even a minor, by any person other than the father or grandfather is considered an unauthorised act, which requires ratification, even though it be contracted by the mother [3] or brother or paternal uncle.[4]

65. According to Shiah law a person who is an adult but of unsound mind, may be contracted in marriage by the executor of his or her father or agnatic grandfather, if it becomes necessary that he or she should marry; or by the Court, if it is for his or her benefit to do so.[5]

(Shiah law) Guardian for marriage of lunatic.

(c) Maliki Law.

66. According to Maliki law the father alone is entitled to be guardian for marriage.[6]

(Maliki law) Father alone guardian.

(3) Termination of Authority of Guardian for Marriage.

67. (1) The authority of a guardian for marriage ceases when the ward attains puberty.

When authority of guardian for marriage ceases.

(1) puberty.

Exception—According to Shafi'i law, a virgin cannot contract herself in marriage.[7]

(2) A female becomes competent to contract herself in marriage—

(2) as to females.

(*a*) according to Shiah and Shafi'i law when she becomes 'thayyaba'[8] (i.e., not a virgin).

(*b*) according to the most approved (though not all) Shiah authorities when she arrives at years of discretion.[9]

[1] Bail. II. 11.

[2] On which see ss. 65,76 below.

[3] Bail. II. 12.

[4] Bail. II. 9, and see *Mulka Jehan* v. *Mahomed* (1873) L. R., I. A., Suppl. 192; 26 W. R. 26.

[5] Bail. II. 68.

[6] Hed. 36, (col. II.)

[7] See s. 20, *ante*.

[8] Bail. II. 7. The distinction between virgins, and girls who are not virgins, has a parallel in the English law relating to the marriage of a person under the age of 21 years, which can be contracted by the consent of the father, and after his death of the mother, if living; but if the minor is a widow or widower the above-mentioned persons have no authority to consent to the marriage. See (1823) 4 Geo. IV. c. 76, s. 16, Halsbury, "Laws of England" XVII. 57, note (g). The Muhammadan law, however, does not give the privilege to a woman who is divorced, or who becomes a widow without consummation of the marriage.

[9] Bail. II. 7. "This is a matter which does not readily admit of ascertainment." Hed. 47. A statement of Shafi'i's which will not call for any dissent.

SECTION 67. *Explanation*—According to Hanafi law, a female, like a male, becomes competent to contract herself in marriage when she attains puberty, irrespective of her being a 'thayyaba' or not.[1]

(4) No Testamentary Guardians for Marriage.

No testamentary power to appoint guardians for marriage.

68. A father has no power to appoint by his will a guardian for marriage of his minor children, and no such appointment can take away the right of the persons entitled by law to be such guardians.[2]

§ 8.—Avoidability of Certain Marriages.

(1) Option to Parties to Marriage.

(a) Options of Puberty, Sanity, Inequality, etc.[3]

Option of puberty and sanity.

69. According to Hanafi law, where a marriage has been contracted on behalf of a minor or lunatic by a guardian other than the son,[4] father, or agnatic grandfather, the party so married has, on attaining puberty, or recovering reason, the option of avoiding the marriage.[5]

Explanation—Where the marriage has been originally contracted by a person who is under the age of puberty and his guardian has approved of it, the marriage is nevertheless voidable, at the option of the minor, on his or her attaining puberty.

(Hanafi law.) Option of inequality.

70. According to the two disciples, but not according to Abu Hanifa (whose opinion the 'Fatawa-i-'Alamgiri' considers more sound), where a father or a grandfather has married his minor child or grandchild, to one who is not her or his equal in regard to the matters mentioned in section 78 below, or has agreed to an improper dower,[6] the minor has the option to avoid the marriage on attaining puberty.[7]

[1] Bail. I. 10, 55.

[2] Bail. I 47, II. 8. The Sunnis and Shiahs agree on this.

[3] The expression "option of puberty" (in Arabic *khayar-ul-bulugh*) is recognised in English books on Muhammadan law but not "options of sanity" or "of inequality" or "of improper dower"; for which an apology is due to the reader.

[4] It is only in Hanafi law that a son can ever act on behalf of his lunatic father, for in Shiah law and the other schools of Sunni law, the son is never recognised as a guardian for marriage (ss. 64-66 *ante*); and it is physically impossible for him to be the guardian of a "minor" father, as a minor father cannot have a son, minority being synonymous with puberty. Even if it were possible, no minor is eligible for guardianship. See ss. 60, 61 *ante*, and also p. 94.

[5] Bail I. 50, 53.

[6] I.e. to pay more or to receive less than the "proper dower."

[7] Bail. I. 73.

71. The Shiah authorities also are not unanimous on the point whether a marriage contracted by a father or grandfather can be avoided under any circumstances, but the more approved doctrine is that the marriage is voidable if the dower agreed upon by the guardian is less than the proper dower.[1]

SECTION 71. (Shiah law.) Option of improper dower.

The opinion of some Shiah authorities is that the marriage is valid, but the "dower is null, and that she is entitled to the proper dower."[2]

72. A marriage contracted by a father or grandfather negligently or fraudulently on behalf of his minor child, is, according to all schools, voidable at the option of the minor.[3]

Option where negligently or fraudulently contracted.

(*b*) *Exercise of Options.*

73. The exercise of an option to avoid a marriage must be confirmed by an order of the Court, and the marriage continues in force until such confirmation.[4]

Confirmation by Court of option to avoid marriage.

74. The effect of confirmation by the Court of the exercise of an option to avoid a marriage, dates back to the time when the option was exercised.

Effect of confirmation retrospective.

75. The exercise by a wife of her option to avoid a marriage is nullified, and cannot be confirmed by the Court, if before an application is made to the Court for its confirmation, the wife permits the husband to have sexual intercourse with her.[5]

Exercise of option how nullified.

Illustration.

W, a female minor has been married to H by her guardian who is neither *W*'s father nor grandfather. If after attaining puberty, *W* permits H to have connection with her,[6] or asks him for maintenance, it will amount to assent to the marriage by implication, and *W* cannot afterwards rescind the marriage.[7] But if H consummates the marriage without *W*'s consent, this does not determine *W*'s option.[8]

[1] Bail. II. 9. (2nd) 80 (2nd).

[2] Bail. II. 80.

[3] Bail. I. 74. See also Bail. II. 63, 66 (cancellation of a marriage for deception as to one of the parties being free or slave), Bail. II. 62 ("*sixth law*"); and cf. for English law on the effect on marriage of fraud, *Swift* v. *Kelly* (1835) 3 Knapp 257, 293; of duress *Scott* v. *Sebright* (1886) 12 P. D. 21.

[4] Bail. I. 50, cf. Bail. I. 30 (para 2.).

[5] Bail. I. 52. Sir Roland Wilson, "Anglo-Muhammadan Law" (3rd Ed.) p. 100 expresses a doubt on this point, but he seems to have overlooked the words "unless she has intermediately surrendered her person," Bail. I. 52 (para. 3). The statement in Bail. I. 51 that "up to the actual separation by the Judge the husband may lawfully have intercourse with his wife," only shows that a mere declaration on the part of the wife that she exercises her option of repudiation, has not (until it is confirmed by the Court) any legal effect; except in so far as it gives her the right to apply to the Court for dissolution of the marriage. Of course, after the "actual separation by the Judge," intercourse would not be lawful even if his former wife permitted it. Cf. s. 13, p. 52 above.

[6] Bail. I. 51, 59.

[7] Bail. I. 51.

[8] Bail. I. 59.

SECTION 76. *(c) Option When Determined.*

Delay on part of virgin.

76. The option to avoid a marriage is determined, if the minor, being a virgin, does not exercise it immediately on attaining puberty.[1]

assent by other than a virgin.

77. If the minor was not a virgin [2] at the time of the marriage,[3] or if she arrives at puberty while living with her husband, her option is not determined unless she assents, explicitly or by implication, to the marriage.[4]

Ignorance of law as to option.

78. (1) The option is determined at the time, and in the manner, stated in the last two sections, notwithstanding that the wife may be ignorant of her right [5] to avoid the marriage.

(2) Where the wife is ignorant of the fact of the marriage, the option is not determined until she has knowledge of that fact.[4]

It is said in the 'Hidaya' that "Ignorance is no plea with respect to an institute of the law,"[5] which is probably taken from the maxim of Roman law[6] 'regula est juris ignorantiam cuique nocere.' The 'Hidaya' adds, however, an exception to the rule; it does not apply to a female slave, "who, being employed in the service of her master, has no opportunity to obtain any knowledge of the law." The following reason has been given for the rule. "Because the prophet of God . . . has said . . . 'seek knowledge even though it be in China, for the seeking of knowledge is obligatory on every Mussalman.'"[7]

(2) Option to Quasi-Guardians: "Unequal" Marriage by a Woman.

Option of inequality.

79. In Sunni law, where a woman, though she is adult and sane, has contracted herself in marriage to a person not her equal, in respect of the matters mentioned in s. 80, the marriage may be avoided by persons who, being agnates, would have been her guardians for marriage if she had been a minor, or of unsound mind; and on an application by such persons, the Court may dissolve the marriage;[8] provided that if any of the said persons[9] has consented to, or acquiesced in, the marriage,

[1] Bail. I. 51, Hed. 37-38. See s. 78 below.

[2] See p. 95 *n.* 8, above.

[3] A female who is not a virgin (*thayyaba*) is competent by the schools of law, other than Hanafi, to contract marriage; and a person purporting to contract her in marriage as her guardian, would be an intermeddler (*fuzuli*).

[4] Bail. I. 50-51, Hed. 37. See s 78 below.

[5] Hed, 37.

[6] Digest XXI, vi. 9.

[7] *Sharh-i-Viqaya* book on *Nikah*, Ch. II., on *Wali* and Equality (*ad med.*).

[8] The rule of law as stated above may be supported on the maxim "boni judicis est ampliare jurisdictionem" It would be otherwise if there were no discretion in th Court.

[9] *Mohumdee* v. *Bairam* (1866) 1 Agra 130.

or the woman has given birth to a child, her said marriage cannot be so avoided or dissolved.[1] SECTION 79.

If "one of her guardians has given his consent, it is no longer in the power of that guardian, or of any other equal to, or below him, to cancel the marriage, but one superior to him may still do so."[2] So the bride's father was held[3] entitled to sue for dissolution of marriage though her mother and brother had consented to it.

80. In considering whether a marriage should or should not be avoided on the ground of inequality, the Court has regard to the following matters :— What constitutes inequality in regard to marriage.

the lineage of the husband,

whether the husband, or his father, or grandfather, belonged to a religion other than Islam, or was a slave (either of which is a disqualification),

whether the husband has sufficient means to pay the 'mahr,' and to maintain the wife,

whether he is pious and virtuous, and

whether he exercises a trade or profession, much inferior to that exercised by the members of the woman's family.[4]

The Shiah law requires "equality" only in regard to Islam—which point is really covered under the section relating to prohibition for difference of religion.[5]

§ 9.—Proof and Presumption of Marriage.

81. Where the question is whether a marriage was duly contracted in a valid form or not, the burden of proving that the woman consented to it, is upon the person who affirms it.[6] Proof of bride's consent.

Provided first, that where it is proved that the parties cohabited together continuously, and for a long period, as husband and wife,[7] and were treated as such by their friends ;[8] it will be presumed that they were validly married,[9] and the burden of proving that their cohabitation was illegal is shifted on the person who affirms its illegality.[10] Presumption from cohabitation and repute.

[1] Bail. I. 67-69.

[2] Bail. I. 69.

[3] *Mohumdee* v. *Bairam* (1866) 1 Agra 130.

[4] Bail. I. 62-66, Hed. 40. Abdur Rahim, "Muhammadan Jurisprudence," 333.

[5] See Bail. II. 34, and pp. 84-85 above.

[6] Bail. I. ,58 59.

[7] See (*Mussamat*) *Kureemoonissa* v. *Attaoollah* (1867) 2 Agra 211; (*Mirza*) *Qaim Ali Beg* v. (*Musst*) *Hingun* (1827) S. D. A. 3 Cal. 152.

[8] See s. 20, *ill.*(3) above p. 56 *n.* 8.

[9] On continual cohabitation and acknowledgment of parentage as presumptive evidence of marriage and legitimacy see *Hiday-ut-oollah* v. *Rai Jan Khanum* (1844) 3 Moo. I.A. 295, S.C., *Shums-oon-nissa Khanum* v. *Rai Jan Khanum* (P.C.) 6 W. R. 521 ; *Monowar Khan* v. *Abdoollah Khan* (1871) 3 N. W. 177. *Mahomed Bauker Hossein Khan* v. *Shurfoonissa Begum* (1860) 8 Moo. I. A. 136, followed in *Ashruffunnissa* v. *Azeemun* (1864) 1 W. R.17

[10] *Noor Bibee* v. *Naivas Khan* (1866) 1 Ind. Jur.,N.S., 221. Peacock C. J. & Morgan J (reversing Norman J.). See also Bail. I. 421.

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Presumption from acknowledgment of marriage.

Provided secondly, that where either party has acknowledged that he or she was married to the other, (and the other party has confirmed, or acquiesced in the acknowldgment,) it will be presumed that they are validly married,[1] unless prohibition to marry is established between them.[2]

Presumption of marriage from acknowledgment of parentage.

Provided thirdly, that where a man has validly acknowledged the paternity[3] of a child, it will be presumed[4] that he was lawfully married[4] to the mother of the child, unless they were prohibited from intermarrying.[5]

See the Evidence Act, s. 50, ill. (a).

Muhammadan law of evidence as to marriage.

By the Muhammadan law of evidence, "testimony must be taken upon his own seeing and perception, not on that of another, except in some special cases, where he may take up his testimony on hearsay. . . . . It is not lawful for a witness to testify anything that he has not seen except 'nusub,' i.e. ('descent from either parent') death, marriage, consummation, and the authority of a judge ; and it is competent for him to testify to these matters when informed of them by a person in whom he has confidence."[6]

The Privy Council have held in a case from Ceylon[7] that mere cohabitation is evidence of marriage, and although it is alleged that all the ceremonies are not performed, their due performance will be presumed. This case was followed by Kekewich J. in England.[8]

Strict proof required in some cases.

In a suit, however, by a Hindu for restitution of conjugal rights, the rites and ceremonies were required by the Calcutta High Court to be specifically proved[9] ; and where a marriage is an ingredient of an offence, the Courts of India follow the English practice, which makes evidence of cohabitation and reputation admissible but not sufficient to prove marriage "where strict proof is required.[10]

[1] Bail. I. 409, II. 5.

[2] Bail. I. 405, 409, II. 5.

[3] See s. 222 below.

[4] *Rook Begum* v. (*Shahzadah*) *Walagowhur Shah* (1865) 3 W. R. 187, the presumption is not conclusive ; and subsequent marriage of the parties may exclude the presumption : *Ashrufooddowlah Ahmed Hossein* v. *Hyder Hossein Khan* (1866) 11 Moo. I. A. 94, 7 W. R. (P. C.) 1. Similarly the presumption was held to be rebutted by the facts that the ladies, though parties to the suit, did not come to give evidence and that one person who was called to prove the marriage threw doubt on it, and no explanation was given why the ladies were not called, and other witnesses not produced : *Butoolun* v. *Koolsoom* ; and *Butoolun* v. *Lloyd* (1876) 25 W. R. 444. *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1844) 3 Moo. I. A. 295, 318, (referred to in *ante*, p. 43 *n* 2. *q v.*) ; *Wise* v. *Sunduloonissa* (1869) 11 Moo. I. A. 177, 193 (reversing the S. D. A. who had held the marriage not proved) ; (*Ranee*) *Khajooroonissa* v (*mut*) *Rowshan Jehan* (1876) 2 Cal. 186 ; 3 I. A. 291 ; 26 W. R. 36 ; *Mahatala Bibee* v. (*Prince*) *Ahmed Haleemoozooman* (1881) 10 C. L. R. 293.

[5] *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 186, 3 I. A. 291, 26 W. R. 36.

[6] Bail. I. 415, 424-425, cf. above p. 43, (para. 1) *n.* 2.

[7] In *Sastry Vilaider Oronegary* v. *Sumbecutty* (1881) 6 App. Ca. 364.

[8] In *Re Shepherd, George* v. *Thyer* [1904] 1 Ch. 456, See also *Doe*, d. *Fleming* v. *Fleming* (1827) 4 Bing. 266, *Collins* v. *Bishop* (1878) 48 L. J. (CH) 31 ; *Fox* v. *Bearblock* (1881) 17 Ch. D. 429 (unofficial entry as evidence of reputation) ; *Re Thomson, Langham* v. *Thomson* (1904) 91 L. T. 680.

[9] *Surajamoney Dasi* v. *Kali Kanta Das* (1900) 28 Cal. 37 ; 5 C. W. N. 195.

[10] As to bigamy cases see *Sobrati* v. *Jungli* (1897) 2 C. W. N. 245. *The Empress* v. *Pitambur Singh* (1879) 5 Cal. 566 (F.B.). *Queen-Empress* v. *Dal Singh* (1897) 20 All. 166. *Akbar Khan* P. R. No. 40 of 1882.

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Nature of cohabitation which raises the presumption.

Cohabitation in this connection means something more than mere residence in the same house: so that residing as a menial servant in the house of a Mussulman, and bearing a child to him, does not raise the presumption of marriage, or, of lawful parentage;[1] and the Privy Council have held, that where it is admitted that the relationship began as concubinage, lapse of time, and propriety of conduct and the enjoyment of confidence, with powers of management reposed in the woman, are not sufficient to raise the presumption of subsequent marriage.[2] Similarly, where the woman lived in a separate dwelling apart from the one in which an undisputed wife was living, no presumption of marriage was drawn[3]; and where the parties had been divorced, a declaration by the defendant in a mortgage deed, that she was the wife of the plaintiff, was held not to be an acknowledgment, and no presumption[4] was drawn that a lawful remarriage had taken place, after the removal of the impediment to remarry a divorced wife.

It must be as wife.

It must not have commenced as concubinage

In one case[5] it was stated that even casual cohabitation without acknowledgment of marriage or parentage, raises a presumption of marriage and legitimacy, but that in such a case the presumption is rebuttable.[5] Apart from estoppel, it is submitted that such presumptions from cohabitation are always rebuttable. In a recent case[6] there was cohabitation from 1870 to 1890, the first child being born in 1876, but the Privy Council held that the presumption did not arise, as the mother, before she was brought to the father's house, was admittedly a prostitute.

Where marriage was once proved, subsequent divorce was not presumed from the facts that the wife left her husband's house on his taking another woman to live with him, and that he stated in his will that he had no wife.[7]

The presumption of marriage has been held to be less strong where there is no issue, and the invalidity of the marriage is alleged by the parties.[8]

Acknowledgment of marriage.

The acknowledgment of marriage must be unequivocal[9] but celebration of the seventh month of pregnancy, and the celebration of the birth of the child, are sufficient to prove marriage and legal parentage.[10]

Valid retirement defined.]

82. When the husband and wife are together by themselves in a place where, if they so desire, they are secure from observa-

Shaikh Alimuddin v. *Emperor* (1906) 10 C. W. N. 982, 984. Cf. the following English cases *Morries* v. *Miller* (1767) 4 Burr 2057, 2059; *R.* v. *Simpson* (1883) 15 C. C. 323; *R.* v. *Althausen* (1893) 17 Cox. C. C. 630; *R.* v. *Atkinson* 1 Russ. on Crimes (6th Ed.) 159; *R.* v. *Woodward* (1838) 8 C. & P. 561, As to reputation in bigamy cases: *Catherwood* v. *Caslon* (1844) 13 M. & W. 261, 265; *R.* v. *Wilson* (1862) 3 F. & F. 119.

[1] *Kureemoonissa* v. *Attaoollah* (1867) 2 Agra, 211.

[2] *Jariutool-Butool* v. *Hosseini Begum*, 11 Moo. I. A. 194; 10 W. R., P.C., 10.

[3] *Masit-un-nissa* v. *Pathani* (1904) 26 All. 295, following *Ashrufool Dowlah Ahmed Hosscin* v. *Hyder Hossein Khan* (1866) 11 Moo. I. A. 94, 115; see also *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (1893) 21 Cal. 666, 678; 2 I. A. 56.

[4] *Akhtaroonnissa* v. *Shariutoollah Chowdhry* (1867) 7 W. R. 268. See s. 41 pp. 80-8, above.

[5] *Nawabunnissa* v. *Fuzloonnissa*; *Nawabun* v. *Jumeerun* Marsh 428, S. C. (same parties *vice versa*) 2 Hay 479.

[6] *Ghazanfar Ali Khan* v. *Kaniz Fatima* (1910) 32 All. 345.

[7] *Noor Bibee* v. *Nawas Khan* (1866) 1 Ind. Jur. N. S. 221.

[8] *Re M'Loughlin's Estate* (1878) 1, L. R. Ir. 241.

[9] *Mahatala Bibee* v. (*Prince*) *Ahmed Haleemoozooman*: *Curreemunnissa Begum* v. *the same* (1881) 10 C. L. R. 293.

[10] *Wise* v. *Sunduloonissa Chowdrance* (1869) 11 Moo. I. A. 177, 7 W. R. (P. C.) 13.

SECTION 82. tion, and where there is nothing in decency, law, or health, to prevent their having sexual intercourse, they are said to have "validly retired."[1]

Its effects compared to consummation of marriage.

Hanafi law.

In Hanafi law the effect of valid retirement ('khilwat-i-sahih' in Arabic) is the same as that of consummation in the following matters :—

1. in the confirmation of dower;
2. the establishment of descent, or paternity;
3. the necessity for the wife to observe ''iddat';
4. the wife's right to maintenance and residence during ''iddat';
5. the prohibition by conjunction against the husband marrying the wife's sister or other four women with her.

But valid retirement without actual consummation,

1. does not prevent the husband marrying the wife's daughter,
2. nor, when a man has divorced his wife three times, is it lawful for him to remarry her, if there has been only valid retirement between her and her second husband, without actual consummation.[2]

Shiah law.

In Shiah law valid retirement without consummation, has not the same effect as sexual intercourse[3] except

1. in order to establish the revocation of a divorce; [4] and
2. to show that a thrice-divorced wife has had sexual intercourse with the second husband, provided that the wife asserts it.[5]

Illustration.

H and his wife *W* are together in a closed room by themselves. This would be valid retirement, unless H or *W* has some illness preventing coition, or rendering it injurious, or if the wife is an idolatress, or there is present any person (except a little child without understanding), or either is under the age of puberty, or is observing the ordained fast which makes coition unlawful.[1]

§ 10.—Irregular Marriages.

(Hanafi law.) Absence of witnesses and some prohibitions make marriage irregular, and not void.

83. (1) According to Hanafi law, where a contract of marriage has been made

(*a*) without the presence of witnesses,[6] or

(*b*) purporting to marry persons, with reference to whose intermarriage prohibition is established by

(i) unlawful conjunction,

(ii) ''iddat,'

(iii) divorce,

(iv) religion, or

[1] Bail. I. 98-100, Hed. 45-46.
[2] Bail. I. 101.
[3] Bail. II. 74.
[4] Bail. II. 121 (fifth).
[5] Bail. II. 126 (second para). and see *above*, pp. 47-49.
[6] See translation from *Tahtawi*, given in 23 Cal. at p. 178.

(v) supervenient illegality,[1]

the marriage is not void, but irregular.[2]

(2) Abu Hanifa holds that a marriage between persons who are prohibited from intermarrying for reasons other than those mentioned in subsection (1), above are also irregular, and not void.[3]

(3) The two disciples of Abu Hanifa, on the other hand, hold that marriages prohibited for causes other than those mentioned in subsection (1) are void, and not merely irregular.[4]

Explanation—According to Shiah law, there is no such distinction between regular and irregular marriages; and all marriages are void, which are contracted between persons who are prohibited from intermarrying,[5] whether for the reasons mentioned in subsection (1), or for any other reason.

Aizunnissa *v.* Karimunnissa.'

The Calcutta High Court has held[6] that the marriage of a Mussulman with the sister of his wife (the latter being alive and undivorced), is absolutely void, and not merely irregular; and that the issue of such a marriage cannot be legitimated by acknowledgment, nor be ever entitled to inherit from the father. It will be observed that their lordships apparently disregard the views expressed in the Sunni text-books on the distinction between different kinds of prohibitions to marry, and put their own interpretation on the Quran: they point out[7] that the Quran makes no distinction between a marriage with two sisters, and other prohibited marriages; and they hold on that ground that the effect of all prohibited marriages should be the same. Reference might in this connection be made to the dictum of the Privy Council[8] that where commentators of great antiquity and high authority have ruled in a certain way the British Courts ought not to put their own construction on the Quran.

Distinction between prohibition by unlawful conjunction and other prohibitions.

The rule of Hanafi law distinguishing between perpetual prohibitions and other prohibitions, it is submitted, is clear, viz., the first cannot be removed by any act of the parties, and the second can be removed by the husband divorcing one of the wives, and it is for the same reason that all marriages

[1] See *above*, s. 52. Bail. I. 30, mentions fosterage and affinity as also merely rendering the marriage irregular ("invalid or vitiated"). The passage translated purports to be an extract from the *Zakhira*. It probably refers to supervening prohibition by fosterage and affinity.

[2] *Fasid* in Arabic. Baillie translates it "invalid," which is misleading. Bail. I. 150-151.

[3] It seems extremely probable that Abu Hanifa merely meant to assert that marriages, however strongly condemned by law, are effectual *de facto* so far as the parties are concerned, without intending by this assertion to give any countenance to such marriages; perhaps he felt the injustice of visiting on the children the sins of the parents.

[4] Bail. I. 150-151.

[5] It will be remembered that Shiah and Maliki law do not require the presence of witnesses for contracting a valid marriage; see sec. 23, *Explanation*.

[6] *Aizunnissa* v. *Karimunnissa* (1895) 23 Cal. 130.

[7] 23 Cal, p. 142 (second para). and p. 144 (second sentence); cf. the texts cited in the report, and see above; and also Abur Rahim, "Muhammadan Jurisprudence," 330, referring to *Radd-ul-Mukhtar* II. 380.

[8] *Aga Mahomed Jaffer Bindanim* v. *Koolsom Bibee* (1897) 25 Cal. 9, 18. See above p. 45 s. 11.

SECTION 83. which are vitiated by unlawful conjunctions of whatever kind, are considered by the Sunni lawyers to be irregular and not void.[1]

Prohibition during 'iddat.'

Similarly the prohibition by 'iddat' is a mere temporary prohibition, according to the view taken by the Hanafi school, for the marriage would be quite valid, if it were celebrated a few months later; it is therefore considered more favourably by the law than a marriage that can never be valid.

Prohibition by divorce, religion, supervenient illegality, absence of witnesses.

As to the prohibition by divorce, religion, and supervenient illegality, different, but analogous classes of reasoning apply, which need not be detailed. The absence of witnesses is an irregularity in the form of marriage, —a matter of which the Shiahs and Malikis permit the absolute dispensation in every case.

Cancellation of irregular marriages by either party.

84. Where an irregular marriage has been contracted, and it has not been consummated, either party may cancel it, even in the absence of the other, either by express words, or by implication.[2]

Quaere, whether it is necessary that the other party should have knowledge of the cancellation.[2]

Irregular marriage, if consummated, must be expressly cancelled.

85. Where an irregular marriage has been consummated, it cannot be cancelled by the parties, except by express words.[2]

Illustration.

H is the irregularly married husband of *W*, and the marriage has been consummated. If H says "I have set your way free" or "I have relinquished you," the marriage is cancelled. If on the other hand H merely denies the marriage, it does not cancel it, unless he says to his wife at the same time, "go and marry."[2]

Irregularly married parties must be separated.

86. Where an irregular marriage has taken place, it is the of the Court to separate the parties.[3]

[1] The Divorce Act IV of 1869 makes a distinction between adultery and incestuous adultery, s. 8 (6); cf. also the distinction between void, voidable, and illegal contracts (see 5 and 6 Will. IV, c. 41). Similarly the religious law of the Sunnis prohibits an irregular marriage; but still, if it is contracted, it has some legal results, one of them being the establishment of paternity, which imposes an obligation on the father rather than gives him any rights. See. Bail. I. 32 (fourth sentence). Reference might also be made to a decision of the same High Court where a Roman Catholic married the sister of a woman with whom he had illicit intercourse, and whom he had married when she was on her deathbed and *in extremis*; and still the second marriage was held valid, and it was presumed that the dispensation necessary by the Roman Catholic religion to remove the obstacle to the marriage with a deceased wife's sister had been obtained. *Lopez* v *Lopez* (1885) 12 Cal. 706 (F. B.).

[2] Bail. I. 156.

[3] This is taken verbatim from Bail. I. 156, substituting "irregular" for "invalid" and "Court" for "Judge." The parties themselves need not apply to the Court; but it is difficult to say at whose instance, and in what form, applications of this nature would be entertained in British India. Cf. s. 8 of Guardians and Wards Act; and compare ss. 10, 19, 22 and 24 of the Indian Divorce Act IV of 1869. Bail. I. 30 (*ll.* 3 sqq.) shows that intercourse is not a crime when the marriage is irregular "whether he had any doubt on the subject or not."

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87. [It is stated in the 'Fatawa 'Alamgiri' that no separation can be made on account of prohibition established by fosterage, except by order of the Judge, but that when prohibition becomes established, it is not proper for the woman to live with her husband.[1]]

Separation when prohibition by fosterage.

There does not seem to be any statement corresponding to that on which this section is based, either in the 'Hidaya' or the 'Shara'ya-ul-Islam;' the section is consequently enclosed in brackets. It seems likely that the excerpt in question (it is from the 'Nahr-ul-Faiq') has come into the 'Fatawa 'Alamgiri' by inadvertence.[2] The 'Nahr-ul-Faiq' has apparently followed the view of Abu Hanifa (from which his two disciples have dissented, and which is not followed in British India). Abu Hanifa considers, that though according to the strict law, some marriages ought not to be contracted, yet if contracted, all marriages have force and effect; and therefore it is quite possible that he should consider an order of the Court necessary for cancelling any marriage whatever, including a marriage which transgresses the prohibition of fosterage. But the same reasoning does not apply in the case of the two disciples of Abu Hanifa; for according to them, prohibition by fosterage is absolute, and it renders the marriage not merely irregular, but void; how then could it be urged that for cancelling such a marriage which is already void in itself, the intervention of the Court is necessary, whereas (according to them) no order of the Court is necessary (see ss. 84, 85 *above*) to cancel even a marriage which is merely irregular and not void?

Quaere, if an order of Court necessary.

§ 12.—Judicial Proceedings Arising out of Marriages.

88. Where either the husband or wife[3] has, without lawful ground, withdrawn from the society of the other, or neglected to perform the obligations imposed on him or her by law, or by the contract of the marriage; the Court may decree restitution of conjugal rights, and may put either of the parties on terms[4] securing to the other the enjoyment of his or her legal rights.[5]

Suit for restitution of conjugal rights.

Amongst the lawful grounds for such withdrawal, may be noted "actual violence of such a character as to endanger personal health and safety, or reasonable apprehension of such violence,"[6] which would consequently be a defence to a suit for restitution of conjugal rights. In a case[7] where

Defences to suit for restitution of conjugal rights: Cruelty.

[1] Bail. I. 200.

[2] See comment on s. 167 below for a similar inadvertence.

[3] "The wife has a right corresponding to that of the husband to demand the fulfilment of his marital duties towards her."—A. Rahim, "Muhammadan Jurisprudence," 334, citing *Al-Wajiz*, II. 20.

[4] *Buzloor Ruheem* v. *Shumsoonissa* (1867) 11 Moo. I. A. 551, 615.

[5] Bail. I. 188-189, II. 88.

[6] *Evans* v. *Evans* (1790) 1 Haggard Consist. 1, quoted and followed by P. C. in *Buzloor Ruheem* v. *Shamsoonissa* (1867) 11 Moo. I. A. 551, 611, with the remark that "the Muhammadan law of what is legal cruelty between man and wife would probably not differ materially from 'our' own."

[7] *Rukmin* v. *Pearc Lal* (1889) 11 All. 480.

SECTION 88. the parties were Hindus, English decisions [1] were followed which lay down that cruelty, falling short of physical violence, but such as to jeopardise health or sanity, is sufficient "cruelty" under s. 488 of the Criminal Procedure Code [2] for refusal on the part of the wife to live with her husband, and yet to get maintenance from him. Of course, wherever by Muhammadan law it would be improper for the husband and wife to cohabit (as after 'li'an,' 'zihar,' etc.) a suit would not lie for restitution of conjugal rights; thus where it was proved that the husband had used blasphemous language against the Prophet, which amounted to apostasy dissolving the marriage, the wife was held to have shown a valid defence to a suit for restitution of conjugal rights.[3]

'li'an,' 'zihar.'

apostasy.

Maintenance under Criminal Procedure Code, s. 488.

It was held by the Madras High Court that the husband must offer to live with the wife as her husband, otherwise he is not entitled to ask her to come to his house.[4] The Bombay High Court, however, dissented from this decision, and held that where the husband denies the validity of the marriage, but offers to maintain the woman (though not as his wife) if she agrees to live in his house, she cannot get maintenance from him unless she accepts his offer so to live in his house.[5] These cases were between Hindu parties. A Mussulman husband may practically nullify an order for maintenance by divorcing his wife.[6]

Limitation of suits for restitution of conjugal rights.

The Limitation Act X of 1908 repeals articles 34 and 35 of the previous Act (XV of 1877) which barred suits for "recovery of wives," and for restitution of conjugal rights," two years after "possession or restitution was demanded and refused." The question then arises whether article 120 of the Act applies, which provides a six years' period of limitation "for suits for which no period is provided elsewhere." It has been assumed in one case that it applies.[7] On the other hand by s. 23 of the Act, "in the case of a continuing . . . breach of contract or . . . wrong . . . a fresh period of limitation begins to run at every moment of the time during which the breach or wrong . . . continues;" and actions for restitution of conjugal rights have been held [8] to arise out of a continuing wrong, and therefore practically incapable of being barred.[9]

Continuing wrong.

Judicial protection to wife.

89. The Court may order the husband to be attentive to his wife; and to be just and equal between his wives, if he has more

[1] *Kelly* v. *Kelly* (1870) L. R. 2 P. & D. 59. *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168.

[2] Sec. 488 of the Criminal Procedure Code provides that magistrates may make an order of maintenance against a person who neglects to maintain his wife or legitimate or illegitimate child. The order may be enforced like a fine. The wife may on just grounds refuse to live with the husband; but the order for maintenance may still be made. See below s. 286.

[3] *Nowroz Ali* v. (*Mussumat*) *Aziz Bibi* (1876) 11 P. R. No. 124 CIVIL JUDGTS., p. 235.

[4] *Marakkal* v. *Kandappa*, 1888, 6 Mad. 371 (1876) (Kernan and Muttuswami Ayyar JJ.).

[5] *In re Gulabdas Baidas* (1891) 16 Bom. 269 (Jardine and Parsons JJ.)

[6] *In re Abdul Ali Ismalji and his wife Husenbi* (1883) 7 Bom. 180 ("Bohra" husband and Hanafi wife). *Shah Abu Ilyas* v. *Ulfat Bibi* (1896), 19 All. 50, cf. *Abdur Rohoman* v. *Sakhina* (1879), 5 Cal. 558,

[7] *Asirunnissa Khatun* v. *Buzloo Miah* (1906) 34 Cal. 79.

[8] (*Bai*) *Sari* v. *Sankla Hirachand* (1829) 16 Bom. 714, *Gaizni* v. *Mehran* 14 P. R. p. 157. followed in a Hindu case, *Binda* v. *Kaunsilia* (1890) 13 All. 126.

[9] But see *Dhanjibhai Bomanji* v. *Hirabai* (1901) 25 Bom. 644 (F. B.). followed in *Saravanai Perumal Pillai* v. *Poovayi* (1905) 21 Mad. 435, and *Asirunnissa Khatun* v. *Buzloo Miah* (1906) 34 Cal. 179, where such suits were held to be barred

than one wife, notwithstanding any consent having been given by any wife to unequal treatment.[1] SECTION 89.

The husband (unless he has contracted otherwise) can always divorce his wife, and thus get rid of most of his matrimonial liabilities.[2] But he may not be willing to rid himself by divorce, as that might render him liable to pay up the 'mahr,' which may not be a negligible circumstance. The wife, on the other hand, is more in need of protection, as she cannot so release herself. The 'Shara'ya-ul-Islam,' indeed, suggests a kind of arbitration,[3] which can hardly be enforced in Courts that do not have more arbitrary powers than those of British India.

90. (1) Where a Mussulman claims to have been married to some person, and that person denies it, a suit may be brought by either party for a declaration that they are married, or that they are not married, as the case may be.[4] **suits, for jactitation of marriage, etc.**

(2) A Mussulman wife may bring a suit for a declaration that the marriage is dissolved, after exercising an option to divorce herself.[5]

(3) *Semble*, in a suit for an injunction against jactitation of marriage it is a valid defence to prove that the plaintiff acquiesced in the defendant's assertion that they were married to each other.[6]

Suit for jactitation of marriage.

A suit was recently entertained in the Allahabad High Court for jactitation of marriage, i.e. to have it declared that a woman who claimed to be the plaintiff's wife was not so in reality.[7] The Court there stated that it must be strictly proved: (1) that the defendant seriously claimed to be married to the plaintiff; (2) that the plaintiff did not acquiesce in the claim or allegation of the defendant; (3) that, in fact, no marriage has taken place.

Acquiescence.

It is not quite clear what would be the effect of acquiescence in such a claim. It has been stated that an acknowledgment, even in the presence of witnesses, would not be sufficient by itself to constitute marriage, unless judicially pronounced to be a marriage, or unless there is an expressed intention to "make this (i.e. the acknowledgment) a marriage." Those are considerations, however, of a nature different from such as would arise in considering whether a suit for a declaration should be dismissed or not.[8]

91. *(Submitted)* In a suit by a Mussulman in British India for breach of promise to marry, no damages will be allowed **marry.**

[1] Bail. I. 188-189, II. 88. *Quaere*, whether in the converse case, e.g. where the husband has consented that the wife should reside with her parents, he will be prevented from suing for restitution of conjugal rights. In *Hamidunnessa Bibi* v. *Zohiruddin Sheik* (1890) 17 Cal. 670, the point was taken, but not decided.

[2] See p. 106 *n.* 6 *ante*.

[3] Bail. II. 88-89.

[4] Bail. I. 20. A suit praying for an injunction to restrain the defendant from falsely claiming to be the plaintiff's husband or wife, is referred to as a suit for jactitation of marriage.

[5] Bail. I. 243. cf. below p. 136, ss. 128-134.

[6] Bail. II. 16, 17; I. 5 (fifth).

[7] *Mir AzmatAli* v. *Mahmud-ul-Nissa* (1897) 20 All. 96; cf. *Thompson* v. *Rourke* [1898] P. 70.

[8] Bail. I. 16-17.

SECTION 91. beyond compensation for such pecuniary loss as has actually been suffered by the Plaintiff.

Compensation for actual pecuniary loss alone recoverable.

The nearest approach to a recognition of the binding effect of a promise to marry is furnished by a passage in the 'Shara'ya-ul-Islam'[1] which states that it is unlawful for a man to pay addresses to a woman who is engaged to another, but if she marries a man other than him to whom she was first engaged, the marriage is valid.

The authorities do not seem to throw much light on the question of damages. The rules giving a right to claim a part of the dower, or a present where the marriage is dissolved without consummation, may perhaps be of some assistance in assessing damages.

Under the circumstances it is submitted that a suit would lie for the actual loss suffered.[2]

[1] Bail. II. 36 (4th).

[2] In Roman law the *arrhae sponsalitiae* (earnest for a marriage), consisted of presents of a substantial kind, given on betrothal; they could be either forfeited, or claimed back with a penalty of the same, or of twice, or four times its value, on the marriage being broken off (Justin V. i. 1-5, 16). There was also an *actio ex sponsu* "giving damages in proportion to the value of the marriage to the party disappointed." Hunter, "Roman Law," 696. In England Lord Herschell introduced a bill restricting the damages in an action for breach of promise to marry, but it did not became law. Such actions are "recognized by the Prussian Landrecht, but expressly denied by the Code of Italy." The French Code is silent, and the Courts in France have taken different views; but the better opinion agrees with the Austrian Code, which allows damages for actual loss, but no more. Prussian Code, Th. II. 1, ss. 75-82. Italian, s. 53. French artt. 1382, 1142; Austrian ss. 45, 46. Draft Civil Code of Germany s. 1228 cited in Holland, "Jurisprudence," 258-259.

CHAPTER IV.

'MAHR' OR DOWER.

§ 1.—Preliminary.

SECTION 92.

92. 'Mahr' or dower becomes due from the husband to the wife on every marriage contract, subject to section 93 below. It arises either by agreement [1] between the parties, or by operation of law.[2]

Mahr when due.

"Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman."[3]

Agreement to marry, without 'mahr'; when valid: Sunni law.

Shiah Law: by adult woman

93. (1) In Sunni law the wife is entitled to claim 'mahr' from her husband even though she has expressly contracted not to do so.[4]

(2) In Shiah law

(*a*) a woman who is adult "and not of a weak or facile disposition"[5] may validly agree not to receive any mahr.[6]

[1] The agreement may be made after the marriage: *Kamarunnissa* v. *Husaini* (1884) 3 All. 266. The agreement for *mahr*, if it is in writing, is called *mahr-namah* or *kabin-namah*, though no writing is necessary: *Abdul Karim* v. (*Mussummat*) *Fazilat-un-Nissa* 5 S. D. A. (BEN.) 75; (*Mussummat*) *Muleeka* v. *Jumeela* (1872) 11 Ben. L. R. 375. L. R., I. A. SUPP. VOL. 135. *Tajoo Beebee* v. *Noorun Beebee* (1864), W. R. 31. But, of course, where the amount is large, and there is no writing, the "very best description of evidence" is necessary to establish it. *Huseina* v. *Husmutoonnissa* (1867) 7 W. R. 495, *Abdul Jubbar Chowdhry* v. *Collector of Mymensingh* (1868) 11 W.R. 65, *Nujeemoodeen Ahmed* v. *Hosseinee* (1865) 4 W. R. 110, *Mohumed Hoossein Ali* v. *Moobaruckoonnissa* (1851) 6 S. D. A., N. W. P., 350.

[2] Bail. I. 91; II. 72.

[3] Bail. I. 91. Amongst the Teutonic races betrothal (*verlobung*) seems to have been a sale of the woman by her guardian for a *pretium puellae* (*mundschatz* or *witthum*), payable after marriage to the guardian, and later on, to the girl herself, Holland, "Jurisprudence," (7th Ed.) 257; citing Baring-Gould's "Germany Past and Present," 98.

[4] Bail. I. 91.

[5] *Quaere*, whether the special rules in favour of pardanashin women in British India would be a guide on this point

[6] Such a contract is called *tafwiz* or voluntary surrender. Bail. II. 72.

SECTION 93.

by guardian

(*b*) It is doubtful whether a guardian for marriage may validly contract his female ward in marriage without 'mahr.'[1] The 'Shara'ya-ul-Islam' favours the view that he can.[2]

option to cancel 'mahr'

(*c*) An option may be lawfully reserved to cancel the 'mahr.'[3]

What may be the subject of 'mahr.'

94. The subject of 'mahr' may consist of

(1) any specified thing which has value, and which is in existence, except hogs and wine ; [4] or

Agreements to do something.

(2) a promise on the part of the husband to do or abstain from doing something, provided that in Sunni law an agreement by the husband that he will personally render some specified or unspecified service to the bride, cannot be the subject of 'mahr.'[5]

Rents and profits.

Explanation I—The rents and profits of property, or of the services of other persons, may be the subject of 'mahr.'[6]

Promise to render services.

Explanation II—In Shiah law an agreement by the husband that he will personally render services to the bride during a stated period of time, can validly be the subject of 'mahr'; provided, first, the services are specified in such a manner as to remove all doubt and uncertainty, and, secondly, that the husband is entitled, if he is unable to perform the services promised, to hire some one else to perform them.[7]

When subject of 'mahr' unlawful.

Explanation III—Where the 'mahr' agreed upon consists of hogs or wine [4] the Shiah authorities are not unanimous on the result of the agreement, [8] viz. whether

(1) the marriage is absolutely null and void ; [8] or

(2) it is valid, and in that case, [8] whether

(*a*) the price of the hogs or wine has to be given in lieu of the 'mahr'; or

(*b*) the 'mahr-ul-mithl,' i.e. proper dower, is due.[9]

The approved Shiah opinion is stated to be that the marriage is valid, but the agreement for 'mahr' is void, and the 'mahr-ul-mithl' is due.[8]

[1] See p. 109 *n.* 6 *above.*

[2] Bail. II. 72, 80 (second).

[3] Bail. II. 5 (fourth), 77 (twelfth).

[4] Which are *extra commercium* in Muhammadan law. The case is not likely to arise in India ; but is given to show the scope and effect of the law.

[5] Bail. I. 93 ; II. 67, 69.

[6] Bail. I, 93.

[7] Bail. II. 67, 69, 79.

[8] Bail. II. 67-68, viz. clause (*b*) above, See below, s. 97.

Illustrations. SECTION 94.

(1) H marries *W*, on the 'mahr' of "a cloth," or "a beast," or a mansion; the 'mahr' is void for uncertainty and *W* is entitled to her "proper dower";[1] but if the species of the cloth or beast is mentioned, then the 'mahr' is valid, and an article of medium quality belonging to that species becomes due.[2]

(2) H stipulates with his bride *W*

that he will not take *W* out of her native place, or
that he will divorce his existing wife, or
that he will perform the 'haj' with her, or
that he will not press the claim of a debt which he has against her;

none of these promises can validly form the subject of 'mahr.'[3]

(3) H marries *W* on the condition that he is to give her father 1,000 'dirhams.' This is no 'mahr' and *W* becomes entitled to the "proper dower."[4]

(4) F gives his daughter, or sister, *W*, in marriage to H, "on condition that H will give to F his daughter, or sister, *O*, in return, the right to the person of each woman being the dower of the other"; the condition would not supply the place of 'mahr.' "The contracts are effected but the condition is void, and each woman is entitled to her own proper dower."[5] According to Shiah law such marriages would be void;[6] and *quaere*, whether by the law of British India they would be held to be void as against public policy.

(5) The guardian, G, of a woman, *W*, marries her to H, on the terms that 1,000 'dirhams' are to be paid by H to *W*, and 50 'dinars' to G. *W* would be entitled in Sunni law to both the 'dirhams' and the 'dinars.' In Shiah law the agreement to pay 50 'dinars' to G[7] would be void; and *W* would receive only 1,000 'dirhams.'[8]

95. According to Hanafi law, the bride is entitled to claim to be paid on her marriage not less than ten 'dirhams'[9] as her

(Hanafi law). 'Mahr' may be to any amount not less than 10 'dirhams.'

[1] Bail. I. 106.

[2] Bail. I. 106, 109; and see Bail. II. 68 (para. 3).

[3] Bail. I. 94.

[4] Bail. I. 105. *Kalavagunta Venkata* v. *Lakshmi* (1908), 32 Mad. 185 (F.B.). "If a decision in one way will involve results which our law considers prejudicial to the public interests or immoral, it is our duty to decide the other way" (per Farwell L.J.) *Re Hoyles; Row* v. *Jagg*" [1911] 1 Ch. 179, 187 and cf. *Ghasiti* v. *Umrao* (1893) 21 Cal. 149. (P.C.).

[5] Bail. I. 94 (para. 2). Such contracts were common before the advent of the Prophet, but the Prophet discouraged them. The Arabic name for such contracts is *shighar*, which means "two persons combining to oppress a third." See also Bail. I. 94, note 1. The term is derived from the root-word *shaghara* which Kasimirski explains as follows: "*lever un pied de derrière en l'air (un dit d'un chien qui le fait quand il urine).*" Bail. I. 94 *n.* 1, applies the meaning of *shaghara* to *shighar*,

[6] Bail, II. 37, and see *n.* 8 below.

[7] Bail. I. 106.

[8] Bail. II. 68-69. According to Shiah law any promise by the husband to pay something to the bride's father has no binding effect, though the parties may agree amongst themselves to give part of the *mahr* to him. Bail. II. 68. This would imply that the bride should be a party to the agreement. Such a transaction would of course have to be strictly proved. Contract Act s. 16, cf. *London & Western Loan & Discount Co. Ltd.*, v. *Bilton* (1911) 27 L. T. R. 184.

[9] Ten *dirhams* were valued at Rs. 107 in *Sughra Bibi* v. *Masuma Bibi* (1877) 2 All. 573. No reason is assigned for this valuation; (cf. Bail. I. 108, which shows that *dirhams* are coins of uncertain value. That case was not followed in *Asma Bibi* v. *Abdul Samad Khan* (1909) 32 All. 167, where Karamat Husain J. in a learned judgment, after citing passages from the texts, laid down the value of a *dirham* to be between Rs. 3 and 4.

SECTION 95. 'mahr' notwithstanding any agreement on her part to accept a smaller 'mahr.'[1]

Reasonable dower in Oudh

Provided that in Oudh,[2] the Court will not, either in a decree, or by way of set-off, lien, or otherwise, award 'mahr' to an amount which is in excess of what shall be reasonable with reference to the means of the husband, and the status of the wife.[3]

(Shiah and Shafi Law) no minimum

Explanation—According to Shiah and Shafi'i law, where there is an agreement on the part of the wife to accept less than ten 'dirhams' as her 'mahr,' she is not entitled to claim any more; provided the agreed 'mahr' is not totally destitute of value.[4]

Illustration.

W is divorced by H her husband, then H offers to remarry W on condition that *W* should make a gift to him of the 'mahr' due on their first marriage. *W's* consenting to the offer does not affect her right to her first 'mahr,' whether they remarry or not; "because *W* placed on herself her property (the 'mahr') as an exchange for marriage; and no consideration is due from the wife to the husband in marriage."[5]

'Mahr' never invalid as excessive.

96. 'Mahr' is never invalid[6] by reason of its being excessive[7], except as provided in section 95 above.

Nominal dowers.

The 'Fatawa 'Alamgiri' contains a section (based on the 'Zakhira') on 'sam'at'[8] or dower, which has been nominally stated in public at a high figure for the purpose of "reputation" but which is never intended to be demanded or paid. Nominal dowers are frequently agreed to as a mere form in India, by persons who have no means of paying it.[9]

[1] Bail. I. 93, (para. 4). "According to the Shafaais and Hanbalis, it is desirable that a dower should not be less than ten *dirhams*." *Asma Bibi* v. *Abdul Samad Khan* (1909) 32 All. 167, 168, per Karamat Hussain J. citing *Qustalani* VIII, 48, 49, a commentary on the *Sahih-i-Bukhari*

[2] The Act was held not to apply in *Zakeri Begum* v. *Sakina Begum* (1892) 19 Cal. 689, 19 I. A. 157, in which a Muhammadan resident of Patna was for a time in Lucknow, and there married the plaintiff, who lived in that city.

[3] Oudh Laws Act, 1875, s. 5. See *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1893) 21 Cal. 135. *Collector of Moradabad* v. *Harbans Singh* (1898) 21 All. 17.

[4] Bail, II. 68; Hed. 44.

[5] *Fatawa Qazi Khan* cited in *'Alamgiri Hiba*, Ch. VIII. (*ad fin.*); Bail. I. 540-541.

[6] Though Shafi'i and the Shiah authorities consider it abominable that it should exceed the *mahr-ul-sunnat*, i.e. 500 *dirhams*, which is the *mahr* that the Prophet to his wives. Bail. II. 68 (para. 2) 70, (para. 4).

[7] Bail. I. 93, II. 68. *Omdutun Nisa Begum* v. (*Mirza*) *Asud Ali* (1809) S. D. A. CAL. I. 277 (Shiah case); *Ghoolam Husunali* v *Zeinub Beebee* (1801) *ib.* p. 48 (*mahr* of 300,000 gold mohurs). *Wajih On Nisa Khanum* v. *Mirza Husun Ali* (1808), *ib.* p. 266 (*mahr* of Rs. 1,14,000 and 355 gold mohurs held valid). The Bombay Court of Appeal (Jenkins C. J. and Heaton J.) upheld a decision of Russell J. in which he passed a decree for eighteen lakhs of rupees for *mahr*. *Mir Anu Ali* v. *Banoo Begum* (Sep. 1907; O. O. C. J. Appeal No. 1472, from Suit 577 of 1906 *unreported*).

[8] Spelt *sumût* by Baillie (I. 116). See footnote to *khul'*, s. 162 below, p. 155 *n.* 2.

[9] See also Bail. II. 70, *ll.* 2-4,

97. Where the parties have not agreed upon the amount of the 'mahr' at the time of the marriage, or it has been invalidly agreed upon that no 'mahr' shall be paid, the husband is bound by the law to give, and the wife is bound to accept [1] the 'mahr-ul-mithl' [2] or proper dower, i.e. such an amount as was paid to other women in the same circumstances as the bride, viz. her full or consanguine sisters or other female descendants of her male agnatic ancestors;[3]

SECTION 97

'mithl,' proper defined

Provided first that in Sunni law when the dower is fixed, and it is less than ten 'dirhams' in value, the bride is entitled only to claim ten 'dirhams.' [4]

Provided, secondly, that, according to Shiah law

(Shiah law.) Maximum of proper dower.

(1) the 'mahr-ul-mithl' can never exceed 500 'dirhams' [5]

(2) where one of the parties dies without the marriage being consummated, and before the mahr is agreed upon, neither 'mahr' nor a present ('mit'at') is due to the wife.[6]

(3) where the amount of the 'mahr' is left to be fixed by the husband at his discretion, he may fix it at any amount, but where it is left to the discretion of the wife, she cannot fix it at more than 500 'dirhams.' [7]

2.—*'Mahr' When Due and in What Portions.*

98. 'Mahr' may either be prompt (or exigible, in Arabic 'mu'ajjal')[8] i.e. payable immediately on marriage if demanded by the wife, or deferred (in Arabic 'mu'ajja,') which is payable on

'muwajjal' (or

[1] But the husband may agree to give more, or the wife to accept less. *Kamarunnissa* v. *Husaini* (1884) 3 All. 266, Bail. I. 95), though the parties may, if they choose, agree on an amount after marriage. *Kamarunnissa* v. *Husain* (1884) 3 All. 266.

[2] Literally "dower of the like," i.e. of those similar to her; but technically, called in English Books "proper dower." See Baillie I. p. xxv.

[3] Bail. I. 95. The *mahr* given to the mother of the bride is not to be taken into consideration in arriving at the *mahr-ul-mithal*. Bail. I 95. Nor the means of the husband. *Sugra Bibi* v. *Masuma Bibi* (1874) 2 All. 73. In *Najmuddeen* v. *Ahmed Hosseini* (1865) 4 W. R., 110, it was said, however, that the means and position of the bridegroom must not be altogether excluded from consideration.

[4] Bail. I. 92, 93; Hed. 44.

[5] Bail. II. 21.

[6] Bail. II. 71.

[7] Bail. II. 73. According to Sunni law *mahr* cannot be so fixed after the contract. And if it is left unfixed till then the effect is the same as if no *mahr* had been fixed (Bail I. 95), though the parties may, if they choose, agree on an amount after marriage. *Kamarunnissa* v. *Husain* (1884) 3 All. 266.

[8] The period of limitation for a suit for dower is three years, and it begins to run for "exigible dower," when the dower is demanded and refused; or, when during the continuance of the marriage, no such demand has been made, when the marriage is dissolved by death, or divorce (Limitation Act X. of 1908. Sch. I. Art. 103), and for deferred dower "when the marriage is dissolved by death or divorce" (art. 104). In *Soorma Khatoon* v. *Afafoonissa Khatoon* (1863) 2 Hay 210, the widow had been ejected by order of court from possession of her husband's property, which she held as security for her *mahr*. Limitation was held to run from the time of such ejectment and not from the death of the husband. When the ejection is not by court's order her lien subsists and the heir or purchaser takes the property subject to it. *Umed Ali* v. *Saffihan* (1869) 3 Ben. L. R. (A. C.) 175. *Bunday Ali*

SECTION 98 the dissolution of marriage, or the happening of some specified event.

Whether deferred dower becomes due on death of wife.

The Privy Council in a case [1] more fully referred to hereafter, considered but did not decide whether the death of the wife is a sufficient dissolution of the marriage in order to make her heirs entitled to claim the deferred dower. It is *submitted, however, that the statement in the 'Fatawa' Alamgiri' that death dissolves* [2] *the marriage, naturally means death of either party,* [3] otherwise it would have been laid down expressly that the marriage is for this purpose considered to be dissolved only by the death of the husband.[4]

Addition to 'mahr' subsequent to marriage.

99. An addition may be made to the dower at any time during the continuance of the marriage, and the husband's promise to add to the dower, if accepted by the wife, becomes incorporated with the marriage contract, and is binding on him.[5]

Provided that where the marriage is dissolved, otherwise than by the death of either party, and without consummation or valid retirement, any addition that has been made to the dower after the marriage contract, becomes void, and in cases where the wife becomes entitled to half of her dower, [6] she gets half of her original dower, and no part of the addition.[7]

Remission or gift of dower by wife to husband.
1. during his life-time
2. after his death.

100. The wife may validly agree to a reduction of her dower,[8] or make a gift of the whole of it to her husband. A gift of the dower may be made even to a deceased husband,[8] or to

Khan v. *Cholu Bibee* (1866), Agra 273; the question was left undecided whether in the case of a revocable divorce, Limitation for deferred dower begins to run from the time of the pronouncement or at the expiration of the *'iddat*. For cases before the Limitation Act 1872, see *Omdatun Nisa Begum* v. *(Mirza) Asud Ali* (1809) S. D. A. CALC. 1, 278. *(Mcer) Nujbollha* v. *(Mussammaut) Doordana Khatoon* (1805) *ib.* 103. *Nooroonnissa Begum* v *Nawaub Syed Mohsin Allee Khan Bahadoor*, *ib.* VII. 40, all over-ruled by *Ameeroonnissa* v. *Moorad-unnissa* (1855) 6 Moo. I. A. 211, in accordance with which the Limitation Act of 1877 artt. 103 and 104 were framed, and they were not altered by Act. X of 1908. See also *Khanrunnissa Begum* v. *Rissannissa Begum* (1875) 2 I. A. 235.

[1] *(Mirza) Bedar Bukht Yahya Mohammad Ali Khan Bahadoor* v. *(Mirza) Khurrum Bukht Yahya Ali Khan Bahadoor* (1873) 19 W. R. 315 (P. C.).

[2] Bail. I. 350 contains one of the few inaccuracies of which the translator may be accused. From line 3 it would appear that "marriage" is said to be "confirmed by" consummation or "death." In the original it is the *'iddat* and not marriage that is said to be so confirmed.

[3] And so it was held in *Mahar Ali* v. *Amani* (1869) 2 Ben. L. R. (A. C.) 306 S. C. *Khyratun* v *Amani* 11 W. R. 212. *Hooseinbodden Chowdry v Tajunnissa Khatoon* 1864, W. R. 199.

[4] Cf. the French Civil Code, art. 227. "Marriages are dissolved: 1. by the death of the husband or wife; 2. by a divorce lawfully decreed; 3, by a final sentence against the husband or wife to a punishment occasioning civil death." (Civil death was abolished by the law of 31st May 1854.)

[5] Bail. I. 111 *Kamarunnissa* v. *Husaini* (1884) 3 All 266. There may be difficulty in proving such an agreement, and unless it could be shown to be governed by Muhammadan law, the question would arise whether a marriage aleady contracted, is a valid consideration. Consideration of *hhul'* cannot be increased subsequently, cf. s. 165 below.

[6] See s. 102 below.

[7] Bail. I. 111; II. 78-79.

[8] Bail. I. 112, 544, (last line).

her heirs and it may be made conditionally.[1] The remission of dower after the death of her husband is valid and effective without acceptance by the heirs of the husband.[2]

SECTION 100

101. In either of the following cases, viz.

(1) where the marriage has been consummated; or [3]

(2) where either party dies,[4]

the wife is entitled, if the amount of the 'mahr' has been agreed upon, to receive the whole of it; and in the absence of any such agreement, to receive the 'mahr-ul-mithl'; and her right to either is not affected by any subsequent event[5]; provided[6] that according to Shiah law where either party dies without consummation[7] and before the 'mahr' is settled, neither 'mahr' nor anything in lieu of it is payable.[8]

The whole of the 'mahr' due (1) on consummation, or (2) death of either party.

For a summary of the rules contained in ss. 101-103 see below p. 117.

102. Where the wife is divorced by the husband before consummation or valid retirement, or where, for any act on the part of the husband,[9] other than his exercising the option of puberty,[10] the marriage is dissolved before consummation or valid retirement, the wife becomes entitled—

When marriage dissolved before consummation by act of husband.

(1) to receive half of the 'mahr' agreed upon; or

(2) in the event of no 'mahr' having been agreed upon, in the contract of marriage, or in the event of its having been expressly but invalidly[11] stipulated that she is not to receive any 'mahr,' she is entitled to a present ('mit'at');[12] which under Sunni law must consist of three articles of dress, or of their value; and which under Shiah law is regulated by the condition and circumstances of the husband.[13]

(1) If dower agreed upon half of it is due.
(2) if
(*a*) no dower agreed upon
(*b*) invalidly stipulated that no dower is to be paid, a present is due.

Present or 'mit'at' explained.

[1] Bail. I. 119 and 120. In (*Mirza*) *Bedar Bukht Mohummed Ali Khan Bahadoor* v. (*Mirza*) *Khurram Bukht Yahya Ali Khan Bahadoor* (187) 19 W. R. 315 (P.C.) it was alleged that the dower was originally fixed at nine lakhs of rupees and that Rs. 7,000 and two armlets worth Rs. 3,000 were sent by the husband (the King of Oudh) and were accepted in satisfaction of the dower and that the rest of the dower was released. The evidence in the case appeared (both to the judges of the first instance, and to the P. C.) "too weak to establish the plea of satisfaction" (p. 317, col. ii).

[2] *Jani Begam Fakiroddin* v. *Umrao Begum* (1908) 10 Bom. L. R. 764 (Scott C. J.).

[3] Bail. I. 96; II. 29, 73, 65, (para. 4).

[4] Bail. I. 96.

[5] Bail. I. 101; II. 29 (3rd para.) 62, 63, 64, 71.

[6] Bail. II. 71.

[7] When there has been consummation sub s. (1) applies.

[8] B. II. 71. e.g. *mit'at*, see s. 102 (2).

[9] The case where the husband dies, is provided for by s. 100.

[10] Bail. I. 53.

[11] In Shiah law an agreement to receive no *mahr* is valid under circumstances mentioned in s. 93. In Sunni law they are always invalid.

[12] Cf. s. 152 below. The word is also pronounced *mu'at* and accordingly in Bail. I. 97 it is spelt *mootát*. See below p. 155 *n* 2.

[13] Bail. I. 97; II. 71.

SECTION 102

Possession does not affect portion of 'mahr' due.

Explanation I—The fact that possession has been given *to the wife of the 'mahr,' or of any part thereof, does not affect the amount or portion to which she becomes entitled, except* in so far as it may show her consent to the amount of the 'mahr.'[1]

Services already rendered as 'mahr.'

Explanation II—Where the 'mahr' consisted of a stipulation on the part of the husband to render, or cause to be rendered, some service to the wife, which has already been rendered, and she becomes entitled to only half the 'mahr' she must pay him half of the hire for such service.[2]

Release of 'mahr.'

Explanation III—Where the wife has released the 'mahr' or any portion of it, or has taken anything in lieu of it, and then the husband has divorced her, without consummation of the marriage, he is entitled to claim from her half of the 'mahr' originally agreed upon.[3]

Illustrations.

(1) H marries *W*, agreeing to pay to *W* Rs. 1,000 as 'mahr', and before the marriage is consummated, or there has been "valid retirement" between them, H divorces *W*, or makes a statement by which prohibition by fosterage is established between H and *W* (of which fact *W* had no knowledge). *W* is entitled to half of Rs. 1,000 as her dower.

(2) In the last illustration if there had been no agreement to pay any 'mahr,' or an express agreement that no dower should be paid to *W*, she would, if governed by Sunni law, have been entitled to receive a present from H, and if governed by Shiah or Shafi'i law, she would be entitled to receive her proper dower.

(3) If the marriage had been consummated, or either H or *W* had died, then *W* or *W*'s heirs would have been entitled to receive the whole of the Rs. 1,000, in the first illustration, and the 'mahr-ul-mithl' in the second illustration.

For a summary of the rules contained in ss 101-103 see next page.

(Shiah law.) When marriage void or cancelled.

103. According to Shiah law—

(1) where the marriage is void, but it has been consummated, the proper dower, and not the dower agreed upon, is due;

(2) where a valid marriage is cancelled after consummation, the dower that has been agreed upon, is due.[5]

[1] Bail. I. 112, 113; II 74. the *'Alamgiri* contains many rules as to the effect of accession or damage to the subject of *mahr*, in case the wife has to return it wholly, or in part (Bail. I. 112-116) but these have been omitted, as it is unlikely that the question should arise in the Indian courts, and if it did, probably the general law of contract would apply.

[2] Bail. II. 75.

[3] See s. 100 *above*.

[4] Bail II. 75 (4th and 5th).

[5] Bail. II. 65-66.

AMOUNTS OF 'MAHR' OR DOWER WHICH BECOME PAYABLE.[1] SECTION 103

I. Where there has been consummation of the marriage, or valid retirement, or either party has died ; — When marriage consummated or either party dies.

(1) if the marriage is regular, and

(*a*) the dower is specifically agreed upon, *the whole dower is due* ;[2]

(*b*) if the dower is not specified or it is invalidly agreed that no dower is payable *the proper dower is due.*[2]

Provided that under Shiah law, if one of the parties die before the marriage is consummated and before the dower is settled, *nothing is due* ;[3] unless it had been agreed that the amount should be fixed subsequently, in which case *half of the amount so fixed is due* ;[4]

(2) if the marriage is irregular, and

(*a*) if the dower is specially agreed upon,

the proper dower or the specified dower } *whichever is less, is due*;[5]

(*b*) if the dower is not specified, or it is invalidly agreed that no dower is payable, *the proper dower is due.*[6]

(*c*) According to Shiah law in all cases where the marriage is void, *the proper dower, and not the specified dower, is payable.*

II. Where there has been neither consummation, valid retirement, nor the death of either party. — When marriage not consummated nor dissolved by death

(1) if the marriage is regular, and

(*a*) it is dissolved by any act of the husband,[7] other than the exercise by him of the option of puberty,[8] and

(i) if the dower is specified upon, then *half the specified dower is due*;[9]

(ii) if the dower is not specified, or it is invalidly agreed that no dower is payable, *a present is due*;[10]

(*b*) if it is dissolved by the act of the wife,[7] or by either the husband or wife exercising the option of puberty, *nothing is due.*[8]

(2) if the marriage is irregular, *nothing is due.*[11]

§ 3.—Liability to Pay and Right to Give Valid Discharge for 'Mahr.'

104. Where the marriage has been contracted on behalf of a male infant by his guardian for marriage the property of the infant is liable for the 'mahr,' and, if he has no property, the guardian is liable to pay it to the wife. — Liability for 'mahr,' on marriage of minor husband.

[1] See ss. 101, 103 above.
[2] Bail. I. 96.
[3] Not even a present (*mit'at*), Bail. II. 71, (first.)
[4] Bail. II. 73, *ll.* 16-27.
[5] Bail. I, 156, (para. 1), 32, (*ll*, 1-3.)
[6] Bail. I. 156.
[7] Bail. I. 96.
[8] Bail, I. 53.
[9] Bail. I. 96. 53 ; II. 74
[10] Bail. I. 96 ; II. 71.
[11] Bail I. 31, 156.

SECTION 104 *Explanation*—If the guardian has already paid the 'mahr,' and the minor on attaining puberty divorces his wife without consummating the marriage, the wife is bound to refund half of the 'mahr' to the husband,[1] and not to his guardian.[2] The husband is entitled to receive the refund of half of the 'mahr', even though he was an adult at the time the marriage was contracted and the 'mahr' has been paid by another person who has purported to act as his guardian for marriage.

Who can give valid discharge for 'mahr.'

105. Payment of 'mahr' to the legal guardian of a woman who is a minor, or of unsound mind, or to the father, or grandfather, of any woman who is a virgin, is a sufficient discharge to the husband; and effectually exonerates him from his liability to pay it to his wife.[3]

§ 4.—Means for Enforcing Payment of Dower.

(1) Denial of Conjugal Rights until 'Mahr' Paid.

Refusal of conjugal rights until dower paid. Option in wife.

106. (1) The wife has the option of refusing to the husband his conjugal rights, or of not permitting him to restrain her movements, until the exigible ('mu'ajjal') part of her dower has been paid to her.

In her guardian.

(2) Where the wife is a minor,[4] or of unsound mind, her guardians have the option of refusing to part with her, and if she is in the custody of her husband, they have the option of taking her back from him, and keeping her in their own custody, until the exigible or prompt portion of her dower is paid up.[5]

Option lost when marriage once consummated.

(3) Where the husband has once had sexual intercourse with his wife, with her consent (she being then neither a minor, nor of unsound mind) the two disciples,[6] the majority of Shiah authorities,[7] and the latest rulings of the British Courts[8] hold

[1] There is room for doubt, Bail. II. 81.

[2] Bail. II. 80.

[3] Bail. I. 129-130; cf. *Nawab Khwaja Muhammad* v. *Nawab Husaini Begam* (1910) 12 Bom. L. R. 638. In *Iftikarunnissa Begum* v. *Amjad Ali Khan* (1871) 7 Ben. L. R. (P.C) 643, the dower being five lakhs, the husband set aside four and a half lakhs' worth of Company's paper; held, this was in satisfaction of *mahr* and not a gift.

[4] *In the matter of Khatija Bibi* (1866) 5 Ben. L. R. 557 and *Mahin Bibi* (1874) 13 Ben. L. R. 105.

[5] Bail. I. 124, II. 70.

[6] Bail. I. 125; Hed. 54.

[7] Bail. II. 70.

[8] *Abdul Kadir* v. *Salima* (1886) 8 All. 149, containing an elaborate judgment of Mahmood J. *Kunhi* v. *Moidin* (1886) 11 Mad. 327. *Hamidunnessa Bibi* v. *Zohiruddin Sheik.* (1890) 17 Cal. 670, *Bai* v. *Abdulla* (1905) 30 Bom. 122, 7 L. R. 684.

that her option is determined, and that the husband is entitled to his conjugal rights.[1] SECTION 106

Explanation—The rights and liabilities of the wife under the marriage contract, other than those of sexual intercourse, are not affected by her exercising the option hereinbefore referred to.[2]

Shiah text on option to refuse conjugal

The following are the translations of extracts from the 'Sharh-Lum'a,[3] a Shiah book of authority: "It is competent for a wife to refuse his conjugal rights (to the husband) before the consummation of marriage, until she receives the 'mahr'; provided that it has become payable [whether the husband is able to pay or not, and whether the subject of 'mahr' consists of substance or usufruct; and whether it has been fixed or not" . . . .][3]

Option lost on consummation.

"After consummation of marriage, it is not competent for her to refuse herself according to the more correct opinion: [for 'mahr' is confirmed by sexual intercourse, and she has willingly surrendered herself; the result is that her right is now restricted to making a demand for payment: but she cannot refuse herself: 'nikah' being a contract for return; and when one of the parties to such a contract gives the return due from him voluntarily, it is not competent for him (the other) to withhold it (his part of the consideration)]".[1]

When dower deferred whether wife has option to conjugal

107. (1) According to Abu Yusuf, where the 'mahr' is payable only on the happening of a specified future event, or on a specified period of time arriving, then, in the absence of an express agreement to the contrary, the wife or her guardian has the option of denying to the husband his conjugal rights, until the 'mahr' becomes due and is paid.[5]

becomes due and is paid.

(2) According to Imam Muhummad and the Shiah authorities there is no such option.[5]

(2) *Widow's Lien for Unpaid Dower.*

Widow's for unpa

108. (1) Where a Mussulman husband dies without paying the 'mahr,' his widow is a creditor of his estate for her 'mahr,' and until it is paid, she has the right, as such creditor, to hold the

possession.

[1] The opinion of Abu Hanifa and a minority of Shiah authorities is that the wife's option is not determined by her husband having sexual intercourse with her. Some of the earlier decisions of the Allahabad High Court were in accordance with this view: Macnaghten, "Moohummudan Law," 281-282 (case 31) *Abdul Shukkoar* v. *Rahee-moonnessa* (1873), 6 N. W., *Eidan* v. *Mazhar Husain* (1879), 1 All. 483, and *Wilayat Husain* v. *Allah Rakhi* (1880) 2 All. 821. The two last cases were expressly overruled in *Abdul Kadir* v. *Salima* (1886), 8 All. 149 (F.B.).

[2] Hed. 54.

[3] *Sharh Lum'a*, Vol I. p. 96 (8th); the *Sharh* (commentary) is enclosed in [ ].

[1] *Ib.* p 97; similarly the *Jami'-ush-Shittat*, p. 443 explaining, "in contracts which involve exchange, refusal of possession is allowed on both sides till the payment of the return."

[5] Bail. I. 94-95, 108, 110, II. 78. The reasoning of Mahmood J. and the other judges in the cases referred to above (p. 118 *n.* 8) tends to show that Abu Yusuf's opinion would not be followed in India.

SECTION 108 property of her deceased husband, of which she has lawfully and without force or fraud obtained possession.[1]

(2) *Semble,* such possession must initially be obtained by the widow on the ground of her claim for her dower debt.[2]

obtained.

(3) The widow's possession of her husband's property is lawful, and in lieu of her dower, where the dower contract provides for it, or she has been put into such possession by her husband in his lifetime, or by his heirs after his death.

(4) Where the widow has been in possession of her husband's property during his lifetime, and has continued so for some time after his death, it will be presumed that her possession has been lawfully obtained and is in lieu of her dower.

and of its being in lieu of dower.

Illustrations.

(1) A Mussalman died leaving a widow (appellant) and other heirs. On the death of her husband the widow applied to the Collector to have her name put in the register, claiming that she was in possession of the property "by right of inheritance and also on account of her dower."[3] Her application was opposed by the others, but was granted by the Collector, and she continued in possession. The other heirs took no steps to disturb the widow in her possession for nearly ten years, after which cross suits were filed, by the widow to establish her right to dower and to hold the estate to secure the payment of her deferred dower, and by the other heirs to eject the widow and obtain possession of their shares in the estate. *Held* (*a*) The claim of the widow to hold the property to satisfy her dower, cannot be founded upon an original hypothecation of the estate for her dower: for such a right does not arise by the Muhammadan law (i) as a consequence of the gift of dower, nor (ii) was there any agreement on the part of the husband to pledge his estate for the dower; but (*b*) the widow, having obtained actual and lawful possession of the estates, *under a claim to hold them* as heir, *and for her dower*, she was entitled to retain possession until her dower is satisfied.[3]

(2) A Muhammadan died, leaving two widows, and other heirs. The widows, who were living in the house of the deceased with him, continued, after his death, in undisturbed possession of the house, for more than a year. They resisted a suit for possession by partition of the property, brought by the other heirs, on the ground that they were in possession for dower, which was proved to be due. *Held*, that in this case,

Bebee Bachun v. (*Sheikh*) *Hamid Hossein* (1871) 14 Moo. I. A. 377, 384; 10 Ben. L. R. 41; 17 W. R. 11. *Bibi Tajim* v. (*Syed*) *Wahed Ali* (1873) 22 W. R. 118. *Sahebjan Bewa* v. *Ansaruddin* (1911) 38 Cal. 475.

[2] See illustrations and comment on this section.

[3] (*Mussumat*) *Bebee Bachun* v. (*Sheikh*) *Hamid Hossein* (1871) 14 Moo. I. A. 377, 382-383. Their Lordships added, "It is not necessary to say whether the right of the widow in possession is a lien in the strict sense of the term though so stated in *Ahmed Husein* v. *Khodeja*. 10, W. R. 369."

the presumption was that the widows were let into possession by their husband in lieu of dower, or that they obtained such possession, after the death of the husband, with the consent, or by the acquiescence, of the heirs.[1]

(3) The mother and sister of a deceased Mussulman, as his heirs, sued his widows for a declaration of their title as such heirs, and for possession of their shares in the estate. The plaintiffs offered to pay a proportionate part of the dower debt found to exist in favour of the widow. The High Court held, on the evidence, that neither of the widows was in possession of the property at the death of the deceased, but one of them seized it in order to have a lien on it, there being no evidence that the widow in possession had obtained it either by contract with her husband, or the consent of the other heirs. The widow relied on proceedings in a revenue court, in which, adversely to the other heirs, she had been placed in possession of the properties in lieu of her dower.

Held, that the widow could not give herself a lien, by taking possession of the estate, without the consent or authority of the persons entitled, and that in the circumstances it was not shown that her possession was lawfully obtained so as to give her a lien.[2]

Amanat-un-nissa v. Bashir-un-nissa considered.

The two cases which are given as illustrations (2) and (3) were decided by the same judges, but it has been questioned whether they are consistent with each other, and the judgment in 'Amanat-un-nissa *v.* Bashir-un-nissa'[2] has been subjected to severe criticism[3] on the ground that the decisions on which it purports to be based do not contain the propositions in support of which they are cited,[4] or that they have been overruled, or discredited.[5] While some expressions[6] in the judgment referred to may be admitted to be open to criticism, it seems difficult to say that the decision could have been otherwise. For the plaintiffs sued the widow for their shares in the estate, and offered to pay her a proportionate part of her dower debt. Under such circumstances it is obvious that the widow cannot resist the claim of the heirs: if it were decided otherwise, her rights would not be

Facts of the case

[1] *Muhammad Karim-ullah Khan* v. *Amani Khan* (1883) 6 All. 50, the question really decided by the judges was that the right to dower is personal to the widow, and does not pass to a purchaser of the estate; and yet the last two cases are cited by Edge C. J. as "supporting the view" that they took.

(1895) 17 All. 93. Edge C. J and Banerjee J. upholding Burkitt J. (1894) 16 All. 225, though not agreeing with his statement that the widow does not require the permission of the heirs for lawfully entering into possession (p. 227).

[2] *Amanat-un-nissa* v. *Bashirun-nissa* (1894) 17 All. 77 (Edge C. J. and Banerjee J.)

[3] Sir R. Wilson's "Anglo Muhammadan Law," 225 under s. 162.

[4] I.e. (*a*) (*Mussumat*) *Wahidunnissa* v. *Shubrattan* (1870). 6 Ben. L. R. 54, to which Edge C. J. referred as leading him and his colleague to the conclusion at which they arrived, merely decides that the widow cannot follow the property in the hands of a *bona fide* alienee. (*b*) In (*Bibee*) *Mehran* v. (*Mussummat*) *Kubeerun* (1870) 13 W. R. 49, 6 Ben. L. R. 60 *note*, the plaintiff was silent as to whether she had ever had possession since her husband's death. (*c*) In *Ali Muhammad Khan* v. *Azizullah* (*Mussumat*) *Meeran* v. (*Mussumat*) *Najeebun* (1867) 2 Agra 335, which is not followed by the very judges who decided it. See (*Syud*) *Imdad Hossein* v. *Musumat Hosseini Buksh* (1870) 2 N. W. P. 327.

[5] See the next two footnotes. The expressions referred to consist merely of a reference *en bloc* to a number of cases, the relevance of some of which is not at once apparent. It may be that the cases had been discussed in argument, and in delivering judgment the judges did not cover the same ground over again by a detailed reference to the facts and decisions of each case that was cited and commented upon.

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Modes in which widow may possess- in lieu of dower; 1. contract. 2. consent,

analogous to those of other creditors, but of a far more extended kind.[1] Next is to be considered whether the opinion is unsound, which was expressed by Edge C. J., viz., that unless the widow comes in under a contract with her husband, or by the consent or acquiescence of the heirs, her possession is unlawful.[2] Before this can be affirmed it is necessary to examine the other means by which it can be suggested that the widow may claim to have obtained lawful possession. If she takes possession against the consent of the heirs, in the sense of doing so by force, it need hardly be stated that her act could not be sustained.[3] Barring the two alternatives referred to by Edge C. J, viz., by consent of either the deceased owner or his representatives after his death, there is one other mode in which the widow can claim to get into possession, viz. by claiming to have a right to be put into possession "in due course of law." To such a right, it is admitted,[4] that neither she nor any other unsecured creditor of the deceased, can lay claim. Even if she did claim it, she would have to apply to the Civil court for being put into possession. It is obvious that the decision on such a point by the Revenue courts, on which 'Amanat-un-nissa' relied[5], could not have any force in a court of law; ordinarily the Revenue courts would refer the parties to the Civil courts when such rights are in dispute. It is submitted, therefore, that on principle the widow's rights could not have been laid down in terms other or wider than those which the Allahabad High Court has employed. Indeed, when it is borne in mind how easily the claim of a lien for dower may be raised against the ordinary creditors of a deceased person, by collusion between the widow and other heirs, it seems a great concession to lay down that possession, however obtained in the lifetime of the husband, will be presumed, unless the contrary is shown, to be possession obtained in lieu of dower.

Third alternative.

On principle, Possession cannot be obtained otherwise.

Presumption as to lawfulness of her possession and as to its nature.

[1] See the Chapter on Administration; cf. *Jafri Begum* v. *Amir Muhammad Khan* (1885) 7 All. 822, *Ambashanker Harparsad* v. (*Sayad*) *Ali Rasul* (1894) 19 Bom. 273, and other cases where the creditor is the plaintiff and the heirs resist his claim on the ground that they do not represent the estate. In those cases it is admitted that the heirs are entitled to their shares subject to payment by them of proportionate parts of the debts.

[2] This proposition is not so singular and devoid of authority as Sir R Wilson seems to imply. Thus (1) Macpherson and Jackson JJ. in (*Meer*) *Meher Ally* v. (*Mussumut*) *Amanee* (1869) 11 W. R. 212, say that "the contract itself does not give the woman a lien on her husband's property" (p. 213); then, after carefully pointing out that the widow is in exactly the same position as other creditors, they say "it is not intended in any degree to lay down that a woman has a lien on her husband's property in the ordinary and legal sense of the term lien." (2) This case is followed by Phear and Jackson JJ. in (*Bibee*) *Mehrun* v. (*Mussamut*) *Kubeerun* (1869) 13 W. R. 49, who again point out that (*a*) there is no lien by the law itself, (*b*) that no contract was set up, (*c*) that "the heirs never did allow her to take possession." (3) Again, Straight O. C. J. and Tyrrel J. say "except when there is a distinct agreement to that effect there is no presumption of hypothecation of his estate for her dower:" *Ali Muhammad Khan* v. *Azizullah Khan* (1883) 6 All. 50, 51. (4) Finally Mahmood J. in *Ajuba Begum* v. *Nazir Ahmad* (1890) All. W. N. (Vol. X) 115, held that though the widow purported to convey the whole moiety of the house belonging to her husband, she passed only the share she inherited, inasmuch as she was never placed in possession in lieu of dower, by the other heirs, (see p 116, first column, last sentence; and penultimate sentence of the judgment, p. 117). See reference to this case below, pp. 126,127, s. 115.

[3] The heirs could summarily recover possession under the Specific Relief Act. s. 9.

[4] (*Bibee*) *Selamut* v. (*Shaikh*) *Mowla Buksh* (1866) 5 W. R. 194. (Trover and Glover JJ.) The headnote exactly covers this point but the judgment is meagrely reported, and, as reported, it does not seem to carry much weight.

[5] Cf. *ill*, (3) s. 108 p. 121 above.

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The presumption is artificial.

Whether this presumption is strong or otherwise, must, it is obvious, depend a great deal on the circumstances of the case. Apart from the subtleties of the law, the possession of a great portion of the husband's property by the wife, would be ordinarily attributed to her being in management of his household, and as really held on his behalf. At any rate, the last idea that would occur to most persons, would be that the house, in which the husband and wife are staying, and that the articles, which are in the immediate possession of the wife, but which are in the use of both, are in the possession of the wife in lieu of her dower. For that would imply that in the case of a dissolution of the marriage (either by the death of wife or by divorce) the husband would have to vacate the premises, and that the wife or her heirs could keep him out of possession, until the dower were paid up. Considered in this light, no one would question the necessity of producing strong evidence to establish the position, that in the lifetime of the husband, he had placed his property in the possession of his wife in lieu of dower. If the dower is small compared to his means, the husband would pay it off ; if it is large, he would not voluntarily place this additional burden and risk on himself.

Injunctions in relating to

If this reasoning is correct, the presumption that the change in the nature of possession takes place [1] 'ipso facto' on the husband's death can only arise by interpreting the law very favourably to the widow—a course with which no Mussulman (except the immediate parties in an action, opposed to the widow) will find fault ; for though she is not, like the minor, expressly and formally under the special protection of the courts of law, her rights, like those of orphans, are specifically safeguarded in the Quran, with strong injunctions not to be unjust or hard with her.[2]

Widow must get into possession with of heirs.

Having dealt with the principles on which the widow's lien is based—principles which apply just as much to the widow as to the other creditors [3] of the deceased, but which come into prominence because the widow's rights are more directly governed by the Muhammadan law, than by the general law of India, and because she has many facilities for getting into possession that are not available to the other creditors ; it must now be considered whether there is any authority for the proposition of Burkitt J. that the widow does not require the permission of the heirs for lawfully getting into possession.[4] He cites the Privy Council decision [5] which is given as illustration (1) to this section, and says that though when the widows obtained mutation of their names they did not in the case before him "expressly claim that any dower was due to them," yet in his opinion this fact "did not affect the question" nor distinguish it from the Privy Council decision referred to.[5] With all deference, it may be pointed out that the Privy Council take pains to bring out the fact that the widow entered into possession under her dower claim, and that they do so every time they have

Possession mus with for dower.

[1] Some such change must take place otherwise the wife has no lien Cf. Contract Act, ss. 170, 171.

[2] Quran, Sura IV. vv. 1, 3, 23 ; II. v. 240.

[3] It will be observed in the Chapter dealing with administration that the rights of the creditors in the estate of a deceased Mussulman have mostly been considered by the Courts, in cases where the widow's right to her unpaid dower has been concerned. And it has been assumed, it is submitted rightly, that her rights are the same as those of the other creditors.

[4] *Amani Begam* v. *Muhammad Karimullah* (1894) 16 All. 225, 227.

[5] (1871) 14 Moo. I. A. 377.

SECTION 108 occasion to refer to her possession.[1] Can it then be supposed that the fact so referred to did not, in their opinion, affect the question? The next point that the learned judge takes up is, that consent of the heirs could not be necessary for lawful possession, inasmuch as in the case before the Privy Council, the other heirs had also opposed the application for mutation of names ; but he forgets that in the said case [1] the widow in her application to the Collector had claimed that she was in possession, and that after the Collector had decided in favour of the widow, ten years had elapsed before the decision of the Collector was questioned, from which circumstance, and from the other contentions in the case, the Privy Council may well have drawn the conclusion that the opposition of the other heirs to the widow remaining in possession had been withdrawn, and that the heirs, having failed in their contention that the dower she claimed was not due, had acquiesced in a state of affairs which perhaps they did not feel themselves in a position lawfully to contest.

'Ameer-oon Nissa v. Moorad-oon

Finally, the case of 'Ameer-oon-Nissa *v.* Moorad-oon-Nissa' [2] has been referred to on the ground that "there the widow did not profess to have been put into possession in her husband's lifetime, and certainly had not the consent of her co-heir, who did not even admit that she had been the wife of the deceased." But the only questions which the Privy Council decided in this case, were that the marriage and deed of dower were proved, that the claim for dower was not barred, and that the Sadr Diwani Court was not wrong in dismissing the suit as framed, but that the dismissal should be without prejudice to the heirs' rights to bring a suit for an account and administration of the deceased's estate, consistent with the establishment of the marriage and the deed of dower [3]

Widow bound to account for profits ; and entitled to interest.

109. Where a Mussulman widow is in possession of the property of her deceased husband in lieu of her dower,

(1) she is under the liability to account to the heirs of the deceased for the profits received by her [4] ; and

(2) she is herself entitled to charge interest on the dower due to her, and to set it off against the said profits.[5]

Lien not affected by doubt as to amount of 'mahr.'

110. The widow's lien over her husband's property for her unpaid dower is not affected by the fact that the amount of her dower is not ascertained.[6]

[1] 14 Moo. I. A. at p. 382 (para 5), p. 383 (para. 1), p. 384 (para. 1).

[2] (1855) 6 Moo. I. A. 211.

[3] *Ib.* pp. 225-226, 230-231, See *ib.* p. 224, where it is said "the lady who lived with the deceased appears to have entered, at his death, into possession of his property in the neighbourhood of the place where he died, and she was treated by the local authorities as administratrix." Her claim was that the deed of dower charged the whole estate of the husband with the payment of the dower, but it did not impignorate his estate, to secure the sum.

[4] (*Bebee*) *Bachun* v. (*Shaikh*) *Hamid* (1871) 14 Moo. I. A. 377.

[5] *Hamira* v. *Zubaida* (1910) 33 All. 182. (F. B.)

[6] *Ahmed Hossein* v. (*Mussumat*) *Khodeja* (1869) 10 W. R. 369, 3. Ben. L. R. (A. C.) 28 (Peacock C. J. and Mitter J.) *Balund Khan* v. (*Musumat*) *Janee* (1870) 2 N. W. P. 319. Cf. *Azizullah Khan* v. *Ahmed Ali Khan* (1885) 7 All. 353.

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The heirs ought, in a case where the dower is not ascertained, to bring a suit for an account of what is due to the widow for dower, and pray that upon satisfaction of that amount they be put into possession of their shares of the inheritance,[1] but they are "not entitled to recover possession and mesne profits so long as any portion of the dower is due."[2]

Lien for dower does not take away right to sue for it.

111. The widow, by being in possession of the property of her deceased husband in lieu of her dower, does not lose her right to sue for her 'mahr,' provided she offers to surrender possession of the said property.[3]

Widow's claim for dower ranks pari passu with claims of other creditors.

112. (1) The widow's claim for dower is a debt due from the estate of the deceased, and ranks equally and rateably[4] with the claims of other creditors.[5]

(2) Where the widow is not in possession of the property of the deceased, the other heirs may transfer it, and the widow has then no right to follow it in the hands of transferees in good faith for consideration.[6]

Widow not adverse to other heirs.

113. The widow holding the property in lieu of her unpaid dower does not, for purposes of the limitation of suits, hold it adversely to the other heirs;[7] nor does limitation run against her or her heir's claim for deferred dower under the Limitation Act, article 104, during the period when the widow is in lawful possession of her husband's property in lieu of dower.[8]

Illustration.

X put his wife *W* in possession of his property in lieu of dower, and then died in 1895. *W* continued in possession till her death, after which X's other heirs, H and Hh, took possession, in 1906, of three-fourths of X's property, and obtained a decree entitling them to pre-empt the other one-fourth share. *W*'s heirs, Wh and Whh, filed a suit against H and Hh in 1907 for *W*'s unpaid dower out of X's estate. *Held*, that the suit was not barred as the cause of action arose only in 1906 when the wrongful dispossession took place.[9]

[1] (*Sayad*) *Umed Ali* v. (*Mussamut*) *Ham* (1869) 3 Ben. L. R. (A. C.) 175.

[2] See p. 124, *note* 6 above.

[3] See next footnote; *Ghulam Alli* v. *Saghir-ul-Nissa Bibi* (1901) 23 All. 432. The proviso appears in the last three lines of the judgment, at p. 433.

[4] Cf Probate and Administration Act, s. 101.

[5] "It has no special charge or preference over the other creditors." (*Meer*) *Meher Ally* v. (*Musumat*) *Amance* (1869) 11 W. R. 212, 213. (*Syud*) *Imdad Hossein* v. (*Musumat*) *Hosseini Buksh* (1870) 2 N. W. P. 327, 382. *Ameer Ammal* v. *Sankara Narayanan Chetty* (1901) 25 Mad. 65, where it was held that the lien with possession "can give her no right as against a purchaser in execution of a decree for sale passed on a mortgage."

[6] *Wahidunnissa* v. *Shubrattan* (1870) 6 Ben. L. R. 54, 68, approved by P. C. *Bazayet Hossein* v. *Doolt Chand* (1878) 4 Cal. 402, 408.

[7] (*Beebee*) *Azeemun* v. *Asgur Ali* (1867) 2 Agra, 367. *Mahomed Ussud-Oolah Khan* v. (*Mussumat*) *Ghasheea Beebee* (1866) 1 A. 150.

[8] *Hamidullah Khan* v. *Najjo* (1911) 33 All.

SECTION 114

Widow's lien does not give power to alienate or charge property.

114. *The widow, who holds the property of her deceased husband in lieu of her unpaid dower, is not entitled to alienate or charge it in derogation of the rights of the other heirs of her husband; and the said heirs may avoid any transfers of such property purported to be made by her.*[1]

Illustration.

X died possessed of and entitled to a moiety of a house. His widow *W* claims to be in possession of the moiety in lieu of dower. *W* jointly with the owner of the other moiety of the house purported to sell the whole of it to P. It was found on the facts that *W* had not entered into possession in lieu of dower with the consent of the other heirs of X. *Held*, that *W* could only have transferred to P her own rights by inheritance in X's property, and could not have passed the entire rights of her deceased husband, even if she had been validly possessed of the moiety of the house in lieu of dower.[2]

Quaere, whether the lien for unpaid dower devolves on widow's heirs.

115. *Where the widow, having been in possession of her deceased husband's property in lieu of her unpaid dower, dies without having the dower paid to her, there are conflicting decisions whether her heirs are entitled to succeed to her right of possession in the said property.*[3]

Conflicting decisions.

It is difficult to imagine that the judgment of Edge C. J. referred to in the footnote [4] is correctly reported. There are two misprints on p. 263; one in the footnote in which 16 All. is printed for 6 All. and the other making the last sentence on that page difficult to understand. As reported, the judgment can hardly carry any weight. In the first place the decision of Mahmood J. which is cited by the Chief Justice,[5] is not to the effect that the widow had acquired a lien, as the Chief Justice is reported to have said, but quite the contrary: Mahmood J. says that the widow was "never placed in possession of the house, which she sold in its entirety, in lieu of dower, by the other heirs of her husband, and that, therefore, whatever the amount of her dower may be, all that she could convey and pass . . . . were her rights and interests only by inheritance from her husband."[6] Again, Mahmood J. expressly states that

Mahmood J. distinguishes rights of widow's heirs from those of purchasers from her.

[1] *Mahomed Ussud-Oollah Khan* v. *Mussumat Ghashcea Beebee* (1866) 1 A. 150, (gift of property avoided to the extent of plaintiffs' shares therein). (*Beebee*) *Azeemun* v. *Asgur Ali* (1867) 2 A. 367, (alienation set aside). *Chuhi Bibi* v. *Shams-un-Nissa Bibi* (1894) 17 All. 19, (mortgage set aside). Of course, the heirs can only set aside the acts of the widow, in so far as such acts refer to their own rights in the estate. In all the cases noted above the plaintiffs sued for possession, which was not decreed. *Ali Muhammad Khan* v. *Azizullah Khan* (1883) 6 All. 50 (purchaser from the widow not allowed to plead non-payment of dower to widow, as against the heirs of the husband).

[2] *Ajuba Begum* v. *Nazir Ahmed* (1890) All. W. N. (Vol. X) 115 Mahmood J. See comment s. 115 below.

[3] In *Azizullah Khan* v. *Ahmad Ali Khan* (1885) 7 All. 353, Oldfield and Mahmood JJ. answered the question in the affirmative. In *Hadi Ali* v. *Akbar Ali* (1898) 20 All. 262, Edge C. J. and Burkitt J. answered it in the negative, upholding Banerjee J.

[4] *Hadi Ali* v. *Akbari Ali* (1898) 20 All. 262.

[5] *Ajuba Begam* v. *Nazir Ahmad* (1890) All W. N. (Vol. X.) 115.

[6] (1890) All. W. N. 116, last sentence in the first column. It may be stated that the husband was entitled to only a moiety of the house, and the owner of the other moiety joined the widow in selling the whole of it, so that when Mahmood J. speaks of the widow selling the house in its entirety, he must be taken to refer to the entire interest of her husband in the house.

he adhered to his previous decision [1] that the heirs upon "the death of a Muhammadan widow, who was in possession in lieu of dower, succeed to her estate, including her claim to dower," and says "that the position of such heirs was vastly distinguishable from the position of a purchaser from her of an isolated piece of immoveable property."[2] And yet Edge C. J. is reported to have said that Mahmood J.'s decision was in favour of the view which the Chief Justice himself took, viz. that the widow's lien is a purely personal right and does not survive to the heirs. SECTION 115

The other case which the Chief Justice cites [3] as supporting his view is a decision on the point involved in the last section and is noted there. It does not deal with the rights of the widow's heirs, but of a purchaser from her.

Quaere, whether the distinction is well founded

The question therefore resolves itself not so much into a choice between the decision of Edge C. J. and Mahmood J.,[4] but rather whether the two decisions of Mahmood J. are consistent with each other; in other words, whether he is correct in holding that the position, on the one hand, of purchasers from the widow, and, on the other hand, of the heirs of the widow, are so distinguishable that quite different rules of law should prevail regarding the rights acquired by each.

§ 5.—Presumptions as to Amount and Prompt Portion of Dower.

The proper dower standard of probability.

116. When a dispute arises between the parties to a marriage at any time during the existence of the marriage, regarding the amount of the dower, or its subject matter, the proper dower is to be assumed as the standard of probability.[5]

Whole shall be presumed to be prompt.

117. (1) In the absence of any agreement and custom to the contrary, the whole of the dower will be presumed to be prompt.

(2) In places and amongst classes of people where there is a custom that part only of the dower is promptly payable, and part is deferred, such a portion only of the dower will be considered to be promptly payable, as is customarily made so payable, in the case of women in similar circumstances, and with similar dowers.[6]

(3) *Quaere*, whether it will be presumed that by general custom in India (except in Madras) part only of the dower is promptly payable.

'Fatawa Qazi Khan' on promptness of dower.

The 'Fatawa 'Alamgiri'[6] cites the 'Fatawa Qazi Khan' on the point covered by the second sub-section above. The passage referred to is probably that which is to be found at Vol. I. p. 175, of the latter work, which may

[1] *Azizullah Khan* v. *Ahmad Ali Khan* (1885) 7 All. 353.
[2] (1890) All. W. N. 116 (col. ii. para. 2).
[3] *Ali Muhammad Khan* v. *Azizullah Khan* (1883) 6 All. 50.
[4] Edge C. J.'s decision is too badly reported in 20 All. 262 to be of any use.
[5] Bail. I. 130, cf. pp. 47, 48 above.
[6] Bail I. 126-127.

SECTION 117 be translated as follows: "Where a woman marries, and a certain amount of dower is fixed, then she has the option of refusing herself, in order to have the whole of her dower paid; but if he be in a place where the custom is that he should pay a portion promptly, while the balance is left deferred in his charge, till the time of divorce or death (as is the case in our country), then she is allowed to refuse herself, in order to get the prompt portion, which is called 'dast-paiman'[1] in Persian, and he is not entitled to demand the whole of the dower. If they explain (or specify) the amount of the prompt portion, that portion should be paid promptly, but if nothing is explained, then consideration should be given to the woman, and the dower which is mentioned in the contract, in determining what portion ought to be considered prompt in the case of such a woman, from such a dower, and that portion should be paid promptly."

Is the whole or only part of dower to be presumed to be prompt.

Macnaghten's view: The whole prompt

The question whether the whole or only a part of the dower must be presumed to be promptly payable in India has been the cause of some difference of opinion in the courts. The Privy Council[2] have approved of a statement of Macnaghten's to the effect that "in all contracts . . . if it be not expressly stipulated that the payment of the consideration shall be deferred, it must be paid immediately as a matter of course, and that dower is the consideration of marriage."[3] This statement of Macnaghten is dissented from by Baillie in a learned note,[4] which does not seem to have been brought to the notice of the Privy Council. They certainly do not refer to it. Baillie says that the amount which has to be promptly paid must be determined by a reference to the portion that is customarily made prompt in the case of "like women."[5] Now, the reference to custom in this connection must not be taken to have the same effect in Muhammadan law as it has ordinarily in English law. For when a custom is mentioned in English law, it is something different from the general law, and it must be proved by evidence, (unless it has been so often proved as to be capable of being judicially noticed)—whereas when a custom is referred to in the original texts of authority[6] on Muhammadan law, and recognised as being validly in existence, such a "custom" by this very reference becomes a part of the general Muhammadan law as much as any other proposition contained in the texts, and by being so recognised, it becomes capable of being judicially noticed. It has been pointed out before[6] that a great portion of the Muhammadan law is based on customs which were prevalent in Arabia or Persia at the time when the authoritative books on the law were first written. They are not spoken of as customs any more, but as general Muhammadan law.

Baillie's view "properly prompt portion."

[1] On *dast-paiman* see Bail. 1. 144-145.

[2] (*Mirza*) *Bedar Bukht Mohammad Ali Khan Bahadoor* v. (*Mirza*) *Khurrum Bukht Yahya Ali Khan Bahadoor* (1873) 19 W. R. 315 (P.C.). The points taken before the Privy Council were three: (1) whether the *mahr-namah* produced in the case was genuine, (2) whether, if it was genuine, the *mahr* had not been satisfied, (3) whether in any event (the whole of) the *mahr* was not to be considered as deferred, till after the death of the husband, and not payable in his lifetime, even though the wife had already died.

[3] "Moohummadan Law," 279 *n*, see also *ib*, 59 (i.e.) Chapter VII. para. 22.

[4] Bail. 1. 126-127 *n*, referring to *Durr-ul-Mukhtar*, *Sharh-i-Viqayah*, and other original texts.

[5] *Mu'ajjal-ul-mithl* in Arabic, which may be rendered "properly prompt" on the analogy of "proper dower," "proper" being taken to signify that which is done in the case of women of the same family and status.

[6] See pp. 7-9, 18-20 above.

SECTION 117
Effect of the law as stated

Hence the statement in Baillie[1] must be interpreted to mean that dower in the absence of a contract to the contrary, must be presumed in law to be prompt as to only part thereof, and that the practice of other ladies of the bride's family is to be the guide for determining what portion is to be considered prompt. As their lordships' judgment contains no reference to Baillie, it is difficult to consider it as a decision to the effect that the law as laid down in the books of authority is more correctly represented by Macnaghten than by Baillie. It should be pointed out, however, that their lordships refer to the fact[2] that there was evidence in the case of very large dowers to other women, and apparently the whole of such dowers were proved to be promptly payable. At the same time it must be noted that their lordships were bound by "the law and practice of Oudh" to cut down even the 'mahr-ul-mithl' (or proper dower) to a "reasonable" dower; and by their decision they ordered this to be done; while again, there was no contention before their lordships that only a part of the dower was payable promptly, and the rest deferred—the contention was on the one hand that the whole was deferred, and on the other that the whole was prompt.[3]

Evidence as to dowers of other ladies.

Whichever view of the law is taken to be correct, in most parts of British India there is no such difficulty in the way of proving a custom even opposed to strict Muhammadan law, as there might be in countries governed by Muhammadan rulers. But, as has been already explained, the effect of the law as represented by Baillie is that there is no necessity for any special custom to be proved, and that the Court will itself order that only a part of the 'mahr' should be promptly payable, and that that part should be determined by a reference to the practice prevailing amongst other ladies of the same social position. It is assumed, no doubt, that evidence is produced by those who assert that part only of the dower is promptly payable, in order to show what part is so payable, and what part is deferred. This evidence would consist of the proof of the dower contracts relating to the marriage of other ladies of the family to which the wife belonged. Where no such evidence has been given, those Courts in India that have accepted Baillie's view have been inclined to order that a third of the 'mahr' should be promptly paid and the rest be deferred.[4]

Conflict of decisions.

The decisions in India conflict with each other, but the law as stated in s. 117 attempts to evolve a general rule, consistent with most, if not all, the decided cases.

The decisions which hold that the whole 'mahr' is presumed to be prompt.

In 'Tadiya *v.* Hasanebiyari,'[5] the Court held that the whole of the dower was to be presumed to be prompt, but it was not contended that part only was prompt, and so the question did not arise what part was prompt. This case was followed by a Full Bench of the Madras High Court,[6] who expressly preferred the ruling contained in it and the statement of Macnaghten to that of Baillie. The view of the referring Judges (White C. J. and Moore J.) was

[1] Bail. I. 92, 126-127, and Bail. I. 127·*n*.

[2] 19 W. R. at p. 317.

[3] There is a passing reference by Mahmood J. to this decision in *Abdul Kadir* v. *Salima* (1886), 8 All. 149, 158, but it does not carry us further.

[4] See cases noted, next page *nn* 2, 4, 6,

[5] (1870) 6 Mad. H. C. Rep. p. 9.

[6] *Masthan Sahib* v. *Assan Bivi Ammal* (1900) 23 Mad. 371 (F. B.). The order of reference carefully collates all the authorities: pp. 372-74.

SECTION 117 evidently opposed to that adopted by Davis, Benson, and Boddam JJ. who formed the Full Bench. See also 'Husain Khan *v.* Ghulam Khatun'[1] which is more fully referred to below.

Custom that a third only to be prompt referred to in S. D. A. decision.

In an old decision[2] the wife claimed her dower alleging that the whole of it was prompt, which the husband admitted; and this fact, the Court held, showed collusion: "Since it is never customary for the whole of so large a dower to be 'prompt' or 'payable on demand,' nor do the witnesses brought forward . . . . depose to its being so. Moreover, by the 'futwa' now obtained from the law officer, it appears that while her husband was alive, Imdadee Begum could not claim the whole of her dower as exigible, for by the Muhomedan law where (as in this case) no specific amount is proved to have been expressly declared as exigible, one-third of the whole must be considered as exigible or payable on demand, '*mowujjul*,'[3] and two-thirds '*deferrable*' or payable at a future time 'mowujjul.'" The last-mentioned case was referred to with approval in Bombay,[4] after the Court had cited a passage from Baillie;[5] and the lower Court's order that one-third only of the dower could be considered prompt, was not disturbed.

Followed in Bombay.

Cases where only part is presumed to be prompt.

In three cases in Allahabad, however,[6] the judges followed more closely the rule as laid down in Baillie, viz. they presumed that only part of the dower was prompt, and said that it was a question for the Court in its discretion to decide how much should be prompt.

Custom set up that whole deferred.

In the latest reported case[1] on the point the husband set up, but could not prove, a custom that the dower could not be claimed except in the case of a divorce, or the death of the husband; and the Court consequently held that the whole of the dower was prompt.

Analogy of 'khul'.'

It may be noted that in the absence of express agreement, the whole of the consideration for a 'khul'' (separation by agreement) is promptly payable.[7] The consideration for a 'khul'' is the counterpart of, and closely connected with, 'mahr'; the latter being frequently spoken of as the consideration for marriage.[8]

[1] *Husain Khan* v. *Gulam Khatun* (1911) 13 Bom. L. R. 511.

[2] *Muriam-oon-Nissa Begum* v. *Imdadee Begum* (1848) 3. S.D.A. (N.W.P.) 185 Morley's Dig. N.S. I. 182. (per G. Thomson Judge, sitting singly).

[3] *Sic* for *mu'ajjal*.

[4] *Fatma Bibi* v. *Sadrudin valad Nizamuddin* (1865) 2 Bom. H.C.R. 291 (Couch, Tucker and Warden JJ.).

[5] Bail I. 126.

[6] *Eidan* v. *Mazhar Husain* (1877) 1 All. 483. *Taufik-Un-Nissa* v. *Ghulam Kambar*; *ib.* p. 506. *Habibunnissa* v. *Nizamuddin* decided 31st July 1877 (*unreported*) referred to All. 507. In the first of these cases, as the wife was a prostitute, and came of a family of prostitutes, the High Court held that the lower court had exercised its discretion wisely in directing only one-fifth prompt. In the second one-third was declared prompt.

[7] See below s. 181.

[8] See below ss. 176 *et seq*.

CHAPTER V

DIVORCE AND DISSOLUTIONS OF MARRIAGE.

§ 1.—Preliminary.

118. Marriage may be dissolved,[1] in the lifetime of the parties thereto, either by act of the husband or wife, or by mutual agreement, or by operation of law, or by a judicial order of separation[2]; or it may be annulled.[3]

SECTION 118
Modes in which marriage may be dissolved or annulled.

Marriage may be dissolved in the lifetime of the husband and wife in any of the following ways: (1) By a 'talaq'[4] or divorce pronounced by the husband or by some person duly authorised by him in that behalf. (2) By 'ila,' i.e. the husband abstaining from connubial intercourse in accordance with an oath to that effect. (3) By 'zihar,' i.e. the husband comparing the wife to a person within the prohibited degrees on which the marriage may be dissolved by the Court on the application of the wife. (4) By 'li'án,' i.e., by the husband solemnly accusing the wife of adultery and on the wife denying the accusation and each respectively imprecating the curse of God, on the husband for falsely accusing, and on the wife for falsely denying the accusation; on which the marriage may be dissolved by the Court. (5) By 'khul'' or 'mubarat,' i.e. a mutual agreement between the husband and wife to dissolve the marriage (for some consideration proceeding from the wife to the husband). (6) By the cancellation of marriage on account of physical defects in the husband or wife. (7) By the Court separating the parties whose marriage is irregular, or has been avoided by a minor on attaining puberty, or a person of unsound mind on recovering reason.

Li'án.

'Khul'

Cancellation judicial separation.

The first, second, third, and sixth forms are by the act of the husband, the third and fourth, partly by act of husband (and wife) and partly by operation of law, the fifth by agreement, the seventh by the Court. They are treated

[1] For the sake of conforming with a familiar title this chapter is headed "divorce" in the sense of all dissolutions of marriage; but in the body of the chapter the word "divorce" is used (unless the subject or context indicates otherwise) to refer to one particular method of dissolving marriage. See s. 119. On the ambiguity of this word see *ante* pp. 81-82.

[2] Called *firqat* in Arabic.

[3] In Arabic *faskh*, i.e. annulment or cancellation. See ss. 191 sqq.

[4] Baillie calls a separation caused by the husband pronouncing certain appropriate words a repudiation and all other separations for causes originating from the husband "divorces." Bail. I. 204. The term "divorce" or *talaq* is used by the present author to refer to what Baillie calls "repudiation."

SECTION 118 in the following pages in such order that the forms in which the husband has greatest voice are mentioned first. The first and the last are probably the most important.

§ 2.—Dissolution of Marriage by 'Talaq' or Divorce.

(1) Form of 'Talaq.'

'Talaq' or divorce: pronouncement by husband.

119. A 'talaq' is a dissolution of marriage effected by the husband [1] making a pronouncement to the effect that the marriage [2] is dissolved, or that the relationship of husband and wife shall not any more subsist between them.

In this Chapter by the word "divorce" [3] (unless there is anything repugnant in the subject or context) 'talaq' is meant.

Form in which divorce must be pronounced.

120. (1) According to Sunni law no special form [4] of pronouncement is necessary for effecting a divorce.[5]

(2) According to Shiah law a divorce must be pronounced in the presence, and hearing, of two male witnesses, who are Muslims, and of approved probity, and in the following mode:

(*a*) by the husband uttering a form of words in the Arabic language meaning,[6] "Thou art," or "this person," or "such and such a person," "is divorced;" or

(*b*) by the husband replying to a question, in which case the question and reply must be in one of the following forms:

(i) *Question:* "Is thy wife divorced?" *Answer:* "Yes."

(ii) *Question:* "Hast thou divorced thy wife, or such a person?" *Answer:* "Yes." [7]

Provided that where a person is unable to pronounce the Arabic words (but not otherwise) he may use another language for expressing the same.[8]

[1] See footnote 4, on p 131.

[2] See s. 41, pp. 81-82 above.

[3] There is no divorce in a *mut'a* marriage. Bail. II. 110.

[4] *Ibrahim* v. *Syed Bibi* (1888) 12 Mad. 63. But the mere repetition of the word *talaq* three times without being addressed to anyone does not constitute a valid divorce. *Furzund Hossein* v. *Janu Bibee* (1878) 4 Cal. 588. In *Hamid Ali* v. *Imtiazan* (1878) 2 All. 71, the husband said, "thou art my cousin the daughter of my uncle if thou goest." The Urdu words are given in a footnote to the report. Evidence showed that the words were used to imply that no other relationship would subsist and they were held to constitute a valid pronouncement of divorce, and so the husband was not entitled to recover either his wife or his infant daughter.

[5] See *Furzund Hossein* v. *Janu Bibee* (1878) 4 Cal. 588 (*talaq* pronounced at a family council in the absence of the wife held ineffectual). Such a *talaq* may be effectual, where efforts are made to communicate it to the wife and she keeps out of the way: *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

[6] Cf. the necessity of using Arabic words in the case of marriage. It may be remarked that the Sunni law requires witnesses for marriage but not for divorce, and the Shiah law is exactly the reverse.

[7] Bail. II. 113-115.

[8] Bail. II. 113-114.

SECTION 120

The 'Shara'ya-ul-Islam' explains in the following words the strict requirements about the exact formula of divorce which is essential in Shiah law: "As a rule marriage being a chaste or protected condition, favoured by the law, and in its own nature, not admitting of being dissolved, it is necessary in taking off or removing the tie to adhere strictly to the terms of the legal permission."[1]

Reason for strictness of form.

With the quotation given above, the Prophet's saying may be compared, that "of all things that have been permitted by the law the worst is divorce."[2]

The Prophet's disapproval of divorce.

On the modes of pronouncing divorce see below ss. 136 sqq., pp. 139 sqq.

121. Pronouncements of divorce are either revocable[3] or irrevocable.[4] A revocable pronouncement of divorce does not dissolve the marriage until the period of 'iddat' has expired[5] and may, at any time during the said period, be revoked.[6] An irrevocable pronouncement of divorce dissolves the marriage immediately.

Revocable and irrevocable divorces.

Though a marriage can be dissolved by the mere pronouncement of 'talaq,' still, during the period of 'iddat' the husband has the power of revoking the pronouncement,[6] either by express words or by resuming the conjugal relationship. (See below ss. 150, 151, pp. 150, 151.) This power of preventing the pronouncement from becoming effectual, is distinct from the permission to re-marry after the pronouncement has had its effect.

Revocation of divorce distinguished from remarriage.

The first two pronouncements of 'talaq' are primarily always revocable, the third is irrevocable.[7] But the Sunni law permits a man (1) to pronounce three 'talaqs' in one breath; and (2) as an extension of this principle, it permits a pronouncement of divorce to be irrevocable, though the pronouncement does not consist of three 'talaqs,' nor is in the triple form, but is expressed to be irrevocable;[8] (3) finally, the Sunni law even permits a pronouncement of divorce to be interpreted as an irrevocable one, though in its terms it is neither triple nor irrevocable when there is something implying that it is such. The Shiah law does not permit any of these three courses.[9] What has just been said refers to 'talaqs' and not to other modes of dissolving a marriage, some of which are revocable, others not, as will appear hereafter.

First two pronouncements revocable; third irrevocable.

CLASSIFICATION OF DIVORCES.

Divorces are also classified as follows :—

I. Those that are pronounced in accordance with the 'sunna' or traditions: These are of two kinds :—

1. Those approved by the Prophet.

(1) 'ahsan,' the most approved,

(2) 'hasan,' the good or approved.

[1] Bail. II, 113.

[2] See *Mishcat-ul-Masabih* XIII. xii. 2 (Mathew II, 118) and A. Rahim's "Muhammadan Jurisprudence," 335-336, citing *Fathul Qadir*, III, 326.

[3] In Arabic *raj'i*.

[4] In Arabic, *bain*.

[5] In Shiah law the marriage may sometimes be said to subsist even beyond the period of *'iddat*. See s. 155 below.

[6] After the *'iddat* has expired, no divorce can be revoked, whether it was in its inception revocable or not. *Mozuffur Ali* v. *Kumeerunisa Bibee* (1864) W. R. 32. But the parties may immediately re-marry, unless there have been three divorces.

[7] Unless, of course, the pronouncement is in an irrevocable form.

[8] Bail I, 285, II, 120.

[9] See s. 142 below, pp. 141-144

SECTION 121

II. Those that are pronounced in a mode which is not recognised by the 'sunna' and are therefore called 'bada'i' or innovated, or heretical. These also are of two kinds :—

(1) 'raj'i' or revocable,

(2) 'ba'in' or irrevocable.

Not so approved.

The first of each class (viz. 'ahsan' and 'raj'i') are revocable, the other two are irrevocable.

Option or restriction in pronouncements of divorce void.

122. Where a divorce is pronounced in terms which provide that it is subject to an option in the husband to cancel it, or that its effect shall be restricted within certain places only, the option or restriction is void, and the divorce is absolute.[1]

Divorce pronounced under compulsion, or in state of intoxication.

123. According to Hanafi (but not according to Shafi'i or Shiah law) a pronouncement of divorce is effectual, though it has been made under coercion,[2] or without the intention of dissolving the marriage; provided that, according to all schools, it is of no effect if pronounced by a person who is involuntarily, or for a necessary purpose, in a state of intoxication.[3]

Quaere, whether the rule of Hanafi law mentioned in this section would be enforced in British India, or be held to be against public policy.[4]

Divorce under compulsion.

Under Hanafi law a divorce given under compulsion is valid, just as consent to a contract of marriage and a revocation of divorce given under compulsion are valid.[5]

Whether Court has authority to dissolve marriage without the husband's consent.

A question may arise whether this provision of law gives the Court power to compel a person to divorce a wife—a question, depending not only on Muhammadan law, but upon the adjective law of British India. The 'Fatawa 'Alamgiri' refers[6] to a divorce given under compulsion by the Sultan.[7]

In one reported case[7] the husband had "reluctantly consented" to a divorce (in the form of a 'khul'), on the District Judge's suggestion that

[1] Bail. I. 217.

[2] Three criteria are mentioned by the *Shara'ya-ul-Islam* for its being established that the divorce was by compulsion: There must be (1) a threat of a serious injury to the husband himself, or "to some one dear to him as his own soul, such as a father or a child"; (2) power in the coercer to carry out his threat; (3) strong apprehension of the threat being carried out in case of refusal to comply. Bail. II. 108. In *Furzund Hossein* v. *Janu Bibee* (1878) 4 Cal. 588, the father of the wife induced the husband to believe that the marriage was invalid, and the husband pronounced the word *talaq* three times. The High Court in its judgment stated that "if the formula for divorce prescribed by the law books had been really pronounced," there would "probably" have been a divorce, notwithstanding that false representations had been made to the husband. Cf. *Buzl-ul-Ruheem* v. *Lutcefutunnissa* (1861) 8 Moo. I. A. 378.

[3] Bail. I. 208-209, II. 107, 108; Hed. 75.

[4] In *Ibrahim Molla* v. *Enayet ur Ruhman* (1869) 12 W. R. 460, 4 Bom. L. R. (A.C.) 13, it was enforced; and see *Vadaka Vitil Ismal* v. *Odakel Beyakutti Umah* (1881) 3 Mad. 347. See also above s. 22 and comment

[5] There are inconsistent traditions of the Prophet, which are quoted in the comment on s. 22, *q.v.*

[6] Bail. I. 210.

[7] *Vadaka Vitil Ismal* v. *Odakel Beyakutti Umah* (1881) 3 Mad. 347. Both volumes of Baillie are cited in the judgment, and there is no indication as to whether the parties were Sunnis or Shiahs.

it would be best for him to divorce a wife who had shown her determined aversion to him, by suing for dissolution of the marriage on the ground of his impotence, and by alleging cruelty on his part. The High Court upheld the divorce, holding that the husband had freely consented to the District Judge's suggestion, though they add in the next sentence; "Under the Muhammadan law a *khoola* divorce is valid even though it may be given under compulsion." SECTION 123

(2) *Persons who may Pronounce Divorce or 'Talaq.'*

124. A divorce may be pronounced by the husband, provided he is of sound mind and has attained puberty.[1] **Husband of sound mind having attained puberty.**

Illustration.

The marriage of H and *W* has become unlawful by supervenient prohibition. H then purports to divorce *W*. Separation is incumbent on them but the divorce does not take effect, as H was in the eye of the law not *W's* husband at the time.[2]

125. A husband may lawfully authorise his wife,[3] or any other person, as his agent, to pronounce, or to revoke,[4] a divorce on his behalf.[5] **Divorce through agent.**

Explanation—A general agent for all the affairs of the husband has no authority to divorce his wife, unless the terms of his appointment expressly or impliedly include an authority to divorce.

Illustration.

H says to his wife *W*, "every woman I marry, I have sold her repudiation to thee for a 'dirham.'" After this H marries *X*. As soon as *W* becomes aware of H's marriage to *X*, she says "I have accepted," or "I have repudiated her," or "I have bought her repudiation." Then *X* is divorced from H.[6]

As to the various modes in which the marriage may be made dissoluble at the instance of the wife, see below, ss. 134, 144. See also comment to s. 18 p. 53 above.

126. The guardian of a person who is permanently of unsound mind, and who has attained puberty, may pronounce a divorce on behalf of that person when it is to the benefit of that person.[7] **Lunatic may be ... his**

[1] Bail. I. 208-209, II. 107, 108. Hed. 75. There is one Shiah tradition (which the *Shara'ya* considers unauthenticated) that a boy of ten years may lawfully and effectively pronounce a divorce in the form approved by the Prophet's traditions. Bail. II. 107.

[2] Bail. I. 205, 210 (paras. 3 and 4).

[3] The Shiah authorities are not unanimous on this point, Shaikh Ja'far-us-Sadiq being of opinion that a wife may not be appointed agent. Bail. II. 109.

[4] See p.

[5] Bail. I. 236, 244, 252-3, 287, II. 109.

[6] Bail. I. 263.

[7] Bail. II. 108.

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Minor cannot be divorced by his guardian.

127. The guardian of a person who has not attained puberty,[1] cannot pronounce an effectual divorce on behalf of that person.[2]

The guardian of a female may agree to a 'khul' with the husband under certain circumstances.[3]

(3) *Delegation of Authority to Divorce.*

(*a*) *Power to Divorce.*

Husband may authorise another to divorce.

128. The husband may lawfully give a power [4] to his wife, or to any other person, to pronounce a divorce between his wife and himself.[5]

See ss. 125, 134, and 144 and comments on the two latter, for a comparison between powers to divorce and agency for divorce.

Duration of power.

129. A power to divorce must, in the absence of an express provision to the contrary, be exercised "at the same meeting"[6] at which the party to whom it is given becomes aware of it; and the power is determined by his or her rising from the meeting.[7]

[Provided that where the power is given to the wife, she will be presumed to have exercised it at the same meeting, if she so affirms].[8]

(*b*) *Termination of Powers to Divorce.*

How option to wife may be determined.

130. Where an option to divorce is given to the wife, and no period is fixed for its duration, the husband may bring about the termination of the option by causing the wife "to rise from the meeting," or having intercourse with her, even though it be brought about against the wish and consent of the wife.[9]

How it may not be determined.

131. Save in the manner referred to in the last section, the husband cannot revoke, or bring about a termination of a power or option to divorce; notwithstanding that it purports

[1] Whether the infant is of sound mind or not. Bail. II. 107-108. After attaining puberty he is competent to act.

[2] Bail. II. 107.

[3] See below ss 185, 186, p. 161 below

[4] Baillie calls them "options" in all cases; that expression has been reserved in this Chapter to cases where the power is given to the wife.

[5] So a stipulation may be made in the marriage contract authorising the wife to divorce herself under certain conditions; *Badar-unnissa Bibee* v. *Mafiatalla* (1871) 7 Ben. L. R. 442.

Poono Bibee v. *Fyez Buksh* (1878) 15 Ben. L. R. (APP.) 5. (*Meer*) *Ashruf Ali* v. (*Meer*) *Ashad Ali* (1871) 16. W. R. 260 (where the option was held to be unrestricted in point of time). Different considerations may arise where the option is stipulated for in the marriage contract, and where it is given by the husband while the marriage subsists; and see *Badar-unnissa* v. *Mafiatalla* (1871), 7 Ben. L. R. 442.

[6] Cf. Bail. I. 10. as to when the "meeting" comes to an end; Hed. 38,87

[7] Bail. I. 236-237.

[8] Bail. I. 242-243; but see s. 106 of the Evidence Act, and pp. 47-50 above.

[9] Bail. I. 237. See s. 131 below.

expressly to provide that it shall arise at a future period of time, and such period has not arrived.[1] SECTION 131

(c) *Interpretation of Powers to Divorce.*

132. Where the terms of a power to divorce purport to fix a period of time, within which it must be exercised, but are silent as to the time from which the said period should be deemed to commence, it shall be deemed to commence from the time when the power is given, notwithstanding that the person to whom it is given does not become aware of it at that time ; and even though he becomes aware of it only after the said period has expired ;[2] provided that where such a power comes to the knowledge of the said person after the expiration of the said time, it may still be validly exercised "during the meeting" when the said person so becomes aware of it.[3] **When power commences.**

133. A power to divorce is exhausted if it is rejected,[4] unless its terms provide that it shall be continuing or recurring.[5] **Rejection of option or power.**

Illustration.

H says to *W* his wife : "exercise the option of divorce to-day, and exercise it to-morrow." *W* may reject her option of the first day without affecting her option of the next day. But if H had said, "I give you an option till to-morrow," *W's* exercising it on the day it was given would have finally determined the option.[5]

134. If the power to divorce is exercised, the divorce takes effect ; and the exercise of the power cannot be revoked or cancelled.[6] **Exercise of option or power.**

Modes in which wife may acquire power to divorce.

The wife may be given the power to pronounce a divorce in three ways : (1) by a stipulation to that effect in the marriage contract ; (2) by an option from the husband ; (3) by being appointed agent in that behalf.[7] The form most prevalent in India seems to be the first. The latter two need not be contemporaneous with the marriage contract. The effects of appointing the wife an agent to divorce, and of giving her an option to divorce, differ in this, that in the case of agency (under strict Muhammadan law), though the authority continues until revoked, the husband has the power of revoking

[1] Bail. I. 240, 253 (para. 4).

[2] Bail. I. 240, 243, 248, 249, 249 *l.* 11. But see p. 49 above

[3] Bail. I. 249 (para. 1) ; and see p. 147 below.

[4] Not by mere omission to exercise the power, *Ashruf Ali* v. *Arshad Ali* (1871) 16 W. R. 260.

[5] Bail I. 240

[6] Bail. I. 240. This, of course, does not mean that the divorce cannot be revoked.

[7] See comment on s. 144 as to divorces pronounced by the husband contingently on his marrying another wife—or a clause in the marriage contract to the effect that a second marriage will render the first marriage void, *ipso facto*.

SECTION 134 *it; whereas in the case of options, the power is restricted to the "same meeting," but cannot be determined by the husband except by bringing about* the termination of the "meeting." Where, however, there is a stipulation in the marriage contract entitling the wife to pronounce a divorce, she is, according to the decisions of the Courts, practically (though it is not so stated expressly) an agent to divorce, whose authority the husband has no power to revoke—a result which is in accordance with the combined effect of the rule stated in the section and the principle of justice, equity, and good conscience underlying the Indian Contract Act, s. 202.[1]

Exercise by the wife of option to divorce.

Various examples of options and their exercise are given in the texts—from which Sir R. Wilson [2] draws the general principle, that the wife "cannot give herself a more complete divorce than the husband had intended." The illustrations have reference very often to the interpretation of Arabic words and expressions,[3] and they do not seem to be of much use in the circumstances likely to arise in India. The general rules of agency would no doubt apply to options.

Option to wife to divorce if husband marries a second wife.

Agreement not to marry a second wife

In the cases that have come before the Courts in British India and have been reported, the stipulations entitling the wife to divorce herself have been conditional on the husband taking a second wife. Such a conditional option is very different from an agreement prohibiting the husband to marry another wife, which latter would be void in accordance with at least the 'Shara'ya-ul-Islam,' where such a prohibition is expressly stated to be "contrary to the (Shiah) law."[4]

Contract Act, s. 26.

The Indian Contract Act, s. 26, also declares that agreements in restraint of marriage are void, though that section would, it seems, apply only where such a stipulation is made as an independent contract, or subsequent to the marriage, and does not form part of the marriage contract; for then only would the law governing the agreement be the law that is laid down in the Contract Act, and not the Muhammadan law of marriage. The fact that the law relating to marriage is, in Muhammadan law, considered to be a part of, and is on many points identical with, the general Muhammadan law of contracts, does not affect the question.

(4) Modes of Pronouncing Divorce.

Modes of accordance with 'sunna.'

135. The modes [5] of pronouncing divorce mentioned in sections 136 and 138 below are approved by the traditions [6] of the Prophet, and are valid according to all schools of Muhammadan law.

[1] See *Hamidulla* v. *Faizunnissa* (1882) 8 Cal. 327.

[2] "Anglo-Muhammadan Law" (3rd Ed.) p. 140, s. 66.

[3] See pp. 49-50 above.

[4] Bail. II. 76. But see pp. 63, 69 above.

[5] Usually referred to as "forms" of divorce. The expression "mode" has been preferred in this Chapter, to draw attention to the fact that these modes refer not merely to the "form" of words used but also to the occasion of pronouncing them and other circumstances.

[6] *Sunna* is the Arabic for] "tradition," hence divorces in accordance with the traditions are referred to occasionally as the *sunni* or "traditional" modes of divorce—an expression that has been avoided in the present work, as it may carry an implication that these modes are not recognised by the Shiahs, whereas these two are the only modes recognised by the Shiahs.

SECTION 136

136. The 'ahsan' or most approved [1] mode of pronouncing divorce is subject to the following conditions :—

1. The most approved mode of divorcing.

(1) where the marriage has been consummated,[2] each of the following conditions must be fulfilled :—

(1) Where marriage consummated.

(*a*) The divorce must be pronounced during the wife's 'tuhr,'[3] except as in cases referred to in the *explanation* to this section ;

(*b*) the husband must not have had sexual intercourse with the wife since her last menstrual courses ;

(*c*) nor divorced her during the said courses ; [4]

(*d*) and according to Shiah law (but not according to Sunni law) such a divorce cannot be pronounced while the wife is in her puerperal courses.[5]

(2) where the marriage has not been consummated, the pronouncement may be made at any time, even though the wife be in her menstruation.[6]

(2) Where marriage not consummated.

(3) In cases where the wife is not subject to menstruation, the pronouncement may be made at any time, even immediately after sexual intercourse.[7]

(3) Where wife not subject to menses.

Explanation—According to Shiah law where the husband is absent from the wife, the pronouncement may be made at any time (irrespective of her being in a 'tuhr') after she has either actually menstruated since the last occasion on which they had sexual intercourse, or after the expiration of sufficient time for the husband to be certain that she has menstruated since the said occasion ;[8] provided that for the purposes mentioned in clause (*a*) of this section, the husband is not considered to be absent from his wife, if he lives in the same city as herself and meets her so as to know when her courses are on her.[9]

When husband absent.

See below commentary following s. 142, pp. 141-144.

137. A divorce pronounced in the 'ahsan' mode (i.e., under section 136 above) is revocable ;[10] provided that in Shiah law in the following cases it is irrevocable, viz., where it is pronounced against a wife—

'Ahsan' mode of divorce revocable. *Exceptions.*

[1] It would be more correct to call it the least disapproved mode. See comment on s. 120 above.

[2] By Sunni law valid retirement is in this case equivalent to consummation

[3] I.e., at a time when the wife is not in her menstruation.

[4] Bail. II. 110

[5] Bail. I. 206.

[6] Bail. I. 205 ; II. 111.

[7] Bail I. 207 ; II : 111.

[8] Bail. II. 110.

[9] Bail. II. 111.

[10] I. e., during the period of 'iddat,' see s. 121.

SECTION 137

(1) with whom marriage has not been consummated; or
(2) who is past child-bearing; or
(3) who has not attained puberty.[1]

2. The second mode of divorcing permitted by the 'sunna,' viz., the 'hasan' or good mode:

138. The 'hasan' or good[2] mode of divorce consists of three successive pronouncements made during consecutive 'tuhrs' during which there has been no sexual intercourse; or, in cases where the wife is not subject to menstruation, after intervals of a month or thirty days between each preceding and succeeding pronouncement.[3]

Three pronouncements.

Explanation—The first two pronouncements are revoked before the second and third pronouncements are respectively made in accordance with this mode. Where the said revocations are followed by resumption of cohabitation, the divorce that is effected is called the 'talaq-ul-'iddat,' by the Shiah authors.

See below commentary following 142, pp. 141-144.

The second mode irrevocable after third pronouncement.

139. A divorce pronounced in the 'hasan' mode (i.e., under section 138) dissolves the marriage when the third pronouncement has been made, and may be revoked at any time previous to the third pronouncement, after which it is irrevocable.[3]

3. The third law.)

140. According to Sunni law, where the marriage has been consummated, the pronouncement of a single divorce is valid, though made at a time when the wife is in her menstruation, or after the husband has had intercourse with her since her last menstruation.[4] This mode of divorcing is disapproved, but held lawful, under Sunni law. It is not valid, under Shiah law.[5]

regarded.

Not known to Shiah law

In this mode the Prophet's directions are disregarded both as to the times when, and occasions on which, divorce may be pronounced.[6]

Third mode revocable.

141. A divorce in the mode referred to in section 140 is revocable.[7]

See below commentary following s. 142, pp. 141-144.

[1] Bail. II. 119, 127-128.

[2] Or "approved" as distinguished from "most approved." See comment on s. 120. This is one of the two modes allowed by the traditions of the Prophet. See s. 135.

[3] Bail. I. 206. See also Bail. I. 205.

[4] Bail. I. 207. This mode and that which is mentioned in s 142 are characterized as *bad'ai*, which means "new" or "innovated" or "unorthodox."

[5] Bail. II. 118.

[6] Bail. I. 207.

[7] As explained in comment on s. 121 above, primarily the first two pronouncements of divorce are revocable, and here, there being only a single pronouncement, it is necessarily revocable.

SECTION 142
4. 'Bá'in' mode of divorcing irrevocable

142. (1) Three pronouncements of divorce may be validly made, according to Sunni law, during a single 'tuhr' of the wife, either in a single sentence, or in separate sentences.

(2) This mode of divorcing is called 'talaq-i-báin' because the divorce is complete and final, and the marriage dissolved immediately. It is irrevocable, and highly disapproved ; but held lawful under the Sunni law.[1]

(3) This mode is not valid according to Shiah law.[2]

(4) A pronouncement of divorce in this mode need not be in the triple form ; but it is effective if it is expressly stated, or it is implied, that it is triple or irrevocable.

1. THE FOUR MODES OF DIVORCE COMPARED.

Origin of the four modes of divorce.

The four modes of divorce mentioned in ss. 136, 138, 140, and 142, respectively, appear to have all originated from the first one, which alone was primarily sanctioned or contemplated by the Prophet. The main features of the first and most approved mode, consist of restrictions as regards the occasions on which it can be pronounced, and of its being left revocable during the whole of the period of 'iddat.' The other modes are mentioned above in the order in which they approximate to the first mode.

Characteristics of first mode.

The characteristics of the first and most approved mode (s. 136 above) may be considered under the following heads :—

Time.

(1) The divorce is not given at a time, when the husband is prevented from having intercourse with his wife owing only to her courses.

Abstinence.

(2) The husband is required to abstain from having intercourse with the wife, even though it becomes permissible after the enforced abstinence during her menses.

Probation.

(3) The divorce is, so to say, on probation during the 'iddat' and the husband has time to reconsider his decision ; so that if the divorce is not revoked, there is indication that it was not capriciously or hastily pronounced.

Re-marriage.

(4) Even after the divorce is complete and the marriage is dissolved, there being only one divorce, there is nothing to prevent the two re-marrying without the woman being married to another husband.[3]

Suspense.

(5) In the first mode the period of anxious suspense for the wife is not so prolonged as it is in the second mode. In the third and fourth modes the period is not longer, but it is unrelieved with the chance of a revocation, as revocation is impossible.

Inheritance.

(6) The tie is severed with no vindictive motive, so that if the husband or wife dies during the period of 'iddat' they can mutually inherit (see below s. 154 (1), p. 151).

Pregnancy.

(7) The necessity for the wife to menstruate after the last occasion when there has been sexual intercourse provides a means for the husband to

[1] *In re Abdul Ali Ishmailji* (1883) 7 Bom. 180. *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

[2] Bail. II. 118.

[3] Even where divorces are not so easy as they are for a Muslim husband, the divorced parties sometimes re-marry, e.g. see *Fendall* v. *Goldsmid* (1877) 2. P.D. 263.

SECTION 142 be sure that she is not going to bear a child to him; the existence of that circumstance may make him relent or may even remove the cause of the divorce.

2. THE SECOND MODE OF DIVORCE.

Second mode an evasion of first mode: because the revocation is not genuine.

The second mode (s. 138 above) follows on most points the letter, though it does not follow the spirit of the Prophet's injunctions as they are laid down in the first mode (s. 136 above); for, divorce in the second mode is a divorce during 'ʾiddat,' or practically "a divorce upon a divorce," though in order to satisfy the forms of the law, the first pronouncement is nominally revoked. It will be observed, that what is done in the second mode is, that a divorce is pronounced in the approved (first) mode, and then revoked; again, a second pronouncement is made, and again revoked; on the third pronouncement the divorce becomes irrevocable: the marriage is then completely dissolved, and the parties are prohibited from intermarrying with each other.

(Shiah Law.) 'Talaq-ul-ʾiddat,' in which, from renewal of intercourse, revocation presumed to be genuine,

That presumption not displaced by subsequent divorce.

Reasons.

This mode is called by the Shiah lawyers the 'talaq' of 'ʾiddat,'[1] provided that after each revocation the husband resumes cohabitation, which fact furnishes some indication that he does not intend to dissolve the marriage; and though the fact that soon after, or in the next 'ʾtuhr,' another divorce is pronounced, may cast suspicion on the motive with which the first pronouncement was revoked, and though that suspicion may almost amount to certainty when the process is repeated a second time, it was felt by the Shiah authorities that such an evasion could not be prevented without radically adding to the requirements or restrictions of the first and most approved mode[2]; and that such additional restrictions[3] would almost of necessity have to be of such a nature as to affect even a husband who has no intention of evading the law at the time that he revokes the earlier divorce, and thus the restrictions would indirectly have the tendency of preventing well-intentioned revocations.

For these reasons, in spite of the anxiety of the Shiah lawyers to "adhere strictly to the terms of legal permission"[4] as to divorce they could not hold that it was unlawful for a man to revoke a divorce which he had pronounced in the preceding 'tuhr' of his wife, and at the same time to pronounce another divorce, if he chose to do so, in the same breath with which he revoked the previous pronouncement. In other words, the 'talaq-ul-ʾiddat' could not be prohibited.[5]

Nor by non-resumption of conjugal relations.

The next point that comes up to be considered in connection with the second mode of divorce is whether, when the revocations of the first and second pronouncements are made verbally, without resumption of conjugal relations,[5] there is such a departure from the injuctions of the Prophet,[6] as to justify the proceeding being declared invalid. The Shiah authorities are not agreed on the point; the balance of authority, however, is stated in the

[1] *Talaq-ul-ʾiddat* in Arabic, Bail. II. 119. The name betrays that the revocation of the first and second pronouncements is not genuine; for, after a sincere and effectual revocation, there would be no *ʾiddat*. The practical difference is that the husband by repeating the pronouncements places it out of his power to revoke the divorce or to remarry the wife unless she is intermediately married to another husband.

[2] I. e. of s. 136 above.

[3] It could, e.g., have been provided that a certain period must elapse between revocation and another divorce; or that a divorce cannot be pronounced in a *tuhr* in which a previous pronouncement had been revoked. The Arabs were (and are at the present day) inveterate in their divorcing propensities.

[4] See comment on s. 120, p. 133 above.

[5] Bail. II. 121.

[6] I.e. as it is laid down in s. 136 above.

Shara'ya-ul-Islam' to be in favour of holding the pronouncements valid, though they have the effect of establishing a triple divorce, unrelieved by a genuine revocation intervening between the first and second pronouncement.[1] SECTION 142

The second mode of divorce[2] has been stated to be in accordance with the letter, but not with the spirit, of the Prophet's injunctions:[3] It has been shown that there is at least no such violation of the letter of the law as could be prevented without a change of the law itself. But there is little doubt that it is not in accordance with what the Prophet really intended; for what he laid down was that if the husband had a settled idea of dissolving the marriage he should show it by the restraint of his acts, and not in any vindictive manner. On the other hand, it was one of the merits of the first mode of divorce that it left a 'locus penitentiae' to the husband. It was not meant that that merit should be perverted into a means by which three pronouncements of divorce may be heaped one over the other, in order that there may be no revocation possible. And yet it is clear that, in the circumstances mentioned in the last paragraph, the husband, in the majority of cases, revokes the first pronouncement verbally, merely for the purpose of following up the revocation with a second and a third pronouncement in succession.

First and second modes of divorce compared.

In the second mode the power of revocation is abused. It ser... th... of marriage irrevocable (through a triple divorce).

It is difficult to say whether from the beginning the second mode[4] was consciously meant to be an evasion of the first mode, or was adopted at first without any ulterior motive; in any case, it is clear that if at the very moment of making the first pronouncement of divorce, the husband has an intention of following it up with two others, he not only evades the spirit of the Prophet's rule, but he sets at nought the Prophet's emphatic recommendations: and, although it may not be possible to prevent this being done, it is easy to surmise that the Prophet could never have contemplated the position in which the power of revocation during the period of ''iddat' (which had been reserved in order to prevent dissolutions of marriage) as far as possible could itself be used for making such dissolutions irrevocable.

As already stated, the Shiah authorities permitted with difficulty, and with dissentient voices, a second and third divorce, where the first two were not revoked by resumption of conjugal relations. They had less difficulty in rejecting a further evasion which was suggested,[5] viz. that the three divorces should be permitted to be pronounced in the same 'tuhr,' two of them being revoked intermediately; for, in this case it amounted to a direct breach of the rule contained in s. 136 (1) (*c*) above.

Shiahs permit no departure from the first mode beyond those of the second mode.

If this evasion had been permitted, then the Shiahs would have come to the other two modes of divorce which are recognised by the Sunnis, though not without being stigmatized as sinful.[6] These forms have next to be considered. The main points of difference and the gradations by which they got a footing in the law have already been indicated with some fulness in considering the various stages of the Shiah law of divorce. It will therefore be possible to deal with them very concisely.

Third and fourth modes.

[1] Bail. II. 120-121.
[2] See s. 138 above.
[3] I.e. as laid down in s. 136 above.
[4] See s. 138 above.
[5] See s. 140 above.
[6] See s. 142, above p. 141,

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3. THE THIRD MODE OF DIVORCE.

Third mode of divorce disregards 'tuhr.'

In the third mode,[1] there is a disregard of the injunctions that the divorce has not to be pronounced while the wife is in her courses, nor unless she has passed through one period of menstruation after the last occasion when there has been intercourse between them.

4. THE FOURTH MODE OF DIVORCE.

Fourth mode: (a) disregards 'tuhr' and (b) is irrevocable.

Steps of departure from first mode.

The fourth mode[2] disregards the injunctions of the Prophet both as to the wife being in a 'tuhr,'[3] and by being triple and therefore irrevocable.[4] Nor does the departure of this mode from the approved form stop here : for, if the three pronouncements were allowed to be made in one 'tuhr,' it followed that they could be made in immediate succession : and if so, then they could be made in one sentence; and if in one sentence, then there would be little meaning in insisting upon the formula being pronounced three times ; the husband might equally be allowed to say, "I divorce three times," instead of saying "I divorce, I divorce, I divorce." Next, the husband could say "I divorce irrevocably" instead of saying "I divorce three times" : and finally he could indicate his intention of the divorce being irrevocable, without using the word "irrevocable," or "triple."

Prevalence of fourth mode.

Possible explanation.

By a deplorable, though natural, development of the Sunni law, it is the fourth and most disapproved or sinful mode of divorce that seems to be most favoured even by the law itself. For, the requirements of the other mode being seldom attended to, it is generally assumed (on the principle that the intention of the parties must as far as possible be given effect to) that the fourth mode was intended to be employed,[5] with the result not only that the formalities for the divorce are done away with, but even its effects are aggravated for, inasmuch as the pronouncement is presumed to be in this mode, it is presumed to be irrevocable. It is indeed possible, that the Sunni jurists wished to inflict on a husband, who disregarded the requirements of s. 136, the penalty of rendering the divorce irrevocable ; and there are indications that they considered it always a favour to the wife to relieve her of the husband (cf. below s. 147, *ill.* 8, p. 149).

(5) Divorce in Writing.

Divorce in writing.

143. (1) According to the Hanafi law, where the husband executes a document[6] containing a statement that he divorces his wife, and such a document is properly superscribed and addressed in the usual form, showing the name of the writer and the person addressed, it constitutes a valid pronouncement of divorce, irrespective of the intention with which it is written.

[1] See s. 140 above.
[2] See s. 142 above.
[3] See s. 136 (1) (a) and (b) above.
[4] See s. 136 (1) (c) above.
[5] Cf. ss. 147 *et seq.* below

[6] And the Calcutta High Court observes that between persons of rank and property, a document is to be expected for satisfactory evidence of a divorce. (*Khajah*) *Gouhar Ali Khan* v. (*Khajah*) *Ahmed Khan* (1873) 20 W. R. 214.

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Intention to divorce when required.

(2) Where the document is not written and superscribed in the usual form, then it does not constitute a pronouncement of divorce in writing, unless it can be comprehended and read, and unless it has been written with the intention of its operating as a pronouncement of divorce.[1]

When permitted by Shiah law.

(3) In Shiah law the pronouncement of a divorce in writing, or by signs, is not valid, unless the husband is unable to pronounce the formula of divorce;[2] and unless the document is written, or the signs made, with the intention of pronouncing a divorce.[3]

(6) *Time when Divorce Comes into Effect.*

Divorce referred to a future time or condition.

144. In Hanafi law, but not in Shiah law, a divorce may be so pronounced as to come into effect not immediately, but at some future time,[4] contingently on the happening of some specified future event.[5]

Explanation I—In Hanafi law, a divorce may be pronounced by a man between himself and a woman who is not his wife,[6] contingently on his marrying that woman, with or without other conditions.[7]

Explanation II—In Shiah law, a divorce cannot be pronounced subject to any condition[8] or qualification, or so as to come into effect at a future time.[9]

Illustrations.

(1) Hanafi Law.

(1) H says to his wife *W*: "Thou are repudiated after a month." The divorce would take effect a month later.[10]

(2) H says to his wife *W*: "Thou art repudiated and I have an option to cancel the repudiation for three days." The divorce is absolute and the option void.[11]

(3) H says to his wife *W*: "Thou art divorced in Mecca." The divorce is absolute and it holds in all places.[12]

(4) H says to *X*, a woman who is not his wife: "If you enter this house you are divorced." H then marries *X*, and *X* enters the house. There is no divorce; but if H had said "If I marry you (and you enter

[1] Bail. I. 288.

[2] Bail. II. 113-114, see s. 120 (2) p. 132 above. Witnesses are also necessary, s; 120 above.

[4] Bail. I. 212.

[5] Bail. I. 212. So in *Hamid Ali* v. *Imtizan* (1878) 2 All. 71, the husband said, "Thou art my cousin, the daughter of my uncle, if thou goest"—and the divorce was held valid.

[6] Cf. *Furzund Hossein* v. *Janu Bibee* (1878) 4 Cal. 588.

[7] Bail. I. 264, II. 109 114-115.

[8] The only exception is when "there is a condition in appearance but none in reality," the husband knowing it to be fulfilled at the time of pronouncing divorce. Bail. II. 115.

[9] Bail. II. 115.

[10] Bail. I. 217, 218-219.

[11] Bail. I. 217, 225.

[12] Bail. I. 217.

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this house) then you are divorced," the divorce would be effectuated on H's marrying (and *X* her entering the house after the marriage).[1]

(2) Shiah Law.

(5) According to Shiah law, the pronouncements in all the illustrations given above, would, it appears, be invalid, except that, perhaps, in the second illustration it may be held that the option is separable from the pronouncement, and that the latter is valid, while the option is void. The question would depend on the words actually used.

Effect of stipulation in marriage contract, that it shall be dissolved on marriage with another wife.

See above s. 125. Mr. Ameer Ali in his learned book[2] states that clauses are usual in marriage contracts to the effect that should the husband marry another wife, the first marriage will be void 'ipso facto.' Such a clause would be valid in Sunni law and would have the effect of dissolving the first marriage[3] on the husband taking a second wife; provided that it is so worded as to be capable of being interpreted as a contingent divorce. If the first marriage has been consummated, the whole of the 'mahr' would then be due. Whether an agreement would be valid to the effect that on a second marriage the first would be dissolved 'ipso facto,' and that the first wife be entitled to her 'mahr' though the marriage with her has not been consummated, would depend upon the question whether the laws relating to 'mahr' and laying down what portions thereof become due on dissolution of marriage, can be altered by agreement between the parties; or, perhaps, on the question whether the 'mahr' can be claimed as damages or otherwise, under the Contract Act, irrespective of the Muhammadan law of marriage. But it is a question that is very unlikely to arise in British India.

Time when divorce in writing takes effect.

145. A divorce in writing may validly be so expressed as to take effect either from the time when it reaches the wife, or so as to take effect from the time when it is written.[4]

Explanation—A divorce in writing is considered to have reached the wife—

(1) if it reaches the father[5] of the wife; provided that he is in the town in which she is at the time, and that he has the disposal of her affairs generally;[6] or

(2) if endeavours are made to communicate the divorce to the wife, and she frustrates them by keeping out of the way.[7]

"Writings of this kind may either be so expressed that the repudiation takes effect on the mere writing . . . whereupon a repudiation takes effect and an 'iddat' becomes obligatory from the time of writing; or the writing

[1] Bail. I. 264.

[2] "Mahommedan law," II. 171.

[3] Cf. *Furzund Hossein* v. *Jaun Bibee* (1878) 4 Cal. 588, 589.

[4] As in *Sheriff Saib* v. *Usanabibi Ammal* (1871) 6 Mad. H. C. Rep. 152. The husband was in Trichinopoli and divorced his wife who was at Tinivelli. There was no evidence of the wife having received any intimation of the divorce, and see *note* 7 below.

[5] *Waj Bibee* v. *Azmut Ali* (1867) 8 W. R. 23.

[6] Bail. I. 233.

[7] *Sarubai* v. *Rahiabai* (1905) 30 Bom. 537.

may be so expressed as to make the repudiation dependent on the receipt of the writing."[1] SECTION 145

The foregoing statement leaves the question untouched as to the presumption when the document is silent. Sir R. Wilson says that there is a presumption that it takes effect only when it reaches the wife, which is, no doubt, in accordance with what the Court would be inclined to hold.

(7) *Interpretation of the Pronouncement.*

(a) *When it amounts to a divorce.*

146. According to Hanafi law, where the husband utters ambiguous words[2] which are susceptible of being interpreted both as a pronouncement of divorce and otherwise, they effectuate a divorce, if they are uttered with that intention. (Hanafi law.) divorce it.

See illustrations following s. 149.

STATEMENT OF THE PRESUMPTIONS AND RULES OF INTERPRETATION RELATING TO OPTIONS[3] OR PRONOUNCEMENTS.

I. When the husband is in an agreeable frame of mind and uses—
   (1) "words of consent and nothing else," i.e. which imply an absolute option to the wife, or
   (2) "words which are good for consent or refusal," i.e. by which the wife is asked to do something which is in her power to refuse to do,[4] or
   (3) "words of consent and reproach," i.e. reproachful expressions which apparently imply an option to the wife,

   —In none of the cases above referred to does a divorce take place unless the husband had the intention of divorcing [and the husband's statement is conclusive as to his intention].[5]

II. When the husband uses the above-mentioned classes of expressions on being asked by the wife or someone on her behalf for a divorce—
   (1) The first class of words effects a divorce.
   (2) ,, second ,, does not effect a divorce.
   (3) ,, third ,, effects a divorce.

III. When the husband uses the above-mentioned classes of expressions in anger.[6]
   (1) The first class of words effects a divorce.
   (2) } The second and third classes of words do not effect a divorce,
   (3) } unless the husband intended it.[6] [His statement is conclusive as to his intention.][5]

[1] Bail. I. 233.

[2] The Evidence Act ss. 61, 93 *et seqq.* would apply to documents. A man said to his wife, "thou art my cousin the daughter of my uncle if thou goest." It was proved that he meant to imply by the words that she would be no other relation to him and the statement was given effect to as a divorce. *Hamid Ali* v. *Imtizan.* (1878) 2 All. 71.

[3] This is taken from Bail. I. 228-229.

[4] This is referred to at Bail I 236 "as ambiguous expressions from which repudiation may be inferred," including *ikhtiyar* or choice, or *amr bu yad* or "business in hand."

[5] As to the value and effect of such presumptions, etc., see above pp. 47-50.

[6] So in Roman law, acts done in anger were not effective, unless *perseverantia judicium animi fuisse*—Dig. XXIV. 23.

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(b) *Whether the Divorce is Revocable or Irrevocable.*

(b) Ambiguity as to whether revocable or irrevocable:

(i) Present or past tense.

147. (1) Where the terms of a pronouncement of divorce are ambiguous, or silent, as to whether a revocable or irrevocable divorce is intended, a single revocable divorce is effected when the expression is such as to imply that a divorce has already been effected.[1] In all other cases an irrevocable divorce is effected.[2]

(i) When marriage not consummated presumption that the divorce is in the most approved mode.

(2) Where a man divorces a wife with whom the marriage has not been consummated,[3] all the pronouncements of divorce following the first one that is effective are void.[4]

Explanation—There may be more than one divorce expressed in the same pronouncement, so that they are all effective simultaneously; or a divorce may be purported to have preceded the first one that is actually pronounced, in which case the earlier one will also be effective; or one or more divorces may all be made contingent on one condition, so that they are all effective at the same moment of time, viz., when the contingency arises.[5]

Illustrations.

Sunni Law.

(1) H says to his wife *W* (with whom he has not consummated the marriage), "Thou art repudiated, repudiated, repudiated." The first pronouncement takes effect as a divorce, and the next two are nugatory.[5]

(2) If he says, "Thou art repudiated three times," three divorces take place.[5]

(3) If he were to say, "Thou art repudiated once before this repudiation," two divorces would take place.[5]

(4) If he says, "Thou art repudiated a thousand times," three[6] divorces will take place; but if he says, "thou art repudiated once and a thousand times," there would be only one divorce.[7]

(5) If he says, "Thou art repudiated and repudiated and repudiated if thou enterest the house," there are three divorces if and when she enters the house.[5]

(6) H says to *W* his wife, "Thou art divorced," or "I have divorced." There is one revocable repudiation, whatever his intention may have been.[8]

(7) H says to *W* his wife, "Thou art repudiated and repudiated and repudiated." She is divorced three times, if the marriage has been consummated and once if not consummated.[4]

[1] *In re Abdul Ali Ismalji* v. *his wife Husenbi* (1883) 7 Bom. 180, *Sarabai* v. *Rabiabai* (1905) 30 Bom. 587.

[2] Bail. I. 230.

[3] In which case, as appears in s. 136 (2), a single divorce is effected in the most approved mode (viz. after the expiration of the [4]

[4] Bail. I. 218.

[5] Bail. I. 227. See above, pp.

[6] I.e. as many as possible, since there cannot be more than three.

[7] Bail. I. 227, 235.

[8] Bail. I. 212.

(8) H is married to *W* by a regular marriage and to *X* by an irregular marriage. If he pronounces a divorce in terms which are applicable to either, W, the regularly married wife, will become divorced.[1]

(9) H repudiates his wife "when she goes to Mecca" and she goes there some time after. The divorce is effectual since then.[2]

(10) H says to his wife *W*, "Thou art repudiated yesterday." She is divorced immediately if she was his wife the day before the statement is made, but not otherwise.[3]

See illustrations following s. 149 below.

(iii) Effect of comparison.

148. It is a general principle, according to Abu Hanifa, that wherever the terms of a pronouncement of divorce liken it to anything, it is irrevocable, whether mention be made of the greatness of the thing referred to or not, while according to Abu Yusuf the divorce is irrevocable if magnitude is mentioned, and it is revocable if magnitude is not mentioned.[4]

Illustrations.

(1) H says to his wife *W*, "thou art divorced or repudiated like the magnitude of the point of a needle, or of a mountain." The divorce would be irrevocable according to both Abu Hanifa and Abu Yusuf.[4]

(2) H says to his wife *W*, "thou art divorced like the point of a needle or a grain of mustard seed, or like a mountain." The divorce would be irrevocable according to Abu Hanifa, but revocable according to Abu Yusuf.[4]

(3) H says to his wife *W*, "thou art divorced thus," pointing one, or two or three fingers separately. There are one, or two, or three divorces respectively.[5]

(iv) Effect of description.

149. The general rule with regard to the description of divorces is that

(1) if the description be such as is not applicable to divorces, the description is to be taken as a mistake or redundant, and a revocable divorce takes place;

(2) where the description is not an aggravation of the divorce, it renders the pronouncement revocable; but

(3) where the description is aggravating, the divorce is irrevocable and single, unless three divorces are intended, when three will take effect.[6]

Illustrations.

(1) H says to his wife *W*, "Thou art divorced—a divorce that does not affect thee" or "does not take effect" or "the best" or "the most

[1] Bail. I. 215.
[2] Bail. I. 217.
[3] Bail. I. 221.
[4] Bail. I. 224. See above, pp. 49-51.
[5] Bail. I. 225 (para. 2).
[6] Bail. I. 225 (para. 3).

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excellent" or "the most beautiful" or "most just of repudiations." There is one revocable divorce.[1]

(2) H says to his wife W, "Thou art divorced or repudiated the strongest of repudiations." The divorce is irrevocable and single, unless three are intended, when three will take effect.[2]

(3) H says to his wife W, "Thou art repudiated irrevocably" or "certainly" or "the most infamous of repudiations" or "bada'i" repudiation," or "the hardest repudiation." There is one irrevocable divorce unless three are intended.[3]

(8) *Revocation of Divorce.*

Express revocation of divorce.

150. A revocable divorce may, at any time during the 'iddat,' be expressly revoked by the husband (provided that he is of sound mind) or by any agent duly authorised by him in that behalf. The husband may ratify an unauthorised revocation.

A divorce is revocable until the pronouncement is repeated three times, (or according to Hanafi law, if it is pronounced in such terms that it is interpreted as a triple pronouncement), after which the wife must be married to a second husband, and then the second marriage must be dissolved, before she can be remarried to her first husband.[4]

Implied revocation of divorce.

151. According to the Hanafi and Shiah law the revocation of a divorce may be implied or conclusively presumed from the conduct of the husband even though he is of unsound mind.[5]

According to the Shafi'i law it must always be made in express terms, or by resumption of connubial intercourse.[6]

Illustrations.

(1) H pronounces a single revocable divorce against his wife W, and then says, "I have retained thee" or "my wife," or has sexual intercourse with her, or kisses her with desire, or looks on her nakedness with desire. The divorce is cancelled under Shiah and Hanafi law.[7]

(2) H pronounces a divorce against his wife W while absent from her, and then enters her apartment on his return. It is a conclusive presumption of Shiah and Hanafi law that the pronouncement is revoked.[8]

Wishes of wife as to revocation of divorce.

The revocation of a divorce, it will be seen, is as entirely a matter for the husband, as is its pronouncement. Sir R. Wilson refers to the following verse of the Quran :—

Contingent revocation invalid.

"But when ye divorce women and they have fulfilled their prescribed term, either retain them with humanity or dismiss them with kindness; *and retain them not with* violence, so that ye transgress; for he who doth this surely injureth his own soul."—Quran, II. 231

[1] Bail. I. 225, 226.
[2] Bail. I. 226.
[3] Bail. I. 225 (para 3.) 226 (para 1).
[4] See s. 41, pp, 80-82 above.
[5] Bail. I. 285-236, 287. Hed. 106-107.
[6] Hed. 103.
[7] Bail. I. 285, II. 126-127.
[8] Bail. II. 121 (*fifth*),

and points out that the italicised words must mean that the wishes of the wife must be consulted. Sale explains the verse in a note to the following effect—" i.e. by obliging them to purchase their liberty with part of their dowry."

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152. A divorce cannot be revoked contingently.[1]

No contingent revocation.

(9) *Incidents of 'Talaq.'*

(*a*) *As to Conjugal Relations.*

153. When a wife has been divorced three times by her husband, their separation is irrevocable; and they cannot then have conjugal intercourse with each other lawfully without remarriage.[2] The same result follows when the pronouncement is single and it is not revoked during the ''iddat.'

Dissolution of marriage.

To say that the legal effect of divorce is dissolution of the marriage would be tautological:[3] this and the following sections refer to some incidents requiring particular mention.

(*b*) *As to Rights of Inheritance.*

154. If the husband or wife dies after a divorce, and while the latter is in her ''iddat'[4]—

Rights of inheritance in case of death during ''iddat.'

(1) where the divorce was revocable,[5] they are reciprocally entitled to inherit,[6]

1. When divorce revocable.

(2) where the divorce was irrevocable, or there were three divorces not referable to any act proceeding from the wife—

2. When divorce irrevocable.

(*a*) according to Hanafi and Shiah law the wife does not inherit from the husband, unless such a divorce is given while the husband is in death-illness, provided that the wife does not expressly or impliedly consent to an irrevocable or triple divorce;[7] according to Shafi'i, the wife does not inherit in any case after such a divorce or divorces,[8]

(*a*) Wife's rights.

(*b*) the husband does not inherit from the wife if she dies during her ''iddat';[9]

(*b*) Husband's rights.

(3) where the marriage has been dissolved by an act on the part of the wife, done while she was in death-illness

3. Dissolution of marriage at wife's instance.

[1] Bail. I. 287, II. 127.

[2] Bail. I. 205, 290, 292, II. 12. As to when prohibition against their remarriage arises, see s. 41, pp. 80-82 above.

[3] See s. 119.

[4] And see s. 155.

[5] Whether the divorce is pronounced in death-illness or 'in health"; the expression "in health" meaning in this connection merely that the person is not in death-illness.

[6] Bail. I. 277, II. 122.

[7] Bail. I. 278, 280, II. 122, 123

[8] Bail I. 278.

[9] Bail. I. 278

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and she dies within the period of ''iddat,' the husband is entitled to succeed.

See the illustrations following s. 157.

(Shiah law.) Wife entitled to inherit for one year after divorce in death-illness of husband.

155. According to Shiah law where a wife is divorced by the husband while he is in death-illness and he dies[1] within a year of the pronouncement of divorce, she inherits from him, whether the divorce was revocable or irrevocable, provided that she remains unmarried.[2]

See the illustrations following s. 157.

Presumptions as to death-illness.

156. (1) According to Hanafi law, where the husband dies during his wife's ''iddat,' after making three revocable, or one irrrevocable pronouncement of divorce, such pronouncement not being referable to any act proceeding from the wife,[3] they or it will be presumed (if the wife so affirms) to have been made in death-illness unless the contrary is proved.[4]

(2) According to Shiah law the presumption is that the pronouncement was made in health.[5]

Time of coming into operation where divorce pronounced in exercise of power.

157. In order to determine for the purposes of section 154, whether or not a divorce is pronounced during death-illness,

(1) where the divorce is pronounced by a person holding an irrevocable power to divorce, it will be considered to be pronounced at the time when the power was given;

(2) where it is pronounced by a person holding a revocable power to divorce, it will be considered to be pronounced at the time when it was actually pronounced.[6]

Illustrations.

(1) H pronounces a revocable divorce against his wife *W*. An impediment which would have prevented *W* from inheriting at the date of the divorce, is removed during her ''iddat' and then H dies while the ''iddat' is still unexpired. *W* is entitled to inherit from H.[7]

(2) H is separated from his wife *W* for impotence after the lapse of the year given to him for consummation, and *W* exercises her option

[1] Death illness or *marz-ul-maut* implies that he never recovered from the illness; if he recovers from the illness during which divorce was pronounced, she does not inherit unless it is a revocable divorce and he dies while she is in her ''iddat.' See s. 154 (1).

[2] Bail. II. 122. See s. 154 (2).

[3] Bail. I. 282 and see pp. 47-49 above.

[4] Bail. II. 123-4. See p. 151 *n.* 5.

[5] Bail. I. 284.

[6] Bail. I. 277.

in 'marz-ul-maut' and then dies within the ''iddat.' H does not inherit from *W*, the cause of separation having arisen before *W*'s death-illness.[1]

(3) If H is separated from his wife *W* for impotence while he is in death-illness and he dies before the ''iddat' of *W* expires, *W* does not inherit from H as her act brought about the divorce.[1]

(4) H slanders his wife *W* while in health and takes the 'li'an' against her in death-illness. *W* would inherit if H dies in her

(5) If the 'ila' or vow of abstinence is both taken, and expires, during the death-illness of the husband, and he dies while the wife is in her ''iddat' she is entitled to inherit.

(6) H in his death-illness is asked by his wife *W* for a revocable divorce, and he divorces her irrevocably or three times, *W* would be entitled to inherit if H dies during *W*'s ''iddat.'[2]

(7) H being in health says to his wife *W*, "when the beginning of the month comes, thou art divorced," and at the beginning of the month, H is in death-illness, and then he dies, *W* is according to Hanafi law not entitled to inherit.

(8) H while in death-illness, pronounces a divorce conditionally on his wife *W* doing some act which it is in her power to avoid doing, as entering a house, and she does so, and thus under Hanafi law effectuates a divorce, *W* is not under Hanafi law entitled to inherit.[3]

(9) H having four wives divorces them all during 'marz-ul-maut,' marries four others and consummates the marriage with them, and then dies during the period of their ''iddat.' All eight are entitled to inherit.[4]

§ 2.—Dissolution of Marriage by 'Ila.'

158. (1) Where a husband, who has attained puberty, and is of sound mind,[5] swears by God that he will not have sexual intercourse with his wife for a period of four months or more, or for an unspecified period (or according to Hanafi, but not Shiah law, where he vows that he will undergo a penalty should he have such intercourse) he is said to make 'ila.'[6]

intercourse

(2) In Shiah law 'ila' is of effect only where the marriage has been consummated.[7]

[1] Bail. I. 281.
[2] Bail. I. 280.
[3] Bail. I. 280.
[4] Bail. II. 121.
[5] Married permanently and not by *mut'a*. Bail. II. 148.
[6] Bail. I. 294 *et seqq.*; Hed. 109; Bail. II. 147-148. *Ila* is the Arabic for "swearing." The husband who has made *ila* is called *muli* and the wife with reference to whom it is made is called *mula*.
[7] Bail. II. 148.

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Illustrations.

(1) H says to *W* his wife

(*a*) I swear by God that I will not approach thee, or

(*b*) If I approach thee, pilgrimage or alms or fasting is incumbent on me.[1]

—The first is a valid 'ila' according to all schools, and the second according to Hanafi law.

(2) H says to his wife *W*, "When I approach thee, prayer or to follow a bier is incumbent on me," there is no 'ila,' as these duties are incumbent on all, nor if he says, "If I approach thee thou art divorced." [1]

Effect where 'ila' is acted upon:

159. Where a husband having made 'ila' abstains from intercourse with his wife for four months during the period therein comprised—

(Hanafi law.) divorce.

(1) according to Hanafi law the marriage is dissolved with the same legal results, as if there had been one irrevocable divorce pronounced by the husband; [2]

(Shafi'i and Shiah law.) Intervention of Court.

(2) according to the Shafi'i and Shiah schools of law the wife is entitled to apply to the Court for restitution of conjugal rights, and on her doing so, the husband has the option of either divorcing her, or resuming sexual intercourse, [and *semble*, on his refusing to do either, the Court itself may dissolve the marriage.[3]

How 'ila' may be cancelled

160. According to Hanafi law 'ila' may be cancelled by—

(1) the husband having intercourse with his wife within the period to which it refers; provided that he has not continued abstinent for four months during the said period;

(2) by a verbal retractation thereof, provided that at the time of such retractation, and during the whole of the unexpired period to which the 'ila' refers, sexual intercourse between the husband and wife is and has been impossible.[4]

Presumption as to avoidance of 'ila'

161. Where within the period of 'ila' the husband asserts that he has avoided the oath or vow, it will be presumed[5] to be avoided, but after the said period, there is no such presumption unless the wife assents to it.[6]

[1] See footnote 6 on p. 153.

[2] Bail. I. 294; Hed. 109.

[3] Bail. II. 149 (second); Hed. 109. But cf. "The judge has no power to compel him to do either (i.e. restitution or divorce) in preference to the other." II 149, (para. 1. *ll.* 16, 17).

[4] Bail. I. 300, 301; Hed. 112.

[5] See above pp. 47-49.

[6] Bail. I. 301.

§ 3.—'*Khul*' and '*Mubarat.*'

SECTION 162

(1) *Definition and Form.*

Dissolution of marriage by agreement.

162. (1) Marriage may be dissolved by agreement,[1] between the parties, for a consideration paid, or to be paid, by the wife to the husband.

'Khul'' and 'mubarat' distinguished.

(2) Where the wife alone is desirous of having the marriage dissolved, such an agreement is called a 'khul'';[2] where both parties are so desirous it is called a 'mubarat.'[3]

Form of 'khul'' or 'mubarat' in Sunni law.

163. (1) According to Sunni law[4] a 'khul'' or 'mubarat' is effected when the husband makes a proposal to pronounce a 'talaq,' or otherwise to dissolve the marriage for a consideration, and the wife accepts the proposal at the same meeting.[5]

(2) The proposal and acceptance need not be in any special form of words.[6]

(3) The contract itself dissolves the marriage without a 'talaq' being pronounced.[7]

(Shiah law.) Form of 'khul'' witnesses.

164. According to Shiah law,[8]—

(1) An agreement by way of 'khul'' must be made in the presence of two witnesses, and when the marriage has been consummated, it must be made at a time when the wife is in a 'tuhr'[9] unless the husband is absent[10] from her.[11]

Arabic formula.

(2) Where the proposal for 'khul'' is not made in an Arabic sentence containing that word, or its inflection, it must be followed by a 'talaq' pronounced in due form by the husband.[11]

[1] Should the question arise whether the wife has consented to the divorce or not, reference might be made to *Maung Pe* v *Ma Lon Magale* (1911) 13 Bom. L.R. 464, 469 (P.C.): according to the Burmese Buddhist law the rights of parties differ when a divorce is given with the consent of the wife and when without it, and the Privy Council held that when the wife allows a decree for divorce to be passed against herself, it does not amount to consent to the divorce.

[2] This word is written "*khoolá*" by Baillie in his Digest. Baillie represents the Arabic letter *'ein* by vowels marked with the circumflex, cf. above s. 96, p. 112 *n.* 8. This mode of transliteration has been misleading. The word *khul'* is in Arabic a monosyllable, the final letter being not a vowel, but the guttural consonant *'ein* which is usually represented in this work by an inverted apostrophe ['], see above, p. 112. *n.*, 8.

[3] Bail. I. 303, II. 129.

[4] For Shiah law see s. 164.

[5] Bail. I. 304, 314. As to the same meeting see Bail. I. 11, 237; Hed. 38, 87.

[6] Baill. 1. 304.

[7] In *Buzul-ul-Ruheem* v. *Luteefutoonnissa* (1861) 8 Moo. 1 A. 379. There was a "kholanamah" but the husband pronounced a divorce, and the Privy Council held that the divorce was independent of the *khul'*. The whole transaction was, however, vitiated by cruelty and ill-usage against the wife.

[8] For Sunni law see s. 163.

[9] I.e. a time when the menstrual courses are not on her.

[10] Cf. the Shiah rule about *ahsan* mode of divorce, s. 136, *explanation*, p. 139 above.

[11] Bail. II. 133-134.

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Form of 'mubarat.'

(3) An agreement by way of 'mubarat' requires the use of no special formula or words, but it must be followed by a 'talaq' in due form.[1]

(2) *Legal Effect of 'Khul'' and 'Mubarat.'*

Legal effect of 'khul'' and 'mubarat.'

165. (1) According to Hanafi law, the dissolution of marriage on a 'khul'' or 'mubarat' has the same effect as a single irrevocable divorce.[2]

(2) According to Shafi'i a 'khul'' or 'mubarat' is not considered as a divorce for reckoning the three divorces which render a re-marriage between the same man and woman invalid without the woman being married to a second husband.[3]

(3) The Shiah authorities are divided on the point[4] referred to in sub-section (1), but they are agreed that the wife may reclaim the consideration paid to her for a 'khul'' at any time during her ''iddat,' and if she does so, the husband may revoke the 'khul'' at his option.[5]

Right of wife during ''iddat' to maintenance.

166. A 'khul'' or 'mubarat' does not, in the absence of express agreement, affect the wife's right to claim from the husband, during the period of her ''iddat,' maintenance for herself and for children borne by her to him, and wages for suckling such children, if she is required by him to do so.[6]

Effects of 'khul'' and 'mubarat' on dower.

167. (1) The Hanafi authorities differ as to whether in the absence of express agreement, the rights referring to dower are extinguished or not by a 'khul'' or 'mubarat.'[7]

(2) Abu Hanifa holds that such rights are extinguished by both 'khul'' and 'mubarat'; and his opinion is adopted by the 'Fatawa 'Alamgiri,'[7] 'Hidaya,' 'Durr-ul-Mukhtar,' and 'Sharh-i-Viqaya.'[7]

(3) Abu Yusuf holds that they are extinguished by 'mubarat' alone,[8] and not by 'khul'.'[7]

(4) Imam Muhammad holds that they are extinguished by neither.[7]

[1] Bail. II. 129-137. It will be seen, therefore, that in Shiah law *mubarat* does not operate as a dissolution of marriage.

[2] Bail. I. 303. Though the Shiah authorities are divided on the point whether a *khul'* is a divorce or not, they agree that it is irrevocable. Bail. II. 135, and if the husband dies during the wife's *'iddat*, she does not inherit unless the *khul'* was agreed upon during *marz-ul-maut*. Bail. II. 123.

[3] *Sharh-i-Viqaya*, book on *Nikah*, chapter on '*khul'*.' See above s. 41, pp. 80, 81

[4] Bail. II. 129.

[5] Bail. II. 135.

[6] Bail. I. 303-306, cf. ss. 294, 300, 316 (2), 317 below.

[7] Bail. I. 303-306.

[8] See comment.

Sir R. Wilson points out [1] that one would expect (contrary to Abu Yusuf's view) that the dower rights would be extinguished rather by a 'khul'' (i.e. when the wife alone is desirous of separating) than by a 'mubarat' (i.e. when both parties desire it—see s. 152 above. SECT 167

Abu Yusuf's view is, perhaps, based on the ground that when both parties agree to dissolve the marriage (i.e. in a 'mubarat') they should be placed as nearly as possible in the position in which they would have been had they never married. On the other hand, as the husband can always dissolve marriage by 'talaq,' it is a necessary precaution that he should not be tempted to drive the wife into a request to divorce her so that he may gain pecuniarily.[2] At the same time, when the wife is trying to bargain for a release from an unwilling husband by a 'khul,'' Abu Yusuf may have thought that it should be presumed that the husband will expressly provide for all the terms that he desires in his favour.

First recorded instance of 'khul'.'

The first instance of 'khul'' recorded in Islam is said to be that of the wife of Thabit ibn Qais, who asked the Prophet to get her husband to divorce her, on her giving him her garden. Thabit was very ugly, and his wife is reported to have said, "If I had had no fear of God, I should have struck him on the face whenever he approached me." [3]

Effect of 'khul'' on dower. Two contradictory extracts cited i

The effect of a 'khul'' which does not contain express provisions with regard to the rights relating to dower, is not quite clear.

There are two extracts quoted in the 'Fatawa 'Alamgiri' which both bear on this point, but which appear to be incapable of reconciliation. The first [4] is taken from the 'Muhit,' and is an illustration of the rule in accordance with the opinion of Abu Hanifa, viz., that after a 'khul',' in the absence of express agreement, the wife cannot ask for her unpaid dower, nor, where dower has already been paid, can the husband demand repayment of any part thereof, even though the marriage has been dissolved without being consummated. The second extract [5] is taken from the 'Wajiz-i-Kurduri' of which the effect is as follows:—H marries *W* for a dower of Rs. 3,000 which is unpaid, and there is a 'khul'' before consummation, in consideration of *W* (the wife) paying Rs. 1,000 (nothing being said in the agreement of 'khul'' about the dower). In that event it is said that the Rs. 1,000 which are payable by *W* as consideration for the 'khul'' are to be set off against the Rs. 1,500 due from H to *W* for her dower [6] and *W* is entitled to Rs. 500 from the husband—in other words, the dower rights are not extinguished by the 'khul.' This second illustration is in accordance with the opinion of Imam Muhammad [7] (whose opinion, no doubt, the 'Kurduri' has adopted).

1. representing Abu Hanifa's views.
2. representing Imam

Second extract inserted probably through inadvertence.

Except, however, for the quotation contained in the illustration which is above referred to as the second extract,[5] the 'Fatawa 'Alamgiri' has adopted the view of Abu Hanifa, and it would seem that the said second

[1] "Anglo-Muhammadan Law," p. 145, s. 71.
[2] Cf. Bail. I. 304, (para. 2.).
[3] *Sharh-i-Viqaya*, vol. II. Book of *Nikah*, Ch. on '*khul*' (*ad init.*).
[4] Bail. I. 306 (para. 1).
[5] Bail. I. 312 (para. 1).
[6] Only half of the dower is due as the marriage is dissolved before consummation. See above s. 102.
[7] Abu Yusuf agrees with Imam Muhammad as to the effect of *khul'*, though on the effect of *mubarat* he took the view of Abu Hanifa and opposed to that of Imam Muhammad, see s. 167.

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illustration has crept in by inadvertence,[1] a fact that is not surprising when we remember that that work is a digest of innumerable extracts from almost all the books of authority ingeniously pieced together like a mosaic work.

'Khul'' or 'mubarat' does not effect

(a) ordinary debts of husband and wife to each other,

(b) nor any rights other than those depending on marriage.

Sir Roland Wilson seems to have committed an oversight in connection with this point. Under s. 31 of his valuable Digest he states that the 'Fatawa 'Alamgiri' "as rendered by Baillie is self-contradictory," not referring to the passages mentioned above, but to the following three sentences which occur in one paragraph[2] viz.:—(1) "'koolâ' and 'moobarat' cause every *right* to fall or cease, which either party has against the other, *depending on marriage.*" (2) "When a 'Khoolâ' is made by means of the word 'Khoolâ it does not occasion the release of any other *debts* than dower; and (3) "In like manner with regard to the word 'moobarat,' though there is a difference of opinion, the correct view is that it does not occasion the release of other *debts* than dower." These three sentences, it is submitted, are not contradictory to each other, but they supplement each other. Thus the first lays down that "all rights *depending on marriage*" fall or cease—in other words that there is a dissolution of marriage. This does not mean that the rights of the wife to be paid her debts also cease; for a right to be paid her debts surely does not depend on her marriage. However, the question may sometimes arise whether in addition to what the wife has agreed to pay as consideration for the 'khul',' she is to be presumed to have also released her rights to be paid such of her *debts* as her husband owes her. The second and third sentences cited above, answer this question in the negative. Finally, the point may still have to be considered, whether dower is to be taken as a *right* depending on marriage (in which case it would drop under the first sentence) or a *debt*, independently due) in which case it would be placed on the same footing as other debts, under the second sentence, and remain unaffected by the 'khul' '). Dower is, no doubt, a *debt* which often becomes payable, at least as to part thereof, only after a dissolution of the marriage, either by death or divorce, but on the other hand in its origin it does depend on marriage. This ambiguity about the nature of the dower-debt is reflected in the fact that a dower-debt is placed in a category by itself, and is not considered on the same basis as other debts (see the second sentence cited above); and that there are some authorities who think that dower should be considered as a right depending on marriage, and not a debt, is shown by the third sentence cited above. The majority hold, however, that dower is to be considered as a debt like other debts in this respect also. There can, nevertheless, be no doubt on the point that debts other than of dower are unaffected by 'khul'' or 'mubarat,' just as such other debts are unaffected by other modes of dissolving marriage (as for instance by the death of the husband or wife). It is true that dower is in certain circumstances extinguished as to half of it, when the marriage is dissolved; yet it is never suggested that a 'talaq' can affect in any manner any other debt due from the husband to the wife, e.g. for money lent to him by her.

Claim to dower: Is it (a) a right arising from marriage, or (b) a debt?

[1] See comment on s. 87, p. 105 above for a similar lapse.

[2] Bail. I. 301-305. The italics in the quotations in this paragraph are mine.

(3) *Revocation of 'Khul'.'*

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168. Where the husband has made a proposal for a 'khul'[1] he cannot retract it, even though he may have purported to reserve an option to himself to do so; but it is taken to be rejected unless it is accepted by the wife during the meeting at which she becomes aware of it.[2]

Revocation of proposal by husband.

169. The wife may reserve an option to herself to withdraw within a specified period of time from a proposal of 'khul'' made by herself.

Option reserved by the wife.

170. Where the wife has made a proposal for a 'khul'' she may retract it at any time before it has been accepted by the husband, and it is cancelled by her rising from the meeting.

wife

171. The husband may propose a 'khul'' conditional or contingent on the happening of a future event, but the wife cannot make a proposal for such a 'khul'.'[2]

172. A 'khul'' may not be agreed upon with an option to the husband to revoke it; and where the parties purport to agree to a 'khul'' on such terms, according to Sunni law, the 'khul'' is absolute, and the option is void;[3] and according to Shiah law both the 'khul'' and option are void.

husband to revoke 'khul.''

173. A 'khul'' may be agreed upon with an option to the wife to revoke it.[3] According to Shiah law the wife has, during her 'iddat' (following and occasioned by a dissolution of marriage under a 'khul'), the right to demand repayment of the consideration which she has paid for the 'khul',' and if she does so, the husband has the option to revoke the 'khul'.'[4]

Option to wife to revoke

(4) *Consideration of 'Khul'.'*

174. Anything[5] that may be the subject of dower, may be the consideration of a '

175. The consideration for a 'khul'' cannot be increased after it has been once agreed upon.[7]

Increase of consideration.[5]

[1] Cf. s. 162, (2) above, p. 155.
[2] Bail. I. 314.
[3] Bail. I. 311.
[4] Bail. II. 135, 137.
[5] In Shiah law there is no such recommendation to limit a 'khul'' as there is to limit a dower to a sum less than 500 *dirhams*. Bail. II. 130; cf. above, s. 96, p. 112.
[6] Bail. I. 310, II. 130.
[7] Bail. I. 307, cf. s. 99 above.

SECTION 176 Dower is consideration for 'khul'.'

176. Where the parties separate under a 'khul' and the consideration to be determined thereafter, such consideration cannot be fixed at a sum exceeding the 'mahr' actually paid to the wife, unless the wife agrees, nor at a sum less than such 'mahr,' unless the husband agrees.[1]

Restoration by wife of 'mahr' already received.

177. Where the parties intend to separate under a 'khul',' but no consideration is specified in the agreement so to separate, then the wife must restore the dower or such part thereof as she may have received from her husband, as consideration for the 'khul'.'[2]

Where consideration for the 'khul'' is the whole of the dower, dower becomes extinguished or has to be refunded.

178. Where the 'khul'' is in consideration of the whole of the wife's dower, or of specified property in value equal to the value of the dower, her right to demand payment of the dower from the husband is extinguished, and she must return it, if she has actually received it.[3]

Where consideration for 'khul'' is a fraction of the dower.

179. Where the 'khul'' is in consideration of a fraction of the dower—

(1) if the wife has not received possession of the dower her right to demand payment of it is entirely extinguished, and, on the other hand, the husband has no claim against her for payment of the fraction of the dower so agreed to be paid by the wife as consideration for the 'khul'';

(2) if the wife has received possession of the dower she must give the fraction agreed upon——

(*a*) of the whole of the dower if the marriage has been consummated, or

(*b*) of half of the dower if the marriage has not been consummated.

Presumption as to divorce following a proposal for 'khul'.'

180. Where the wife makes a proposal to the husband of a 'khul'' for a specified consideration, and the husband subsequently pronounces a divorce against her, which agrees with the wife's proposal in its being either single or triple as she proposed, then the husband (if he so asserts) will in Hanafi law be presumed to have accepted her proposal for a 'khul'' and will be entitled to the consideration specified by the wife.[4] The Shiah authorities are

[1] Bail. I. 311. As in marriage the "proper dower is a standard for the fixing the amount due as *mahr*," sec. s. 116, so here it is the dower he may have given her that is the standard.

[2] Bail. I. 311. (para. 1), cf. s. 176 above.

[3] Bail. I. 306-307.

[4] Bail. I. 312, 313. But see above, pp. 47-49.

divided on the point whether under the circumstances above referred to the presumption is in favour of a 'khul'' or of a divorce without consideration.[1] SECTION 180

(5) *Exigibility of Consideration for 'Khul'.'*

181. In the absence of an express agreement specifying a time for payment of the consideration for a 'khul'' it will be payable immediately[2] but the dissolution of marriage is not contingent on the payment of the consideration.[3] payable.

(6) *Persons Authorised to Enter into a 'Khul'.'*

182. A minor or insane person cannot validly effect a 'khul'.'[4] Competence.

183. According to Hanafi law (but not according to Shafi'i or Shiah law) a 'khul'' under compulsion or by a person in a state of voluntary intoxication is valid.[4] 'Khul'' under compulsion.

184. A 'khul'' may be effected through agents on behalf of either party. It is doubtful whether one person may act as agent for both parties in a 'khul'.'[5] through

185. The guardian of a minor wife may, according to Hanafi law, validly effect a 'khul'' on her behalf, but the consideration is payable by the guardian and not by the wife. Where the 'khul'' provides that the consideration is payable by the wife, it is of no effect unless it is sanctioned by her,[6] *semble*, on her attaining puberty.[7] by 1. wife.

The Shiah authorities are divided on the point whether a guardian can agree to a 'khul'' on behalf of a minor wife.[8]

186. The guardian of a minor husband cannot validly effect a 'khul'' on his behalf. 2. of mi husband.

§ 4.—*'Zihar.'*

187. In Hanafi law 'zihar' is a declaration by the husband (he being adult[10] and of sound mind) that his wife[11] (or 'zi i

II 130.

[2] Bail. I. 314.

[3] *Buzl-ul-Ruheem* v. *Lutcefutoonnissa* (1861) 8 Moo. 11 A. 379; 1. W. R. (P. C.) 57; 1 Ind. Jur. o. s. 1.; Sevestre's Reports of Indian cases affirmed on Appeal to the P. C., VII. 251; cf. s. 117 above.

[4] Bail. I. 319, II. 133.

[5] Bail. I. 318, 319.

I. 319.

[7] Or majority, see above s. 12, pp. 47-49.

[8] Bail. II 133 (para. 2), 129 (para. 2).

[9] Bail. I. 319.

[10] Bail. I. 321, 324 (para. 2). "The husband must be capable of making expiation, hence the *zihar* of a *zimmi*, a boy or an insane person is not valid."

[11] Even though she has been revocably divorced, provided her *'iddat* has not expired. Bail. I.

SECTION 187 any undivided part of her person or any member which implies the whole person) is to him like the back (or any other part which it is unlawful for him to see) of his mother, or of any other person whom he is prohibited from marrying.[1]

In Shiah law.

(2) In Shiah law 'zihar' is a declaration made in the presence of two just witnesses by the husband[2] (he being adult and of sound mind) that his wife[3] is to him like the back[4] of his mother, or of any other woman whom he is prohibited from marrying otherwise than by affinity or unlawful conjunction. Where the husband is not absent from his wife and she is subject to menstruation, 'zihar' is only effectual if made when the wife is in a 'tuhr' during which there has been no connubial intercourse.[5]

Restriction in point of time, place, condition or option.

188. 'Zihar' may be so made that its legal effects are restricted to a specified period of time, or made contingent on a condition being fulfilled or with the reservation of an option to revoke it; but in the absence of specific provision it is perpetual, absolute, and irrevocable.[6]

Legal effects of 'zihar.'

189. It is unlawful for a husband who has made 'zihar' to have sexual intercourse with his wife (under Hanafi law, notwithstanding that it has been made in jest, or under compulsion or mistake); and the wife may prevent[7] his having sexual intercourse with her, unless and until he makes an expiation, which is done by freeing a slave,[8] or fasting for two months, or feeding sixty poor persons.[9]

Necessity for expiation.

Expiation becomes necessary, and sexual intercourse is unlawful between the husband and wife till expiation is made; even though after 'zihar' he should divorce his wife irrevocably and then re-marry her.[10]

[1] Bail. I. 321-322. See comment following s. 192, next page.

[2] By the majority of Shiah authorities he may be a *mut'a* husband. Bail. II. 140. The point was considered doubtful and left undecided in *Luddun Sahiba* v. *Kamar Kudar* (1882) 8 Cal. 736, 11 Cal. L. R. 237.

[3] Not merely a part of her.

[4] No other part—except by a weak tradition.

[5] Bail. II. 139-140. When the marriage has not been consummated there is some doubt as to whether *zihar* may validly be made by Shiah law. But "later opinions favour the view" that it is valid. Bail. II. 140.

[6] Bail. I. 323, 324, 326, 325; II. 141.

[7] Cf. *Nowroz Ali* v. (*Mussummat*) *Aziz Bibi* (1876), 11 P. R. No. 124. CIV. JUDGTS p. 253, where the court refused to order restitution of conjugal rights as the husband had been guilty of apostasy. See above p. 84 s. 50.

[8] Though there are no slaves in India, this provision has been allowed to remain in the text, to explain its scope; besides, parties may be in a country where slavery exists when the events take place; or they may have a slave outside India freed.

[9] Bail. I. 322-323. B. II. 139, 142.

[10] Bail. I. 323.

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190. A 'zihar,' though unexpiated, does not of itself dissolve the marriage or disentitle the wife to claim restitution of conjugal rights.[1]

Legal effect of 'zihar.'

191. On a wife suing for restitution of conjugal rights against a husband who has made 'zihar,' and has not made expiation, he may be ordered to make the expiation. But he cannot be forced to divorce her.[1]

Suit by conjugal rights after

192. The husband's assertion that he has made the expiation will be presumed to be true.[2]

Presumption.

The following is an instance of 'zihar': "Suleman said 'you are to me as the back of my own mother until after Ramadhan.' Then Suleman slept with his wife when half of the month of Ramadhan had passed, and the Prophet enjoined him to make expiation."[3]

Instance of zihar.'

'Zihar' is a pre-Islamic institution, and though at its start the formula does not seem to have been used except out of regard for the wife, and as a sign of the husband's respect for a woman whom he compared to his mother,[4] it had degenerated by the time of the Prophet into an engine of oppression in the hands of the husband.[5] It was not a divorce, and not necessarily followed by one, and its evil was that while the husband had an excuse for refusing to give his protection to his wife[6] and for disclaiming the obligations of a husband, she on her part was still kept in bondage to him. The Quran removed the hardship of such a 'leonina societas,' or rather 'leonina dissolutio societatis,' and gave to the wife the option of having it determined for once, whether the husband wishes to dissolve the marriage or not.

Its pre-Islamic origin.

A means of oppression.

Where the husband has used the formula with the intention of making it serve the purpose of the pronouncement of a 'talaq,' he is entitled to do so: he may (except under Shiah law) pronounce a divorce in terms as highly metaphorical as he chooses, and as the Prophet is reported to have said that "such a form of speaking was by general consent understood to imply a perpetual separation," these terms might have been interpreted into a pronouncement of 'talaq' in the form of a well understood figure of speech. Still the words had an evil association, and Islam entitles the wife to demand, that if the husband desires to divorce her, he should do so in more approved terms—in terms which leave no doubt as to their effect.

'Zihar' formula as a pronouncement of 'talaq'

The case is different where the husband makes 'zihar' without any intention of releasing the wife, apparently as a mere pretext for not fulfilling his obligations, and with a desire to keep her in cruel suspense. In such cases his conduct could not be allowed to pass without some mark of disapprobation, by the religion which took women under its special protection.

'Zihar' without intention of dissolving marriage

[1] Bail I. 323, Hed 112.

[2] Bail. I 323 (para. 3). But see pp. 46 47 *ante*.

[3] *Mishcat-ul-Mashbih*, Book XIII, ch xiii. 2, Matthew, I. 122.

[4] Cf. Smith's "Kinship and Marriage in Ancient Arabia," 193*n*, and the commentaries on Quran XXXIII. 4.

[5] Quran XXXIII, 4.

[6] So Shylock says, "I have an oath in heaven; shall I lay perjury upon my soul?—No, not for Venice."—M. of Ven. IV. i. 228-230.

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Hence, where the husband makes 'zihar' with the intention of dissolving the marriage, he is asked by the law of Islam to do so in other and clearer terms : where he makes it without such intention, he is required to make an expiation for trying to place his wife in a difficult position.

'Zihar' not important in India.

'Zihar' has hardly any importance so far as the law courts in India are concerned. The words do not come naturally to Indian Muslims, as they did to the Arabs, and a person wishing deliberately to give his wife a cause of action for restitution of conjugal rights in India, would probably adopt an easier, more usual, and better understood mode of doing so.

Procedure in suit for restitution of conjugal rights after 'zihar.'

Should a person of sufficient acquaintance with the expressions and institutions of a distant country be desirous of trying the experiment, it is still possible that the wife may prefer not to sue for restitution of conjugal rights, but if she does so, before the suit could come on for hearing the husband would have plenty of time to make up his mind whether he should not settle the suit with the wife, or end it by divorcing her. If he does neither, the court would be bound by law to offer to the husband the option of divorcing or expiating, and, it is submitted, if necessary, to take evidence of the fact whether expiation has been made or not. As expiation has to be made by overt acts, there would probably be not more difficulty in deciding whether it had been made or not, than in deciding many of the questions that ordinarily come before the courts. In deciding whether a slave has been emancipated or sixty poor persons have been fed, no religious questions are involved. It is conceivable that a question might on some occasion arise whether a fast is proper or not. A fast is no doubt a religious institution, but the courts have to consider religious rites, and to decide upon them where civil rights are involved.[1] These remarks have seemed necessary as Sir R. Wilson expresses doubts whether it would be possible for an Anglo-Indian Civil Court to give effect to the rules relating to 'zihar' ; and his doubts "arise from the nature of the prescribed expiation." "By what evidence," he asks, "is the judge to satisfy himself either that the fasting has been made 'bona fide,' or that it is so impossible as to let in the last (and for a rich man the easiest) alternative,"[2] viz. of feeding sixty poor persons? The answer to these questions seems to be that 'bona fides' is not a necessary ingredient in the expiation, and even if it were, the fact of expiation having been made would, it is submitted, be sufficient to raise a presumption that it was made with 'bona fides.'

The question is however of hardly any practical importance.

§ 5.—*'Li'án'*

'Li'án' explained.

193. Where a Mussulman husband being adult and sane has made a statement[3] that his wife[4] has been guilty of

[1] As it did for instance in *Fazl Karim* v. *Maula Baksh* (1891), 18 Cal. 448 ; 18, I. A. 59 ; and see *Krishnasami* v. *Krishnamacharyar* (1882) 5 Mad. 313.

[2] "Anglo Muhammadan Law," 147, p. 75.

[3] According to Shafi'i and Shiah law a dumb husband may do it by signs but by Hanafi law a dumb husband cannot take *li'án*. Hed. ; Bail, II. 155. Under Shiah law the husband must allege that he caught the wife in the act and so a blind husband cannot take *li'an* and it is also requisite by that system that there should be no other proof of the adultery. Bail. II. 152.

[4] Though the wife has been revocably divorced, provided she is in *'iddat*, Bail. II., 153, but she must be permanently married and not be deaf nor dumb. Bail. II. 155.

adultery,[1] then she has (if she has been regularly married to him and she has not been previously notorious for loose life, nor has borne a child of unknown paternity)[2] the option[3] of applying to the Court to put the husband upon the alternative of either retracting the statement[4] or swearing four times by God that she is guilty of adultery, and imprecating upon himself the curse of God if he accuses her falsely.

SECTION 193

1. Accusation by husband.

2. Application to Court by wife.

On the wife's exercising the said option,[5] intercourse between her and her husband becomes unlawful[6] unless the husband chooses the alternative of retracting his accusation.[7]

3. Oath and imprecation by husband.

If the husband chooses the alternative of swearing with the imprecation above referred to, then the wife has again the option of admitting her guilt,[8] or swearing, in the same mode, that she is innocent, with an imprecation upon herself if she be guilty.

4. Oath and imprecation by wife.

Making such oaths and imprecations under the circumstances above referred to is termed making the 'li'án.'

On the husband and wife having both reciprocally made the 'li'án' the husband has the option of divorcing the wife, and if he refuses to do so, then, notwithstanding any agreement between the parties to forgive each other, or to release their liabilities, or otherwise to condone the alleged adultery, the marriage must be dissolved by the Court.[9]

5. Dissolution of marriage after mutual oaths and imprecations.

See comment under s. 194 below.

194. A dissolution of marriage by the Court on a 'li'án' being made has the same effect as one irrevocable divorce.[10]

Effect of such dissolution.

'Li'an' is perhaps somewhat less inapplicable to the circumstances of British India than 'zihar.' Should a case in which it is involved, come up before the Courts, ss. 8-12 of the Oaths Act X of 1873 partially provide a machinery for the enforcement of the law. For (*semble*) the wife by bringing a suit for dissolution of the marriage under this rule of law would be taken by

Procedure on 'li'án' in British India.

[1] The accusation may also be implied by denying paternity of a child borne by her. Bail. II. 152. Cf. p. 100, s. 81 above.

[2] By Shiah law the wife must have been chaste, not notorious for her bad character, and the marriage must have been consummated. Bail. II. 152.

[3] See above p. 164, *n.* 3.

[4] Shiah law requires the use of Arabic language, unless the parties are unable to use it. Bail. II. 156 (para. 2).

[5] She may not exercise the option, in which case the husband's statement does not prevent him from applying for restitution of conjugal rights. *Husaini Begam* v. *Muhammad Rustam Ali Khan* (1906) 29 All. 222, and see *Jaun* v. *Beparee* (1865), 3 W. R. 93.

[6] But does not of itself "operate as a divorce." *Jaun* v. *Beparee* (1865), 3 W. R 93.

[7] By retracting he becomes in Mussalman law liable to be punished criminally for slandering his wife. Bail. I. 335-336. Imputing unchastity to a woman was first made actionable in England, by 54 and 55 Vict. c. 51.

[8] In which case she would be criminally liable to be punished for adultery under Muhammadan law. Bail. I. 335-336.

[9] Bail. I. 333-337; Hed. 123-126; Bail. II. 122-123.

[10] *Ibid.* In Shiah law they are perpetually prohibited from intermarrying. Bail. II. 29 (para. 1), see above, s. 45, p. 83.

SECTION 194 operation of law to have made an offer under the Oaths Act, s. 9.[1] If the husband agrees to make the 'li'án' that would similarly be a counter offer by him, which the wife's refusal to accept[2] would naturally render her suit liable to be dismissed. Should, however, the husband retract the accusation the wife's suit would fail, probably with the 'solatium' of costs. When on the other hand the husband does not agree to make the oath, and does not retract the accusation, it all becomes "part of the proceedings" (Oaths Act, s. 12) and it is submitted that the judge would then be authorised to dissolve the marriage on the ground of equity, justice, and good conscience.[3]

On the effect of 'li'án' for disclaiming paternity, see s. 218 below.

§ 6.—Apostasy.

Apostasy cancels marriage.

195. Subject to Act XXI of 1850 [4] where either party apostatises from Islam the marriage becomes null and void.[5]

Effect on dower: 1. of husband's apostasy:

196. Where a marriage is made void by the apostasy of the husband, if it has been consummated, the wife is entitled to the whole of her 'mahr'; if it has not been consummated, she is entitled to half of the 'mahr.'[6]

2. of wife's apostasy.

197. The wife is entitled to no part of the 'mahr' where the marriage becomes void by her apostasy.[6]

Apostasy of both together.

198. If both parties apostatise together and come back to Islam, the marriage is re-established.[6]

(Shian law.) Marriage subsists during 'iddat' if consummated.

199. According to Shiah law where the marriage has been consummated, it does not become void by apostasy until after the expiration of 'iddat.'

(Hanafi law.) Dissolution after apostasy has effect of divorce.

200. Where the marriage becomes void by apostasy the effect in Hanafi law is the same as that of a divorce according to

[1] The commission which the judge is empowered to issue by s. 10 of the Oaths Act is also contemplated by at least the Shiah authorities: "It is not valid except in the presence of the judge or some one appointed by him for the purpose. Yet if the parties are content with a private person and take the *li'án* before him it is lawful." Bail II. 156.

[2] By the Hanafi law the judge is empowered to compel the parties by imprisonment to take the '*li'án*' or to retract. Bail. I. 335-336

[3] If necessary the Courts will no doubt call in aid the maxim that *boni judicis est ampliare jurisdictionem* and also reasoning similar to that in *Vadaka Vitil Ismal* v. *Odakel Birjakutti Umah* (1881), 3 Mad. 347. Proceedings of a like nature are not unknown in England. see *William* v. *Innes* (1808), 1 Camp. 364; *Daniel Pitt*, *ibid* 366 *n*., *Lloyd* v. *Willan* (1794), 1 Esp. 178; *Price* v. *Hollis* (1813), 1 M. & S. 105.

[4] The Act is given in full above, p. 30, and see *Noorooz* v. (*Mussammat*) *Aziz Bibi* (1876), 11 P. R. No. 124. (Civ. Jmts.) p. 253, where the effect of this Act is discussed with great learning. Boulnois and Campbell JJ. held (Lindsay J. *diss.*) that it does not affect the Muhammadan law by which apostasy deprives the husband of the right to sue for restitution of conjugal rights.

[5] As distinguished from "dissolved," see ss. 196, 201 (comment) above, pp. 166, 167.

[6] Bail. I. 182, II. 29, 125, 127. In India, however, difficult questions may arise as to the effect of this rule. See above, p. 59 *n.* 3.

Abu Hanifa and Abu Yusuf ; Imam Muhammad dissents from this view.[1] SECTION 200

Syed Ameer Ali in his learned work[2] states that the lawyers of Balkh and Samarqand hold that when a woman abjures Islam for a scriptural or revealed religion like Judaism or Christianity her renunciation of the faith does not dissolve the marriage, but the Allahabad High Court (Stanley C. J. and Banerjee J.) in a recent case[3] felt themselves unable to disregard the view expressed in Baillie[4] and two previous decisions.[5] Conversion to a scriptural religion by wife.

§ 7.—Nullification of Marriage for Physical Defects, etc.

(1) *Hanafi Law.*

201. Under Hanafi law— (Hanafi Law.)

(1) The wife has a right to apply to the Court for dissolution of the marriage on the ground of her husband's continued impotence[6] from the time of the marriage, provided that she was not aware of it before the marriage.[7] Application wife for dissolution, on husband potent.

(2) On such an application being made, where the husband admits, or it is otherwise proved, that he has never had sexual intercourse with her, the application will be stayed for such a period as shall include one calendar year, during which the husband is not prevented either by illness or want of access, from having intercourse with the wife.

(3) Where it is proved that the wife has had sexual intercourse with some man, it will be presumed[8] that the husband had intercourse with her, if he so asserts.

Under Hanafi law there is no power in the husband to annul or cancel[9] the marriage. Annulment of the marriage differs from divorce apparently only in regard to 'mahr' and in that an annulment does not count as a divorce for establishing prohibition. Annulment of marriage distinguished from divorce.

202. Any time after the expiration of the period of one year referred to in section 201, if it is proved that there has not been sexual intercourse between the husband and wife, she has the option of having the marriage dissolved by the Court, unless the husband elects to divorce her himself.[10] If no mation for one year

[1] Hed. 66.
" Mahommedan Law" (3rd Ed.), p. 132.
[3] *Amin Beg* v. *Saman* (1910), 33 All. 90.
[4] Bail. I. 182 ; Hed. 66.
[5] *Zuburdust Khan* v. *His wife* (1870), 2 N. W. P. 370 ; *Imam Din* v. *Hasan Bibi* (1906), Punj. Rec. 309.
[6] Impotence is physical inability to have sexual intercourse with women generally or any particular woman. Bail. I. 345. On impotence, *quoad hanc*, see *G.* v. *M* (1885) 10 App. Ca. 171, (per Dr. Lushington and Lord Watson) and *S.* v *B.* (1892) 16 Bom. 639.
[7] Bail. I. 345, 346, 348.
[8] See above, pp. 47-49.
[9] Which is the expression that Baillie uses, see above, s. 118.
[10] Bail. I. 347.

SECTION 203 (Hanafi law.) Effect of such dissolution.

203. The dissolution of a marriage under section 202 has the same effect as one irrevocable divorce.[1]

(Hanafi law.) 'Mahr' and 'iddat' after such dissolution.

204. Where the marriage has been dissolved either by the Court or by the wife under section 202, if there has been valid retirement between the parties, the wife is entitled to her full dower, and she is under the obligation to observe 'iddat.' Where there has not been valid retirement, she is entitled to half her dower, if any has been specified; otherwise to a present[2] and then she is under no obligation to observe 'iddat.'[1]

(2) Shiah and Shafi'i Law.

(Shiah and Shafi'i law.) Avoidance of marriage by wife.

205. Under Shiah and Shafi'i law a marriage may be annulled by the wife (without the intervention of the Court) on any of the following grounds:—

Insanity of husband.

(1) the insanity of the husband, whether he has lucid intervals or not, and whether it comes on before or after the contract, and whether before or after consummation;[3] or

Husband a eunuch.

(2) the fact that the husband is a eunuch; provided that he was so prior to the marriage contract; according to the opinion of some Shiah authorities (not endorsed by the 'Shara'ya-ul-Islam') even if it supervenes;[3] or

General impotence of husband.

(3) the husband's impotence with reference generally to all women, whether it comes on before or after the marriage is contracted, provided that the marriage has never been consummated;[3] or

(Shafi'i law.) Inability to provide maintenance.

(4) according to Shafi'i, but not under Shiah law, the husband's inability to provide maintenance for his wife.[4]

There are contradictory Shiah traditions as to whether supervenient disability on the part of the husband to maintain his wife also confers on her the power of cancelling the marriage. According to the most generally received traditions she has none.[5]

(Shiah and Shafi'i law.) Annulment of marriage by husband for wife's— total insanity, leprosy.

206. In Shiah and Shafi'i law a marriage may be annulled by the husband (without the intervention of the Court) on the ground of any of the following physical or mental defects in the wife:—(1) total insanity,[6] (2) leprosy whether black or white[7] or causing the members to wither away[8] ('juzam'),

[1] Bail. I. 347, cf. p. 117 above.
[2] Or *mit'at*. See above s. 102 (2), p. 115.
[3] Bail. II. 59-60; Hed. 128.
[4] Hed. 142.
[5] Bail. II. 34.
[6] Bail. II. 60.
[7] Bail. II. 60. (*Bars*) in Arabic.
[8] *Juzam* in Arabic.

(3) structural defects preventing sexual intercourse;[1] provided that according to the best supported Shiah authority the ground of avoidance has existed before the marriage was contracted.[2] According to some authorities the marriage may be avoided at any time before consummation, notwithstanding that the ground of avoidance arises after the marriage was contracted, and according to them in such a case half the proper dower is due whether any dower has been specified or not.[3]

SECTION 206 defects. When the ground for annulment arises after marriage contract.

207. According to Shiah and Shafi'i law either party may annul the marriage on any of the grounds stated in section 205 or 206 and the marriage is then dissolved without any order of the Court; provided first that there is no delay[4] in exercising the option after the ground comes to the knowledge of the party purporting to annul it;[5] and secondly, that where the ground for annulling the marriage is the impotence of the husband, the wife must apply to the Court to fix a period of time for testing his impotence; and if no sexual intercourse takes place during the period so fixed, then the wife may annul the marriage without any further order of the Court.[6]

Shafi'i law.) Order of Court not necessary to avoid marriage. Application to Court necessary if ground impotence.

208. In Shiah and Shafi'i law the annulment of a marriage under sections 205, 206, and 207 does not amount to a divorce for purposes of establishing prohibition by divorce between the parties remarrying each other.[7]

Shafi'i law.) Such does not count as divorce for prohibition.

209. According to Shiah and Shafi'i law, where the marriage is annulled by either party on the grounds referred to in section 205 or 206 without having been consummated, no portion of the dower is due,[8] unless the marriage is annulled for impotence, in which case the wife is entitled to half of her dower.[9] Where the marriage is annulled after consummation the whole dower is due.[8]

rights of such avoidance.

[1] In Arabic *karn, ifzau, rutuk*. Bail. II. 60, 61.

[2] Bail. II. 61 (*first*).

[3] Bail. II. 66.

[4] Cf. cases on Acquiescence in English law, and per Lindley L. J. *in re Sharpe* [1892] 1 Ch. at 168, on "staleness of demand as distinguished from the Statute of Limitation," "analogy to which may furnish defence to equitable claim," and see *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5, P. C. 221, 239; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Ca. 1218, 1279.

[5] Bail. II. 6 (*second*).

[6] Bail. II. 61-62.

[7] Bail. II. 61.

[8] Bail. II. 62; "the husband has, however, a right of recourse against the person by whom he was deceived." *Ibid.* Cf. effect of fraud on marriage, above, s. 72, p. 97 *n.* 3.

[9] Bail. II. 63, cf. p. 117 above.

SECTION 210

§ 8.—Dissolution of Marriage by Court.

court in case

210. According to Hanafi law a marriage may be dissolved by the Court in the following cases :—

Options.

(1) where the marriage is irregular ; or

(2) where a person having an option to avoid a marriage has exercised it ; or

(3) [where parties are married between whom prohibition by fosterage is established.[1]]

"A man is not to be separated from his wife for inability to maintain her."[2]

When husband missing for four years.

211. According to Shiah law, where the husband is missing, and no intelligence has been received of his place of residence, and his wife is not maintained by someone on his behalf,[3] she may apply to the Court to have her marriage dissolved, on which the Court will postpone the application for four years in order that enquiries may be made about the husband, and if no intelligence is received of him at the end of the said period, the Court will order the wife to observe 'iddat' as for his death, and on the completion thereof the marriage will be dissolved, and she may marry again.

Explanation—Where previous to the expiration of the 'iddat' above referred to, the husband returns, the marriage is not dissolved, and the parties continue to be husband and wife.[4]

Husband not liable for costs in matrimonial proceedings.

212. In divorce proceedings between husband and wife instituted in the Courts of British India, the husband is not liable as such for the costs incurred by or on behalf of the wife, even though she be not possessed of sufficient property to bear them herself.[5]

[1] See above s. 57, p. 105 and cf. p. 103 *n.* 1

[2] Bail. I. 443, and see above s. 205 (4), below ss 294 *et seq.*

[3] See ss. 289, 290 below.

[4] Bail. II. 165-166.

[5] *A* v. *B.* (1896), 21 Bom. 77, above, p. 69 *n.* 12

CHAPTER VI.

PARENTAGE.

§ 1.—Preliminary.

SECTION 213 Establishment

213. When one person is considered in law to be the father[1] or mother[2] of another, paternity or maternity of the latter is said to be established in the former.

A man may be the actual begetter of a child and yet not his father according to law, e.g., for purposes of inheritance, guardianship, etc. Thus according to Shiah law the child of illicit intercourse is not "related in law" to its father,[3] so that it seems even to have been suggested by some authority that it is not beyond doubt whether a man is prohibited from marrying his own child born by illicit intercourse. The rule is different with reference to a mother and her son. Hence it will be noticed that establishment of parentage is a very different notion from establishment of "legitimacy" under English law.

1. ORIGIN AND DEVELOPMENT OF THE MUHAMMADAN LAW OF PATERNITY.

customs as to paternity.

Previous to Islam it seems probable, that the customary rules relating to parentage that were prevalent in Arabia, were as elastic, and as much in favour of the man in power, as those about marriage and divorce. It was no doubt a source of strength in those unsettled times to have sons, real or adopted, who would be able to bear arms, and, there seem to have been few, if any, counterbalancing duties; while the feelings of the mothers were, as usual, neglected: rights they had none.

Strengthening of family tie by Islam, and imposition of duties.

The change that was brought about by Islam was in the direction of strengthening the tie of natural relationship, and imposing duties on it. The real father could not be deprived of his own child by a stranger, but where a person claimed to be the father, and there was no one to contest his claim, nor any ground for disbelieving the claimant, then the claim was allowed.

It will be useful to state the law in the shape of the strict rule which it was the aim[4] of Islam to see enforced, and then to state the modifications that came to be introduced, in later times. These modifications are based on various presumptions, of which the origin may be traced in the principle that a person will be presumed to be acting lawfully, unless the contrary is proved.

[1] Bail. II. 14.
[2] See s. 214 below.
[3] See above, p. 16.

SECTION 213 The rigorous rule of Islam was probably as follows: "Parentage is only established in the real father and mother of a child, and only if the child is begotten by them in lawful wedlock." Now, in enforcing this rule various presumptions were no doubt given effect to, which may also be stated categorically: First presumption: A child's mother is presumed not to have been guilty of adultery, if she is married. Second presumption: When a man says that a child has been begotten by him, and no other man claims to be its father, and the child itself does not dispute it, and the ages of the two persons are such that they may be father and child, they are presumed to be such, subject to the next-mentioned presumption. Third presumption: Such a statement as that mentioned above, cannot be presumed to be true when it implies that the mother of the child has been guilty of 'zina,' and which therefore accuses her of a crime[2] imposing upon her serious penalties; and upon himself liability to be punished for slander.

Strict rule aimed at by Islam.

Presumptions—
(i) against adultery;
(ii) as to truth of claim to paternity—unless that involves adultery.

Law of parentage arose through rules of evidence which developed into rules of substantive law.

It would therefore appear that the rules of parentage arose as rules of evidence.[1] But it has been held that, whatever be their origin, they form part of the Muhammadan law of inheritance and marriage, and not of the adjective law of evidence.[3] This process by which a rule of evidence passes into the realm of substantive law, is not by any means rare, and even as regards so integral a part of the substantive law of England as the doctrine of consideration, Lord Mansfield remarked: "I take it that the ancient notion about the want of consideration was for the sake of evidence only,"[4] and it has been said by another great authority: "In one sense everything is form, which the law requires in order to make a promise binding, over and above the mere expression of the promisor's will. Consideration is a form as much as a seal."[5]

2. LEADING IDEAS INVOLVED IN THE LAW OF PARENTAGE.

Analysis of ideas.

Legal effects, artificial parentage (adoption).

The questions arising with reference to the law of parentage may be divided under the following heads: (1) What are the legal effects of parentage and filiation, (e.g., with reference to inheritance, maintenance, guardianship of person, property, and for marriage). (2) Whether parentage in law, as distinct from natural parentage, is recognised; in other words whether legal parentage can be established over other people's children, (e.g., by adoption).

Different classes of actual parentage

(3) Whether the law recognises actual parentage of only one class, or of different classes and grades, with varying legal effects, and whether it distinguishes between the relationship that the father and mother respectively bear to the child in each case; [e.g., (*a*) the parentage of children born in lawful wedlock, (*b*) the issue of irregular marriages, (*c*) of children whose parents are not, though they could be, legally married, and of children whose parents could not even if they had desired to do so, have been legally married; these

[1] See above p. 16.

[2] Except in this respect the mother seems to occupy a dormant position.

[3] *Muhammad Allahdad* v. *Mahomed Ismail Khan* (1888) 10 All. 289; (*Mussumat*) *Bibee Fazilatunnessa* v. (*Mussummat*) *Bibee Kamarunnessa* (1905) 9 C. W. N. 352. In this regard acknowledgment of a child differs from the acknowledgment of other relationships such as brother or uncle, for the latter may be binding between themselves but do not affect other parties. Bail. I. 406 and see *Himmut Bahadur* v. *Sahebzadi Begum* (1873) 1 I. A. 23; 13 Ben. L. R. 182; 21 W. R. 113.

[4] *Pillans* v. *Van Mierop* (1765), 3 Burr. 1664.

[5] Holmes, "Common Law," 273.

again may be re-divided (i) as the issue of adultery and (ii) of incestuous adultery.] (4) Whether a relationship, which in its inception was illegitimate, can be legitimated (e.g., by subsequent marriage of the parents or acknowledgment, etc.[1]) (5) Whether the subsequent legitimation of a relationship, which was in its inception illegitimate, has the same legal effect as a relationship which was legitimate from its inception. (6) Whether a man is permitted to acknowledge the natural parentage of a child, without taking upon himself some or all of the burdens of legal parentage, and if so what is the position of a child so acknowledged. (7) Whether a person can disown the paternity of his actually begotten child, of any or all the classes referred to under head (3); and if so whether he can degrade a child from a higher to a lower class of filiation.

SECTION 213
Legitimation.
Effects of legitimation
Partial legitimation.
Disowning.

It need hardly be said that not all these points are known to Muhammadan law, nor are they covered by the sections contained in this chapter. It has, however, been felt that some such preliminary analysis of ideas is necessary inasmuch as those who are familiar with one legal system are apt to consider that the notions underlying the expressions "legitimacy," "parentage," "acknowledgment," etc., which are prevalent in that system are the same as those that are prevalent in Muhammadan law, whereas what really happens is that each expression connotes in each system of law some one or more of the elementary ideas that have been sought to be indicated above.

2. Establishment of Parentage.

214. (1) Maternity can only be established under Muhammadan law in the woman who gives birth to a child; and it cannot be disclaimed.[2]

Maternity.

(2) According to Sunni law it is established in the case of every child. According to Shiah law maternity is established only where the child is begotten in lawful marriage.[3]

215. Paternity[4] is (subject to sections 216 to 220 below) established in the husband[5] of the child's mother—

Paternity.

(1) where the child is born not earlier than six lunar months after[6] its mother has contracted (and according to Shiah law, consummated) marriage with her husband; and

[1] E.g., in Roman law it could also be done by a rescript of the Emperor, or by a testament confirmed by the Emperor. Hunter, "Roman Law," 203.

[2] Bail. I. 389, 411: Hed. 354, 136.

[3] Cf. above, s 213, comment

[4] Courts lean most strongly in favour of legitimacy, until convinced by most conclusive proof to the contrary. The absence of a marriage certificate amongst Mussulmans does not matter.—Per Beaman J.: *Moosa* v. *Ismail* (1909), 13 Bom. L. R. 169, 174.

[5] The rule applies though there is only "semblance of right," on which see ss. 14, 81; and in the case of an irregular marriage, Bail. I. 157. But see *Abdul Razak* v *Aga Mahomed Jaffer* (1893), 21 Cal. 666; 21 I. A. 56, where the point seems to have been overlooked But of course, the rule does not apply to children born in *zina*: *Mahomed Allahdad* v. *Mahomed Ismail* (1888) 10 All. 289 followed. *Mardan Saheb, Gansusaheb* v. *Rajaksaheb Kashimsaheb* (1909) 11 Bom. L. R. 117.

[6] Bail. II. 90.

SECTION 215 (2) (in case the marriage has been dissolved), within the following periods respectively after its dissolution, viz.,—

(*a*) according to Hanafi law, two lunar years,[1]

(*b*) according to Shafi'i and Maliki law, four lunar years,[1]

(*c*) according to Shiah law, ten lunar months;[2]

provided that the woman has in each case remained unmarried.[2]

Quaere, whether the rules of law above stated are abrogated by section 112 of the Indian Evidence Act[3] to any and if so to what extent.

(1) *Sunni Law.*

(1) H, a Sunni, marries W on the 1st of January 1900 and

(*a*) W gives birth to a child C within 6 lunar months from 1st January 1900; the paternity of C is not established in H.[4]

(*b*) H divorces W on 1st January 1901 without consummation, and W gives birth to C within six months from 1st January 1901: H's paternity is established; if C had been born more than six months after 1st January 1901, the paternity of H would not have been established.[5]

(*c*) H divorces W on 1st January 1901, the marriage having been consummated, and W gives birth to C within two[6] lunar years of 1st January 1901. The paternity of C is established in H.[7]

(*d*) H dies on 1st January 1901; then, whether the marriage has been consummated or not, if W remains unmarried and gives birth to C within two[6] lunar years of H's death, the paternity of C is established in H; unless six months before C's birth W had declared her 'iddat' to have expired.[7]

(2) *Shiah Law.*

(2) H, a Shiah, consummates[5] his marriage with W on the 1st of January, 1900.

(*a*) W gives birth to a child C within six lunar months from 1st January 1900. The paternity of C is not established in H.[8]

[1] Bail. I. 390, 391, 393 394; Hed. 137; Bail. II. 90, 14, 153 (penultimate sentence). *Jesmunt Singjee Ubbuj Singji* v. *Jet Singjee Ubbuj Singji* (1844) 3 Moo. I. A 245; 6 W. R. (P.C.) 46.

[2] Two other views are mentioned in the *Shara'ya*: One cutting down the longest period of gestation to nine months, and the other extending it to one year. The latter view is stated to be exploded and abandoned. Bail. II. 90.

[3] Which is as follows: "The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

[4] Bail. I. 391.

[5] Bail. I. 394, *ll.* 1-6. In Shiah law the same would hold, Bail. II. 92—but only if there has been consummation. Bail. II. 90, 91, 14. Cf p. 180 *n.* 6.

[6] Four years under Shafi'i or Hanbali law.

[7] Bail. I. 394.

[8] Bail. II. 91. See also *ill.* (*b*) in Sunni law.

(*b*) H dies on the 1st of June 1900, and W gives birth to C on the 1st of April 1901, more than ten lunar months after 1st June 1900. C is illegitimate in Shiah law [1] [but legitimate in Sunni law].

1. CONFLICT BETWEEN THE EVIDENCE ACT AND THE MUHAMMADAN LAW OF PARENTAGE.

Doubts as to Evidence Act s. 112 superseding Muhammadan law

1. Muhammadan law required to be administered.

It is unsettled whether the rule of Muhammadan law as given in ss. 215-221 must be taken as in force in British India, or as repealed by the Indian Evidence Act s. 112. The difficulty of deciding the question was pointed out as early as in 1888 by Mahmood J.[2] Sir Roland Wilson[3] seems to favour the view that s. 112, though placed in the Evidence Act, deals with a branch of substantive law, and that as there are statutory provisions later in date than the Evidence Act requiring Muhammadan law to be administered, s. 112 does not apply in so far as it conflicts with the provisions of Muhammadan law. Mr. Mulla,[4] on the other hand, expresses the opinion that the Evidence Act supersedes the rules of Muhammadan law. He argues that whatever be the collocation of s. 112, it has to be applied to Muhammadans as well as to all others, and must be taken to have altered the substantive Muhammadan law on the point it covers. As to the statutes requiring the administration of the Muhammadan law of marriage and parentage, Mr. Mulla points out that though they were passed after the Evidence Act[5] they do not require pure Muhammadan law to be administered in its entirety, but in so far only as the same has not been altered or abolished by legislative enactments.

2. Legislature may alter or abrogate Muhammadan law even through an act dealing with evidence.

Rules other than those of evidence not affected by Evidence Act unless expressly repealed.

It seems, however, to have been overlooked that by the Evidence Act (last paragraph of s. 2) nothing contained in that Act affects any Statute, Act or Regulation, not expressly repealed, and that by s. 2 (1) only rules of evidence not contained in a Statute, Act or Regulation are repealed. In other words, those rules are not repealed by the Evidence Act, which are not rules of evidence, though they be contained elsewhere than in a Statute, Act or Regulation. Hence the Muhammadan law on the point is not repealed unless the rule is one of evidence. Therefore there are two elements of uncertainty, for first of all it has to be determined whether the rule contained in s. 112 of the Evidence Act is one of evidence or of substantive law; secondly, if it is a rule of substantive law, is it to be supposed to have altered the Muhammadan law, or is the last clause of s. 103 of the Evidence Act to be taken as saving the substantive Muhammadan law on the point as a presumption of law.

2. THE RULE OF PURE MUHAMMADAN LAW.

Points of difference between law and the Evidence Act s. 112.

Muhammadan law in its strictness differs in three points from the Evidence Act: (1) The presumption arises six months after marriage and not before. (2) It continues not only during 280 days after dissolution of marriage, but during the periods respectively mentioned in s. 215 of this work, i.e.

[1] Bail. II. 91. *Quaere*, what law would govern the case if one of the parties to the marriage were Sunni and the other Shiah?

[2] *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1888) 10 All. 289, 339.

[3] "Anglo-Muhammadan Law," s. 83, pp. 101-102.

[4] "Mahomedan Law" (3rd Ed.), 139-140; (4th Ed.) 147.

[5] The High Courts are, of course, governed by their Charters, which are of much earlier date, and this portion of Sir R. Wilson's agreement does not apply to the jurisdiction of the High Courts.

SECTION 215 2 years, 4 years, or 10 months respectively. (3) It seems to be not a conclusive, but a rebuttable presumption. But see below.

Presumption of Muhammadan law is not conclusive.

It is unnecessary further to refer to any but the third point. That by Muhammadan law the presumption of paternity may be rebutted in one mode is clear; but it has been questioned whether the special mode in which alone it could be rebutted by the father in Muhammadan law, viz. 'li'án,' can be given effect to in British India. It has been already submitted that it can.[1] If, however, it is held that the rules of making 'li'án' are not applicable in British India, it would probably be on the ground that they consist mainly of adjective law; if so, the Courts would, no doubt, permit another procedure to be employed, preserving at the same time the substantive reqirements of the law, viz., a solemn denial of paternity, coupled with an accusation of adultery against the wife. The accusation of adultery, it is true, is implied in the denial of paternity, but its separate mention is of importance where the Muhammadan law of slander prevails.[2]

Enforceability of 'li'án' in British India.

Can the presumption be rebutted by other than the putative father?

There are, again, the further points to be considered, whether the presumption of paternity can be rebutted only by the putative father, or also by other parties, and whether the right of other parties to rebut the presumption (if they have any) may be exercised while the father himself is on the scene. There seems to be no direct authority covering these points. It is submitted, however, that the presumption is, in its origin, a rebuttable one and its nature should not, as far as possible, be altered, and that, if it is held to be rebuttable, it should be permissible to anyone interested to disprove it.

Practical effect of the rule of Muhammadan law in India, if held rebuttable.

If it is held that the presumption in question is a rebuttable one, then the practical effect of the rule in British India would be that after the expiration of 280 days succeeding the dissolution of the marriage, very slight evidence would be considered sufficient to remove the presumption. The Calcutta High Court, before the passing of the Evidence Act, declined to follow this part of the rule of Muhammadan law as being "contrary to the course of nature and impossible."[3] They referred to the 'Hidaya' in the decision, but did not consider the question in all its bearings, nor the full effect of their ruling. The ruling, however, which was given in that case is consistent with the Muhammadan law if the presumption is held to be rebuttable.

The policy of law underlying the presumptions relating to paternity.

In reply to a critic who has suggested that the Muhammadan law relating to the presumption of parentage is "absurd," and should therefore give place to the Evidence Act, Sir Roland Wilson answers that it is not less absurd to presume that a child born a day after marriage is legitimate (as is done by English law and the Indian Evidence Act). Sir Roland Wilson also refers to the policy which underlies these presumptions equally of Muhammadan and of English law. If indeed the critics of Muhammadan law took a little more pains to examine it, and to compare it with other systems, they would find that in a great number of cases the same principles make their appearances with variations in most systems of law, but a rule which appears incomprehensible or absurd in an imperfectly understood system, is recognised in another

[1] See comment on ss 193-194 above, pp. 165-166, and the Oaths Act there cited.

[2] Cf. Hed. 135 (col. i. para. 1), 136 (col. ii. para. 2). See above, p. 165 *nn.* 7-8.

[3] (*Mir*) *Ashruf Ali* v. (*Mir*) *Ashad* (1871) 16 W. R. 260.

system, with which the critic is more familiar, as the embodiment of public policy ; and it is a truism that the most ignorant are the hastiest and the severest in their strictures. SECTION 21

Policy of Muhammadan

The reason why some of the Muhammadan lawyers stretched the length of the period of gestation to two and four years, are not difficult to surmise. There was, no doubt, an initial want of scientific knowledge of physiology.[1] Added to this was the desire not to take any risk of bringing down on the head even of an erring woman the extremely severe punishment which adultery involved.[2] English lawyers would, one should have imagined, be familar with the process by which the rigour of the law is lessened by fictions and technicalities which are the more admired the more far-fetched they are.

3. EFFECT OF THE EVIDENCE ACT S. 112 ON MUHAMMADAN LAW.

Difficulties of applying Evidence Act s. 112 to Muhammadan law.

Assuming that the Evidence Act supersedes Muhammadan law, we are faced by various questions regarding the manner in which the former should be interpreted and applied to persons governed by the Muhammadan law of marriage. Section 112 assumes that the proposition that "a child born during the continuance of a valid marriage" is "legitimate" has as clear and definite a meaning, and, presumably, the same meaning, in Muhammadan law, as it has in English law. But this is hardly the case: For in the premise of the proposition contained in s. 112, "a valid marriage" is postulated. There is no definition of a valid marriage in the Evidence Act. What is the effect to be given to those words in Sunni Hanafi law? Marriages are divided by that system into two classes, usually termed the valid and the invalid, but which are referred to in this work as regular and irregular marriages, and power is given to the man that is regularly married to disclaim a child of his wife, by 'li'án,' an irregular marriage gives no such power, to the man. Shall it be held that because the word referring to the former class of marriages has by English authors been translated "valid," therefore that class of marriages is alone contemplated by the Evidence Act? Or shall it be held that both classes of marriages permitted by Hanafi law are contemplated by the section? Similarly the Shiah 'Itna 'ashari' law also recognises two classes of marital relationship, the permanent and the temporary ('mut'a'). The latter is generally spoken of as a "marriage" in books written in English, because it permits a relationship in some respects similar to that of the ordinary marriage; but it is said in a work of great authority[3] that "the name of *wife* does not in reality apply to a woman contracted in *moota*, for of these a man may possess more than four at a time. . . . Since then . . . these women are not in reality wives, it follows that they cannot be included in the law of marriage, nor comprehended in the sense and intention of the sacred text already quoted," i.e. she is not a "wife" for purposes of inheritance.[4] Shall the connection by 'mut'a' then be held to fall within the expression "valid marriage" in the Evidence Act, s. 114 or, if not,

1. As to interpretation of valid marriage.

(a) as to regular and irregular marriages.

(b) as to permanent and temporary marriages

[1] But see p. 179, *n.* 2. below.

[2] See also comment under s. 213 above.

[3] Bail. II. 344-345. The passage here translated does not occur in the *Shara'ya-ul-Islam*, but is taken from the Digest of Sir W. Jones, which is composed of extracts from a commentary on the *Mafatih*, and a work called the *Kafi* besides the *Shara'ya-ul-Islam*; Bail. Vol. II. p. xxvii.

[4] And yet women contracted by *mut'a*, have been held to come within the term "wife" in the Criminal Procedure Code s. 488 and maintenance has been ordered in their favour. See below, s. 294 (3).

SECTION 215 will the Muhammadan law of paternity be followed in regard to 'mut'a' but not in regard to the regular marriage?

It will be seen that if the section is held to apply to all these classes of marriages, we nullify the distinction between a valid (or regular) and an invalid (or irregular) marriage, and between a permanent marriage, and 'mut'a'; and if we so interpret the section we practically substitute for the words "valid marriage" the words "any connection between persons of the opposite sex, which the law permits without penalising and from which legal rights and liabilities flow." There does not appear to be any indication that such was the intention of the legislature.

2. As to legitimacy.

In the next place when we come to interpret the words "legitimate son" we have a new set of difficulties. Legitimacy attaches to the child and is a qualification of the relationship subsisting between itself and not only both its parents, but all its other blood relations. It is submitted that the Muhammadan law does not contain any exactly corresponding notion.[1] The Muhammadan law speaks of the relationship, and not of the person; and in particular it speaks of two distinct relationships, viz., paternity and maternity. Now as to maternity, there is, at least in Sunni law, nothing like an illegitimate mother;[2] hence, to qualify the term mother with the epithet "legitimate" or "illegitimate" is to employ an additional word which can have no meaning in the Sunni law in this context. On the other hand, with reference to paternity, the law gives to the man in certain cases the power of establishing paternity, and in others of disclaiming it, though his disclaimer has no effect on the child's relationship with its mother. In fact, acknowledging paternity is the nearest approach in Muhammadan law to adoption,[3] and the disclaimer of parentage the one mode of disinheriting a child born to one's wife.

3. Whether any portion of Muhammadan law unaffected by s 112.

Presumptions after 280 days have expired.

Then again the section does not purport to lay down that legitimacy cannot be established under any other circumstances than those mentioned in the section, nor that the absence of the circumstances mentioned in the section shall be conclusive proof that the child is illegitimate. Unless words to this effect are read into the section—and this, it is manifest, cannot be done without doing violence to the words of the Act no less than to the opinion of scientists[3]—it would appear that in the case of birth after the expiration of 280 days there is nothing to prevent the Muhammadan law having its effect. So that even if the section be held to apply, still without doing violence to it, paternity can, in the case of a child that is governed by Shiah law be presumed to be in the late husband of the mother, if it is born between 280 days and 10 months after the dissolution of the marriage, and a similar presumption may be admitted as to a child governed by Hanafi law who is born between 280 days and two years after the dissolution of the marriage-unless in either case the putative father disclaims the child by 'li'án.'

[1] Cf. Bail. I. 433 *n.* 1. Cf. note 3 on this page.

[2] The Shiah law authorities recognise the difference between a mother by marriage and by illicit intercourse, in so far that the latter cannot inherit from her child nor *vice versa*, Bail. II. 305 (para. 4).

[3] In the case of the child of a slave-girl owned by two men jointly, paternity could be established in either owner, Bail. II. 92-93, 93 (para. 2). A woman cannot acknowledge a child without the assent of her husband, Bail. I. 404. And in regard to "semblance of right" the husband's knowledge and state of mind are alone considered, Bail. II, 92-93, 172.

This brings us to another point of vital distinction between the Evidence Act and Muhammadan law which has been already referred to, viz., that while the presumption of s. 112 is irrebuttable that of Muhammadan law is rebuttable, though under strict Muhammadan law it could be rebutted only in one way—by 'li'án.' Is the whole Muhammadan law of disclaiming parentage repealed by s. 112?

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Presumption of Evidence Act is conclusive, that of Muhammadan law is rebuttable.

4. CONCLUSION.

It is difficult to resist the conclusion that the Evidence Act s. 112 was drafted without giving a thought to the framework in which it would have to be set, if it is to displace the Muhammadan law on the same point. It is almost as difficult to decide whether this oversight can be a ground for disregarding its provisions. The uncertainty and difficulty of applying an Act of legislature does not have the same effect on its provisions as similar defects in a contract.[1] It would, therefore, appear that in spite of all the difficulties mentioned above, the Courts must struggle to give effect to that section.

Evidence Act applies, but the presumption of Muhammadan law after expiration of 280 days intact.

As has been already submitted, the section does not seem to affect the presumption of Muhammadan law after the period of 280 days but that presumption is rendered weak, and almost nugatory by the knowledge of physiological facts that we now possess.[2]

216. According to Sunni law, where after dissolution of her marriage a woman has married again, and a child is born to her at such a time that its paternity may be established, (in accordance with the rule contained in section 215) in favour equally of a husband regularly married, and of a husband irregularly married, preference will be given to the paternity of the former; provided that paternity will be ascribed to an irregularly married husband, where, if that is not done, the child must be held to be born of illicit intercourse.[3]

Presumption in favour of paternity of husband by marriage.

217. According to Shiah law paternity is not established where it is shown that the husband had no access to the wife or that the husband was not able to have sexual intercourse at any time when the child could have been begotten.[4]

had no access to the wife.

§ 4.—Disclaimer of Paternity.

218. (1) Where the marriage is valid and regular[5] the husband may by taking the 'li'án' disclaim the paternity of a

Disclaimer of paternity by

[1] *Manchester Ship Canal* v. *Manchester Racecourse Co* [1900] 2 Ch. 352, [1901] 2 Ch. 37; and see per Warrington J. in *Ryan* v. *Thomas*, Solicitor's Journal for 25th March 1911 at p. 364.

[2] See Taylor, "Medical Jurisprudence" (5th Ed. 1905). II. 60 *sqq.* At p. 63 it is stated, "It is not in our power to fix" the limit to gestation; and cases are recorded of its being prolonged to 324 days. See also Lyon, "Medical Jurisprudence" (1889) 343. Barry, "Medicine" (1903), II. 104-106.

[3] Bail. I. 395-396. Cf. *Roshun Jehan* v. *Enaet Hosscin* and *Enaet Hosscin* v. *Roshun Jehan* (1886) 5 W. R., 5 affirmed by P. C. as *Khajooroonissa* v. *Rowsham Jehan* (1876) 2 Cal. 184; 3, I. A. 291; 26 W. R. 36.

[4] Bail. II. 153. Cf. Evidence Act, s. 112.

[5] See next page, *n.* 1.

SECTION 218 child born to the wife and thus prevent it from being established [1] ; provided that he has not previously acknowledged its paternity nor acquiesced [2] in its being attributed to him.[3]

(2) Where the parties are Shiahs, who have contracted a 'mut'a,' paternity may in some cases be apparently disclaimed even without the husband taking the 'li'an.' [4]

(3) Paternity cannot be disclaimed except as provided in this section.[5]

Illustration.

H consummates [6] his marriage with *W* on the 1st January 1900.
W commits adultery and gives birth to C on 1st August 1900.
H's paternity is established and he can only disclaim it by 'li'ān.' [7]

Disclaimer of paternity after acknowledgment.

219. Paternity cannot be disclaimed or renounced after it has once become established.[8]

Acknowledgment after disclaimer.

220. According to Shiah law where paternity has been disclaimed by 'li'án,' it may nevertheless be subsequently acknowledged [9] by the husband of the mother, and thus it may become established ; provided that in such a case the father has no right to inherit from the child.[10]

Paternity of a widow's child born after "iddat.'

221. Where a child is born to a widow after she has made a declaration that her ''iddat' has expired [11] (such declaration having been made at a time when the ''iddat' may reasonably be supposed to have expired),[12] paternity of the child is not established in the widow's husband, unless it is born within six months of such declaration, and within two years or four years or

[1] Where the marriage is irregular, the husband cannot disclaim the child by 'li'án' Paternity is a burden on the father ; so in Shiah law the child of a woman married during *'iddat* is affiliated to the husband. Bail II. 26 (*second*). In England parents cannot be compelled to make statements which might bastardize their children : see *Aylesford Peerage* (1885) 11, A. C. 1. *Poulett* [1903] A. C. 395 ; *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282.

[2] As to the lapse of time required for presuming acquiescence, Abu Hanifa is said to have considered this as governed by "custom," "what is usual," or "in the discretion of the judge." Abu Yusuf and Muhammed fixed 40 days, Bail I. 390.

[3] Bail. I. 390, 391, 393, 394, 413, II. 91, 43.

[4] Bail. II. 43 (*fifth*), 91 (para. 2). See above, s. 193, on *li'an* ; and s. 25 on *mut'a*.
Bail. I. 340 (*ll* 30-35).

[5] "Consummates" because the illustration is from a Shiah authority. A Sunni book would say "contracts." See ss. 215 (1), 217 above, pp. 173, 179.

[7] Bail. II. 91.

[8] Bail. I. 408. In *Ashruf-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan* (1866), 1 MOO I.A. 94 a formal deed of renunciation was put forward, but was taken into consideration merely to disprove the allegation that it had been preceded by an acknowledgment. See also *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 340.

[9] See s. 221 below.

[10] Bail. II. 14 (para. 4). The instance refers only to acknowledgment by the father, but if it is established in any other way, the same results would no doubt follow.

[11] The *'iddat* can only expire if the widow is not with child. See s. 39 above, p. 79.

[12] Bail. I. 394 ; see also Bail. I. 34 last sentence.

ten months[1] of the death of the husband, according to Hanafi, Shafi'i, and Shiah law, respectively.[1] SECTION 221

§ 4.—Acknowledgment of Paternity.

Establishment of paternity by acknowledgment of the father.

222. Paternity of a child is established in any man who acknowledges it with the intention of admitting that it has been established ;[2] provided that each of the following conditions is fulfilled ; viz., that

(1) the paternity of the child is not established in anyone else ;[3]

(2) the ages of the parties are such that they may be father and child ;[4]

(3) the child confirms or acquiesces[5] in the acknowledgment, if it is of an age to do so ;[6] and

(4) the man could lawfully have been the husband of the child's mother[7] at the time when the child was begotten ;[8] and it is not proved that the child is the offspring of illicit intercourse.[9]

Cf. section 81 above for presumptions of marriage.

Distinction between formal and informal acknowledgment of paternity.

The distinction between casual and deliberate, or formal and informal, acknowledgments[10] does not seem to have been known to Muhammadan law. Such a distinction is necessary only where unlawful intercourse is not punishable, but its introduction by our Courts aids in giving effect to the intention of Muhammadan law, under which the distinction would have been meaningless, because acknowledgment had always serious consequences : if it did not establish paternity it imposed the liability to be punished for 'zina' or slander.[11]

[1] Bail. 1. 394. There does not seem to be any reference to this point in the *Shara'ya-ul-Islam.*

[2] An admission of paternity made casually and not intended to have a serious effect, is not "sufficient" to confer the status of legitimacy." *Ashruf-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan* (1866) II. Moo. I. A. 49, 104 *Abdul Razak* v. *Aga Mahomed* Bindanim (1893) 21 Cal. 666, 678, 21 I. A 56.

[3] *Nujeebunnissa* v. *Zuneerun* (1869) 11. W. R. 426, 4 Ben. L. R. (APP. CU.) 55 ; affirmed on appeal, *Jaibun* v. *Nujeeboonissa* (1869) 12 W. R. 497.

[4] I.e. the man must be at least 12½ years older than the child, according to Bail. I. 408.

[5] *Kedarnath* v. *Donzelli* (1873) 20 W. R. 352 *Oomda Bibee* v. *Jonab Ali* (1866), 5 W. R. 132 ; 1 Jur, N.S., 43, *Fuzeelun Beebee* v. *Omdah Beebee* (1868) 10 W. R. 469 *Wuheedun* v. *Hossein* (1871) 15 W. R. 403.

[6] See comment on s. 225 p. 183 below.

[7] *Wuheedun* v. *Wusee Hossein* (1871) 15 W. R. 403.

[8] Bail. I. 405 ; Hed. 439, and see comment to this section p. 181 *nn.* 3-6.

[9] *Aizunnissa Khatoon* v. *Karimunnessa Khatoon* (1895) 23 Cal. 130. See, however, comment to s. 83 above.

[10] *Ashrufood-dowla Ahmed Hossein* v. *Hyder Hossein Khan* (1866) 11 Moo. I. A. 94 *Abdul Razak* v. *Aga Mahomed Bindanim* (1893) 21 Cal. 666, 678, 21 I. A. 56.

[11] Thus it has not seemed necessary to introduce any rule in the Evidence Act that a confession must be made with the intention that it should have a serious effect though it has been necessary to prevent extortion of confessions. See p, 165 *nn.* 7, 8.

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The acknowledgement itself need not be of such a character as to be evidence of marriage.[1]

Cases have come before the Courts in which it has been held that when the mother is a prostitute, the child cannot be acknowledged:[2] nor when she is the sister of the acknowledger's wife:[3] nor when she has another husband.[4] The question whether "the offspring of adulterous intercourse could have been legitimated by any acknowledgment" was left undecided by the Privy Council in 1883,[5] but it was answered in the negative seventeen years later,[2] when it was also decided that paternity can neither be established in the case of a child of fornication as distinguished from adultery. The law had been stated in the same terms by Mahmood J.[6]

Acknowledgment under sec. 211 conclusive proof of paternity.

223. Where a man acknowledges his paternity of a child under section 222, it is conclusive proof of the relationship, and evidence cannot be given for the purpose of disproving it.[7]

Presumption of acknowledgment.

224. Where a man has openly treated another as his child it may be presumed that the former has acknowledged the parentage of the latter.[8]

The presumption has been held to be rebuttable.[9]

§ 5.—Adoption and Muhammadan Law.

Adoption not known to Muhammadan law.

225. Subject to section 226, paternity or maternity cannot be established in a Mussulman who purports to adopt another,[10] nor is the latter considered in Muhammadan law to be the child of the former.

[1] See p. 181, *n.* 7, above.

[2] *Dhan Bibi* v *Lalon Bibi* (1900) 27 Cal. 801 *Ghazanfar Ali Khan* v. *Kaniz Fatma* (1910) 32 All. 345.

[3] See p. 181, *n.* 9, above.

[4] *Liaqat Ali* v. *Karan-un-nissa* (1893) 15 All. 396.

[5] *Sadakat Hoosein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 668, 11, 1, 31. *Mahammad Azmatali Khan* v. *Lalli Begum* (1881) 8 Cal. 422, 428.

[6] In *Muhammad Allahdad* v. *Muhammad Ismail* (1883) 10 All 289, 337.

[7] *In the matter of the Petition of Najibun nissa* (1869) 4 Ben. L. R. (A C.) 55; 11 W R 426, affirmed on appeal. *Jaibun* v. *Nujeeboonissa* (1869) 12 W R. 497. *Nubo Kant Roy Chowdhry* v. *Mahtab Bibee* (1873) 20 W. R. 164; *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* 10 All. 289. See also *Muhammad Azmat* v. *Lalli Begam* (1881) 8 Cal. 422, 9 I A. 8 *Sadakat Hossein* v *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I. A. 31.

[8] *Mahomed Gouhur Ali Khan* v. *Harratoonissa* (1865) 2 W. R. 52, upheld on facts by P. C. (*Khajah*) *Habeebollah* v. (*Khajah*) *Gouhur Ally Khan* (1872) 18 W. R. 523. *Roushun Jehan* v. *Enaet Hossein* (1866) 5 W R 5; affirmed in P. C. *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184; 3 I. A. 291, 26 W. R. 36; *Muhammad Ismail Khan* v *Fidayatunnissa* (P.C.) (1881) 3 All. 723; *Waliulla* v. *Miran Sahib* (1864) 2 Bom. H. C. R. 285. *Mahammad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422; 9 I. A. 8.; *Mahomed Bauker Hossein Khan Bahadur* v. *Shurfoonnissa Begum* (1860) 8 Moo. I. A. 136, 159; 3 W. R. (P. C.) 37.

[9] *Buttoolum* v. *Koolsoon Butoolun* v. *Lloyd* (1876) 25 W. R 444 see above p. 100 *n.* 4.

[10] *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1888) 10 All. 289, 340; *Jeswunt Singhjee* v. *Jet Singhjee* (1884) 3 Moo. I. A. 245. *Ghasiti* and *Nanhi Jan* v. *Umrao Jan* (1893) 20 I. A. 1 199, 21 Cal. 149.

SECTION 225
The Quran on Adoption. Quran IV. 4-5.

Adoption seems to have been in vogue in Arabia before the following verse from the Quran was promulgated—

> "Nor hath He made your adopted sons your (true) sons. This (is) your saying in your mouths: but God speaketh the truth, and He directed the (right) way. Call (such as are adopted) the sons of their (real) fathers: this (will be) more just in the sight of God. And if ye know not their fathers, (let them be) your brethren in religion, and your companions: and it shall be no crime in you that ye err (in this matter): but that (shall be criminal) which your hearts purposely design; for God is gracious (and) merciful."
>
> Quran IV. 4-5.

Reason for abolition of adoption.

Previous to Islam adoption seems to have been prevalent in Arabia mainly from a sense of comradeship in arms, or from the common tie of bloodwit and blood-feud. It was this tie which continued to take the place of blood relationship even in the early days of the Prophet's preaching:

Quran VIII. 73.

> "They who have believed and have fled their country and employed their substance and their persons in fighting for the religion of God and they who have given (the Prophet) a refuge (among them) and have assisted (him), these (shall be deemed) the one nearest of kin to the other."
>
> Quran VIII. 73.

Strengthening tie of blood.

This was abrogated by a later verse when the Prophet could enforce the new policy of preferring the tie of the family to the tie of war,

Quran VIII, 76.

> "Those who are related by consanguinity (shall be deemed) the nearest of kin to each other (preferably to strangers) according to the book of God."
>
> Quran VIII. 76.

And by the verse,

Quran XXXIII. 6.

> "Those who are related by consanguinity (are) nigher of kin the one of them unto the others, according to the book of God, than the other true believers and the 'muhajjirun.'"
>
> Quran XXXIII. 6.

Acknowledgment and companionship in arms.

These verses show the connection between acknowledgment of parentage, adoption and comradeship in arms, and the reason for the rule requiring the acknowledged child, when he is old enough, to consent to the acknowledgment of his parentage.[1] They also show the alliance of this rule of the law with that relating to the "acknowledged heir" or the "heir by contract" (see the chapter on law of succession). It was the same policy which on the one hand replaced the tie of blood-feuds by that of blood relationship and on the other required that a disclaimer of parentage should be restricted by the imposition of heavy penalties on it, unless it was done in order to renounce a child who was really the offspring of adultery; and by which finally a relationship was not allowed to spring up by the mere use of the words son and father. See Quran IV. 4-5 quoted above.

Similarly in England it has been held[2] that adoption, in the sense of a transfer of parental rights and duties in respect of a child to another person

[1] See s. 222 (3) above.

[2] *Humphreys* v. *Polak* [1901] 2 K. B. 853. (C. A.) In this case the illegitimate mother sued the adoptive parents for breach of contract to maintain the child.

SECTION 225 and their assumption by him, is not recognised by the law of that country, and a contract to maintain another's child as though it were the promisee's own, relieving the real parent from all liability and responsibility for its bringing up and maintenance will not be enforced; though a relative or a stranger may place himself 'in loco parentis' towards a child, and certain legal consequences as between the parties result from that position.[1] See, however, comment to section 260 below.

(Oudh Estates Act) Legislative power to adopt.

226. Under the Oudh Estates Act,[2] every Muhammadan 'taluqdar,'[3] grantee,[3] heir, or[4] legatee referred to in the Act and every widow of such 'taluqdar,' grantee, heir, or legatee, with the consent in writing of her deceased husband, has for the purposes of the said act, power to adopt a son, whenever, if he or she were a Hindu, he or she might adopt a son.

Such power is exercisable only by writing duly executed and attested in the manner required by the said Act.

Right to give a Hindu son in adoption.

227. A convert to Islam from Hinduism may give his son who is still a Hindu in adoption or may authorize his being given in adoption.[5]

"Where the parties are Brahmans, not Rajputs, and 'dattahoma' is essential, then possibly the father, after becoming Mahomedan, could not sanction his brother to be present at the giving during the 'dattahoma.'"[5]

Law of adoption not part of inheritance or succession retained on conversion.

228. A convert to Islam from Hinduism, who alleges that he has, by the customs of his caste or community, retained the Hindu law of adoption, must prove it, and proof of the retention of the law of inheritance and succession does not imply that the law of adoption has also been retained.[6]

Chandavarkar J. has said,[6] "Adoption is not necessarily inheritance or succession, although it leads to inheritance or succession. The Mahomedan law does not recognise adoption. The presumption is that as a necessary consequence of conversion to Mahomedanism the law of adoption recognised by Hindu law and usage has been abandoned by the Girasias. Therefore, those who allege that the usage and law in question had been retained must prove it."[6]

[1] See the Irish case of *Re O'Hara* [1900]. 2 Ir. Rep. 232, 241-244, per Fitzgibbon L. J.

[2] Act I. of 1869 s. 29. It applies only to the estates referred to in the Act.

[3] I.e., one whose name is entered in the first, fifth, or sixth list mentioned in s. 8 of the Act.

[4] I.e., a person (other than a widow) who inherits property, or to whom property is bequeathed under the Oudh Estates Act.

[5] *Shamsing Omraosing* v. *Santabai* (1901) 25 Bom. 551, 555.

[6] (*Bai*) *Machhbai* v. (*Bai*) *Hirbai* (1911) 13 Bom. L. R. 251, 256.

CHAPTER VII.

GUARDIANSHIP.

1.—Preliminary.

SECTION 229 Minor in Muhammadan law.

229. (1) In Muhammadan law the term minority is applied to the period of life, whether of males or females, which precedes the attainment of puberty, and persons who have not attained puberty are called minors.[1]

Indian Majority Act. Age of majority of persons domiciled

(2) Under the Indian Majority Act and the Guardians and Wards Act, every minor of whose person or property a guardian[2] has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, is deemed to have attained his majority when he has completed his age of twenty-one years, and not before ; . . . every other person domiciled in British India is deemed to have attained his majority when he has completed his age of eighteen years, and not before ; but nothing contained in the Indian Majority Act affects—

(*a*) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption ;

(*b*) the religion or religious rites and usages of any class of His Majesty's subjects in India ; or

(*c*) the capacity of any person who before the said Act came into force had attained majority under the law applicable to him.

(3) In this Chapter unless there is anything repugnant in the subject or context, " a minor " refers to a person who has not attained the age of majority under the Indian Majority Act.

[1] In England a minor may be adjudged of full age by Act of Parliament : his status cannot be changed in any other way. Halsbury, " Laws of England," XVII. 126. A person who is not a minor may by his acquiescing in being treated like one, estop himself from being considered of full age *Kebul Kristo Doss* v. *Ram Coomar Shah* (1868) 9 W. R. 571. As to the converse case see *Mohori Bibee* v. *Dharmodas* (1902) 30 Cal. 539, 545 and cases there cited.

[2] This does not include a guardian for the suit, see the Civil Procedure Code.

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Absolute and qualified disabilities of minors.

Though the power of legal action possessed by minors is very limited, and their interests are carefully protected by law, since they are regarded as of immature intellect and imperfect discretion, the law does not impose upon them an absolute disability as regards all civil acts. In some matters they are under only qualified disabilities. It has already been pointed out [1] that there is no specific provision, at least of statutory law, in British India placing the minors in express terms under "a general incapacity to exercise the rights of citizenship and to perform civil duties." [2]

Capacity may vary at different ages—for different transactions

Again, a person who is under the age of majority, may still have the power to perform some specified juristic acts, though such a power is generally given to him only on his attaining a fixed age, falling short of the age of full majority.

Even as regards the branch of law dealing with the custody of a minor's person, different considerations prevail (under certain circumstances) at different ages. Thus the Indian Majority Act emancipates the minor, as a rule, as soon as he attains 18 years of age, but if there is a guardian appointed by the Court, or his property is under the supervision of the Court of Wards, the age of minority is prolonged to 21 years. Similarly in England "guardianship in

English law

socage" lasts only till the infant attains 14 years, after which age the infant may choose his own guardians.[2]

230. In this Chapter unless there is something repugnant in the subject or context, "guardian" means a person having the care of the person of a minor,[3] or of his property, or both his person and property.[4]

1. SCOPE OF THIS CHAPTER.

Scope of this chapter.

It is not the object of this Chapter to give the general law of British India referring to guardians and wards, yet where the general law is intermixed with the special provisions of Muhammadan law, it has been considered best to state the whole of the law, and not to give it piecemeal; and the Guardians and Wards Act has therefore been frequently referred to at full length. That Act

Guardians and Wards Act does not affect Muhammadan law as to persons primarily entitled to be guardians

leaves to the Court the choice of the person who should be appointed guardian, in the cases of an application being made to it, fettering the discretion of the Court mainly with the object of seeing that the persons entitled, by the personal law of the minor, to be his guardians are not, without some good cause, deprived of that right.[5] The first point, therefore, to which attention has to be

[1] See pp. 46-47 above.

[2] Cf. Halsbury, "Law of England," XVII. s. 130.

[3] See below, s. 232.

[4] This section is taken *verbatim* from s 4 (2) of the Guardians and Wards Act VIII. of 1890 (referred to in the notes to this Chapter as the G. & W. Act). As to "guardians for marriage" see above ss. 59 *seqq*. Generally "the word guardian, standing alone" means guardian of the person per Jessel, M. R. (1880) 14 Ch. D 630, 632.

[5] Sir Courtenay Ilbert, in introducing the G. & W. Act, said "Nothing can be further from my intention than to interfere with native customs or usages, or to force Hindu or Muhammadan family law into unnatural conformity with English law. . . . It is not intended by this Act to make any alteration in Hindu or Muhammadan family law." Sir R. K. Wilson has collected some interesting extracts from the discussions on the Act when it was first introduced. "Anglo-Muhammadan law" (3rd Ed) p. 135 (s. 97). In another place the same author remarks that "the Act does not require or permit the Court to subordinate the law to which the minor is subject, to the consideration of what will be for his or her welfare. Its plain meaning is exactly the reverse," *ib.* p. 130, see below s. 262.

given is to discover who the persons are that are entitled by Muhammadan law to be guardians. SECTION 230.

2. CLASSIFICATIONS OF THE LAW OF GUARDIANSHIP.

Classifications based on
1. Nature of guardian's authority.
2. Source of his authority.

The law of guardianship applicable to Muslims in British India may be arranged under various heads or categories of division. Thus the subject may be dealt with successively as to the law relating to (1) guardians of the person; and (2) guardians of property; or the subject may be divided in the following manner: The law relating to (1) guardians by operation of law; (2) guardians by testamentary appointment; (3) guardians appointed by other instruments; (4) guardians appointed by the Court.

Whichever classification is primarily adopted, the subject has to be re-divided in accordance with the other category, and a certain amount of repetition is necessitated. On the whole it has seemed more convenient to follow in the main the second classification of the subject mentioned above, which depends on the source from which the guardian derives his authority, but even that classification has not been rigidly adhered to, as it has seemed better to sacrifice logical accuracy to the convenience of practitioners, in dealing with the subject.

3. GENERAL CONSIDERATIONS BEARING ON THE SUBJECT.

Nature of

The following remarks of Professor Holland [1] may appropriately form the preface of any treatment of the subject: "The right of a 'tutor' or guardian . . . is, of course, given to him not for his own benefit, but for that of his 'pupillus,' or ward [2] whose want of understanding he supplements, and whose affairs he manages. It is an artificial extension of the parental power, and may

How conferred

be conferred by the last will of the parent,[3] by a deed executed by him,[4] or by a judicial act,[5] or by devolution on certain defined classes of relatives,[6] or may vest in a tribunal. such as the Court of Chancery.[7] According to some systems the guardian cannot refuse to accept the office which is regarded as being of a public character.[8] In French law a 'subrogé tuteur' is appointed by the family council as a check on the 'tuteur.'[9]

Termination of authority.

The right terminates on the death of tutor or ward, on the resignation or removal of the former,[10] on the marriage of the latter[11]; or his attainment of a certain age.[12] By the older Roman law a woman was under perpetual guardianship.[13] Under those systems which release the ward at an early age, generally at fourteen in the case of a boy, and twelve in the case of a girl,[14] from the superintendence of a guardian, he may be placed for a further period under the lighter control of a 'curator,' whose duties cease when the ward attains the age of full majority.[15] Such curators,

Emancipation of ward.

[1] "Jurisprudence," 157. They are quoted with the kind permission of the author.

[2] "The Lord's Wardship in Chivalry without account of profits was on the contrary for his own benefit."

[3] See below ss. 257-260.

[4] "See Stat. 12 Car. II. c. 24, s. 8 as varied in favour of the mother by 49 g. and 50. Vict. c. 27."

[5] See below s. 261.

[6] See below ss. 235-244.

[7] See below p. 205. Cf. below s 267.

[8] "Code Civile," art. 420.

[9] See G. & W. Act, ss. 38-42

[10] Cf. below s. 256.

[11] Cf. below ss. 277, 278.

[12] Cf below s. 278.

[13] See above p. 46, and below s. 278.

[14] Cf. the control exercised by the Muslim father over children after they have attained puberty: Bail I. and below. That control probably gives rise to moral obligations hardly amounting to lega duties.

[15]

SECTION 230 and the curators or committees of lunatics or persons interdicted as prodigals are generally appointed by a court of justice.

Infringement of right of guardianship.

"The right is infringed by any interference with the control of the tutor or curator over the person [1] or property of the ward, lunatic, or prodigal."

4. THE QURAN AND 'SUNNA' ON MINORS, ORPHANS, AND LUNATICS.

The Quran: exhortations to be just and equitable.

The Quran contains the following precepts relating to minors and persons of weak intellect—

> And give the orphans when they come of age, their substance; and render them not in exchange bad for good: and devour not their substance by adding it to your own substance: for this is a sin.
>
> And if ye fear that ye shall not act with equity towards orphans (of the female sex), take in marriage such other women as please you.
>
> And give not unto those who are weak of understanding the substance which God hath appointed you to preserve for them, but maintain them thereout, and clothe them, and speak kindly unto them.
>
> And examine the orphans until they attain (the age of) marriage; but if ye perceive they are able to manage their affairs well, deliver their substance to them; and waste it not extravagantly or hastily because they grow up. Let him who is rich abstain (entirely from the orphan's estate), and let him that is poor take (thereof) according to what shall be reasonable. And when ye deliver their substance unto them, call witnesses (thereof) in their presence: God taketh sufficient account (of your actions).
>
> —Quran IV. 2—5.

Traditions about guardianship of property

The following tradition may also be quoted: "Ibn-'Abbas said, 'when these revelations came down, "meddle not with the substance of the orphan, otherwise than for the improving thereof," [2] and "surely they who devour the possessions of orphans unjustly, shall swallow down nothing but fire into their bellies and shall broil in raging flames," [3] all those who had orphans in their care went home, and separated their own food from that of the orphans, and also their water, fearful lest they might be mixed. Then, when the orphans left any of their meat or drink, it was taken care of, for them to eat afterwards, or spoilt. Then this method was unpleasant to the orphans, and they mentioned it to the Prophet, then God sent down this revelation, "O Muhammed, they will ask thee concerning orphans, answer, to deal righteously with them is best, and if ye mix your things with theirs, verily they are your brethren." [4] Then they mixed their meat and drink together.'" [5]

Guardian of the person 'hizanat' or custody.

231. Guardianship of the person is referred to in Muslim books on law as 'hizanat' or custody.

[1] "On the writ of 'ravishment of gard' see 2 Inst. 440. When the tutelary right has been vested in a Court any infringement of it becomes a matter of public law. Thus interference with a ward of Chancery is treated as 'contempt of Court.'" E.g. *in re H's Settlement* [1909] 2 Ch 260 a ward of Court was committed to prison because he "interfered with the Courts' control" over himself by marrying without its sanction.

[2] I.e Quran VI. 152

[3] I.e. Quran IV. 9.

[4] I.e. Quran II. 221.

[5] *Mishcat-ul-Masabih.* Book XIII. Ch. xvii. part 3; Mathew, II. 142-143.

The right to 'hizanat' or custody must be distinguished from the duty to maintain, on which see the next Chapter. SECTION 231

232. The Mussulman jurists seldom (if ever) refer to any person being appointed specifically as the guardian of a minor's property, which is ordinarily assumed to be in the charge and under the control of the executor [or administrator][1] of the father of the ward. Executors may be appointed to take charge of specific portions of the estate of the deceased.[2] The guardian of the person is not necessarily the guardian of his ward's property.[3] Guardians of property in Muhammadan law. Executors.

233. The Shiah law does not seem to contemplate[4] joint guardians of the person ;[5] there does not seem to be any indication of the view of the Sunni authorities on the point. Joint guardians. Shiah law. Sunni law.

It will be observed that the Guardians and Wards Act s. 15 (1) contemplates the possibility of the personal law of a minor not permitting the appointment of joint guardians even by the Court. See below s. 263, p. 210. Appointed by Court.

234. The Muhammadan law relating to the guardianship of persons of unsound mind, is, with the necessary changes, to the same effect as the law relating to the guardianship of minors.[6] Guardianship of persons of unsound mind.

§ 2.—Persons Entitled to be Guardians by Law.

(1) Sunni Law.

(a) Custody during Infancy : the Mother and Females.

235. According to Sunni law the mother[7] is entitled[8] to the custody of a male child until he attains the age of seven years ;[9] and of a female child until she attains puberty.[9] (Sunni law.) Mother guardian during child's infancy.

[1] There is no word in English exactly equivalent to the Arabic *wasi* which includes executors as well as administrators. See below Chapter on Administration ; Bail. I. 129, 665 ; II. 248.

[2] Cf. G. & W. Act, s 15 (5) : "If a minor has several properties the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties," which settles the dissent amongst Hanafi Jurists. Bail. I. 671.

[3] Cf. G. & W. Act, s. 15 (4) : "Separate guardians may be appointed or declared of the person and of the property of a minor."

[4] It can hardly be said to prohibit

[5] Bail. II. 96, where it is suggested that "where there is a combination of persons equal in degree . . . . the right to the infant's custody is to be determined by casting lots between them." This seems a crude way, but it may often be the means of preventing parties from rushing to the Court merely because there is no *modus vivendi* ready at hand When the intervention of the Court is called in aid, under the G & W. Act, s. 17 (1) the Court may apparently choose the person whose appointment would be most in the interests of the child. Cf *Bindo* v. *Shan Lal* (1906) 29 All. 210, *re Gulbai and Lilabai* ; (1907) 32, Bom. 50.

[6] See Quran IV. 4, quoted above, p. 188 ; Hed. 524 525 ; Bail. I, 4, 208, 209, 403, 530, 552, 669, II. 4, 7, 8, 107, 203, 211, 248, 249.

[7] In England prior to and apart from the Guardianship of Infants Act, 1886 (49, 50 Vict. c. 27, s 5) the mother had no right, as against the father, with respect to the control and custody of the child. Halsbury, "Laws of England," XVII. s. 254, p. 108.

[8] As to her rights as against the husband of the minor, see below s. 256 and *Nur Kadir* v. *Zuleikha Bibi* (1885) 11 Cal. 649. *Korban* v. *King-Emperor* (1904 32 Cal. 444, cf. below p. 197 *n.* 3.

[9] Bail. I. 431, 433; Hed. 138. *Zarabibi* v. *Abdul Rezzak* (1911), 12 Bom. L. R. 891.

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When the husband and wife are living together, the child must stay with them, and the husband cannot take the child away with him, nor can the mother, even during the period that she is entitled to the custody of the child, take it away without the permission of the father.[1] When the child is with one of its parents, the other is not to be prevented from seeing and visiting it.[2]

Natural guardian, strict sense of the term

The person who is entitled in law to have the custody of the child is frequently referred to as the "natural guardian" to distinguish him from a guardian appointed by the Court, and from a testamentary guardian. "Guardianship by nature" is a term of art in English law, and means in its strict sense "the natural paternal jurisdiction between the age of discretion and the age of 21 which the law will recognise" over the heir apparent.[3] The expression is employed now in England in the same unrestricted sense as in India.[4] The father's and mother's right to the custody of a child of tender age has been referred to as "guardianship for nurture."[5] It is to be observed, that "in the laws of England there are three manners of guardianship, viz., by common law, by statute law, and by custom. By the common law there are four manners of guardians, viz., guardian in chivalry, guardian by nature, as the father of the eldest son, guardian in socage, and guardian 'per cause de nurture.' According to the strict language of 'our' law only an heir apparent can be the subject of guardianship by nature."[6]

It has been said with reference to Muhammadans that the mother is not the natural guardian of her children's property,[7] though she is often treated as such. See below s. 259, pp. 202-204.

(Sunni law.) Persons entitled to custody in the absence of the mother.

236. In the absence, or on the disqualification, of the mother, the custody of the child—until, being a male, he has attained the age of seven years, or being a female, she has attained puberty,[8]—belongs to the following persons in the order of priority in which they are mentioned below—

1 the mother's mother ;[9]

2 the father's mother [10]

[1] Bail. I. 435 ; Hed. 139. This would follow from the general rule that the wife's movements during coverture are under the control of her husband. But the passage referred to from Bail. I. 435 calls attention to the fact that the texts do not expect the child to be taken out of the place where the marriage took place. This is probably a survival of Pre-Islamic tribal law ; but may have some application in India, if either parent desires to prevent the other from removing the child to such a distance as to exclude the former from visiting it. Cf. the English Guardianship of Infants Act, 1886, ss. 5 and 9.

[2] Bail. I. 435.

[3] Per Bowen L. J. *re Agar-Ellis ; Agar-Ellis* v. *Lascelles* (1883) 24 Ch. D. 317, 335, 336.

[4] *Ib.* ; Halsbury's "Laws of England," XVII. s. 283. p. 122.

[5] Halsbury's "Laws of England," XVII. s. 255 and per Lord Chancellor King : "The father is entitled to the custody of his own children during their infancy not only as guardian by nurture but as guardian by nature."—*Ex parte Hopkins*, (1732) 3 P. Wms. 154.

[6] Co. Litt. 886 Harg. *nn.* 12, 13, quoted "Simpson on Infants" (3rd Ed., 1909) 105, 106.

[7] Ameer Ali's "Mahommedan Law," II. 476 and per Rampini and Pratt JJ. *Mayna Bibi* v. *Bauker Behari Biswas* (1902) 29 Cal. 473.

[8] Bail. I. 431.

[9] *Bhoocha* v. *Elahi Bux* (1885) 11. Cal. 574 failing the father's mother, the mother's mother's mother, would be entitled. Bail. I. 432 : "The intention is no doubt to prefer the female line at every step in the ascending pedigree, as is more distinctly shown in the Shafeite treatise, *Minhaj-at-Talibin* III. 97." Wilson, "Anglo-Muhammadan Law," 183.

[10] See comment to this section.

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3 the mother's grandmother
4 the father's grandmother [1] } how high soever ;
5 the full sister ;
6 the uterine sister ; [1]
7 the daughter of the full sister,
8 the daughter of the uterine sister, } how low soever ;
9 the full maternal aunts,
10 the uterine maternal aunt, [1]
11 the full paternal aunt. [1] } how high soever.

Paternal grandmother.

The mention of the paternal grandmother and aunt [2] here seems to be an anomaly ; "The principle in this kind of guardianship being that the custody of an infant belongs of right to its mother's relations."[3] But if the paternal aunt and grandmother are not mentioned here by mere inadvertence, there is no reason why the consanguine half-sister should not come in between the uterine sister (sixth in list) and the daughter of the full sister (seventh in list) and similarly the other consanguine half-relations (half-sister of the father, etc).

Consanguine

Devolution of mother's right to custody.

The effect of this section, it will be noticed, is that if before the age at which the father is entitled to the custody of his child, the mother dies, then the nearest female relation is entitled to the same privilege as the mother. Proximity being considered on the same principles as for guardianship for marriage and for succession : viz. (descendants first), then ascendants, and finally collaterals.

Analogy of law of succession.

The influence of 'qiyas' [4] or analogy in the development of Muhammadan law is evident in the similarity of these principles. The rules by which the mother's rights of guardianship devolve are analogical to the rules by which the father's rights devolve, and these last again are based on the Pre-Islamic law of succession. On the point whether the law ever followed the exact analogy, (in accordance with which, only those between whom and the minor no male intervenes, should be entitled to take the place of the mother) it may be interesting to recall the results of the investigations of ethnologists which indicate a period in social development when relationship was traced exclusively through female links, instead of the more familiar mode of reckoning relationship through males alone.

237. In the absence, or on the disqualification, of the mother and the females mentioned in section 236 above, the father and the males mentioned in section 239 below are entitled to the custody of the child [5] ; provided that they are not otherwise disqualified [6] from taking charge of the child.

entitled

(b) Custody after Infancy : The Father and Male Agnates.

238. The father becomes entitled to the custody of a male child after he has attained the age of seven years ; [7] and of a female child after she has attained puberty.[8]

when it arises.

[1] See comment to this section.
[2] Bail. I. 432 (*l.* 8).
[3] Cf. Bail. 1. 432, (*ll.* 8-11) and see below p. 193 para. (2.)
[4] See pp. 16-18 above.
[5] Bail. I. 433.
[6] Cf., e.g., s. 241 below.
[7] *Idu* v. *Amiran* (1886) 8 All. 322 ; Bail. I. 434 ; Hed. 129.
[8] Bail. I. 434 ; Hed. 129.

SECTION 239 (Sunni law.) Right to custody in absence of father.

239. In the absence of the father, and subject to the rights (if any) of any testamentary guardian appointed by the father, the following persons are entitled, (in the order of priority in which they are mentioned below) to the custody of a child, after it has attained the age at which the father becomes entitled to its custody—

1 the nearest paternal grandfather ;
2 the full brother ;
3 the consanguine half-brother ;
4 the full brother's son ;
5 the consanguine half-brother's son ;
6 the full brother of the father ;
7 the consanguine half-brother of the father ;
8 the son of the father's full brother ;
9 the son of the consanguine half brother of the father.[1]

Testamentary guardian.

It is doubtful whether the father has any right to appoint a testamentary guardian of the person of his minor children when the paternal grandfather (or any of the other relations mentioned in this section) is living and competent to act as guardian.[2]

Whether guardian appointed by father's will takes precedence over grandfather.

Sir R. K. Wilson places the father's "executor" (i.e. guardian appointed by the will of the father) in priority to the grandfather, and he relies for this on Baillie I. 665, where the executor is defined as "an 'ameen' or trustee appointed to superintend, protect and take care of his property and *children* after his death,"[3] and on the following passages from the 'Sharh-i-Viqaya,' referred to in Macnaghten :[4] "He to whom the father has entrusted the disposal of his family and fortune is his executor," and "the guardianship of a minor belongs first to the father, next to his executor, next to the paternal grandfather."

Reasons for giving precedence to grandfather.

It is clear, however, that the definition of an executor as one to whom children are entrusted does not necessarily imply that the father could by appointing a guardian take away the right of the grandfather. All that is meant is that a testamentary guardian of the person is also called a 'wasi' or executor It is therefore only necessary to consider the second passage from the 'Sharh-i-Viqaya' given above. This sentence does not occur in the Lucknow edition of the book published in 1313 A.H., as will appear from a translation of the whole passage on the subject which is given below. It may also be added that the 'Fatawai 'Alamgiri'[5] mentions the "'asaba,' i.e. all agnates, as being entitled to custody after females, and the father is mentioned merely as the first in point of right from amongst the agnates ; he is not mentioned as standing apart from the other male relations with special rights of his own.

[1] Bail. 1. 433 ; Hed. 138.
[2] See below, ss 257, 258.
[3] This passage does not occur in the *Fatawai 'Alamgiri* as pointed out in the foot-note, in Bail. I.
[4] Sixth precedent on guardians, p. 310. See also Case 1, p. 304.
[5] *Book on Talaq*, Ch. XVI. on *Hizanat* corresponding to Bail. I, 433, and of an excerpt from the *Kafi*.

For these reasons the question whether the father's executor or the grandfather has precedence cannot be said to be free from doubt. On the analogy of Shiah law [1] (if it may be called in aid) the grandfather would have priority over the father's executor, even if the other relations do not have it. SECTION 239

The law as to the right of custody is thus stated in the 'Sharh-i-Viqaya': [2] "For the education of a minor (1) the mother has the first claim, but she cannot be compelled to undertake its custody [in case she refuses to do so, for the refusal would probably be on account of her inability to undertake it ; but where there is no one else to undertake it, she should be compelled] whether she has separated from her husband or not. And when the mother is not available, i.e., she is either dead, or has married a stranger, [or is otherwise disqualified from acting as a guardian in consequence of her renouncing Islam, or getting depraved in character, and the like] then (2) the maternal grandmother is entitled, how high-soever she be, [for this reason that the right is inherent, in mothers, so that] if the mother is absent, it will go to the mother's mother, and if the mother's mother is absent, it will go (3) to the father's mother, and then (4) to the sisters, the sisters are entitled first the full then the uterine, and then the consanguine, and (5) then the maternal aunt in the same priority, [and according to one tradition the maternal aunt is preferred to the sister, for the Prophet said that the mother's sister takes the place of the mother . . .], then follow the full sisters of the mother and the uterine half-sisters, the uterine half-sister of the mother, and then the consanguine half-sisters of the mother ; [for this reason that in this matter the mother has the prior right, and consequently the relations through her are given preference over those on the father's side], then (6) the sisters of the father, full, then uterine, then consanguine.

"And this is on the condition that the women are free ; for a slave and 'umm-i-valad' is not entitled to custody [as they have no leisure from their service] ; and if a woman marries one who is not prohibited from marrying a minor female, that woman loses her right of custody, and if such a marriage is dissolved, then the right reverts to that woman. If there is no woman either from the paternal or maternal side, then the right of bringing up is in the agnates in the order of priority mentioned in the chapter on inheritance, [that is to say the father comes first, then the paternal grandfather how high-soever, then the full brother, then the consanguine[3] half-brother, then the sons of the full brother, then the sons of the consanguine half-brother, and similarly their descendants how low-soever, then come the paternal uncle, and then the paternal uncle's son]. But a female minor will not be under the guardianship of an agnate who is not prohibited from marrying her, e.g., her emancipator or the son of a paternal uncle, nor one depraved in character."[2]

'Sharh-i-

Persons entitled to custody

1. Mother.
2. Mother's mother.
3. Father's mother.
4. Sister.
5. Maternal aunt.
   (i) Full sister of the mother
   (ii) Uterine half-sister.
   (iii) Consanguine. half-sister.
6. Paternal aunt.
   (i) Full
   (ii) Uterine
   (iii) Consan-

Freedom. Marriage.

Failing women agnates—

1. Father.
2. Paternal grand father.
3. Full brother.
4. Consanguine half-brother.
5. Sons of full brother.
6. Sons of consanguine half-brother.

[1] See below s. 243.

[2] *Sharh-i-Viqaya*, Book on *Talaq*, Ch. on *Hizanat*, Vol. II. p. 168 (Lucknow Ed. 1313 A.H.). The portions enclosed in square brackets are from *Umdat-ul-Ri'aya*, a commentary on the *Sharh-i-Viqaya* (which itself consists of a commentary on the *Viqaya*. *Sharh* means commentary).

[3] An explanation of the absence here of uterine brothers will be found in the Chapter on Inheritance.

SECTION 240

(2) *Shiah Law.*

(a) Parents' Right to Custody.

(Shiah law.) Mother's right to custody in infancy.

240. According to Shiah law, the mother[1] has the right to the custody of a male child until he attains the age of two years ;[2] and of a female child until she attains the age of seven years.[3]

(Shiah law.) Father's right at later age.

241. After the child attains the age mentioned in the last section, the father has the right to the custody of the child.[4]

(Shiah law.) Survivor of parents.

242. In the absence of either the father or the mother, the other parent has the right to the custody of a minor child, whatever its sex and age.[5]

(b) In the Absence of Parents.

(Shiah law. Father's father

243. In the absence of both parents, the father's father is entitled to the custody of the children.[2]

(Shiah law.) Persons entitled after grandfather.

244. In the absence of both parents, and of the father's father, it is doubtful who are preferentially entitled to the custody of the children.

The 'Shara'ya-ul-Islam' mentions the following instances, though some doubt is expressed as to all of them,

1. The consanguine half-sister is preferred to the uterine half-sister.
2. The paternal grandmother is preferred to the maternal grandmother.
3. The grandmother is preferred to the sister.
4. The paternal and maternal aunts are equally entitled.

It would seem that these preferences can only serve as guides to the Court in selecting the guardian, without fettering its discretion.

SUMMARY OF THE PRINCIPLES OF SUNNI AND SHIAH LAW RELATING TO THE RIGHT OF GUARDIANSHIP.

Custody.

Under Sunni law—

1. In early years the female relations are entitled to the custody of the child, and the first one so entitled is of course the mother.

[1] As against the executor of the father, *Re Hooseini Begum* (1881) 7 Cal. 434; and see note to s. 242 below ; also *Lardli Begum* v. *Mahomed Amir Khan* (1887) 14 Cal. 615 (*obiter*).

[2] Bail. II. 95.

[3] *Ibid.* Two other opinions are mentioned, fixing the age respectively at ten years, and at puberty ; but the opinion said to be " more agreeable to traditional authority " is seven years.

[4] Bail. II. 95. *Re Petition of Mahomed Amir Khan*, *Lardli Begum* v. *Mahomed Amir Khan* (1887) 14 Cal. 615.

[5] Bail. II. 95. *Re Ebrahim M. Hassam Sherbanoo* v. *Ajbai* (1908) II. Bom. L. R. 75; Davar J. held in proceedings under Criminal Procedure Code, s. 491, that the mother was not deprived of her right to the custody of the child, as there was no specific appointment of guardians by the will of the father; he left the question open whether even such specific appointment, when arbitrarily and capriciously made, could deprive the mother of her right of guardianship.

2. Then the male agnates commencing with the father are entitled. SECTION 244
3. Failing qualified male agnates, the Court must appoint a female as guardian to a female.

Under Shiah law—

1. The first right is that of the parents, with priorities between them on the basis that the mother should be entitled during infancy, and later on the father.
2. Failing the parents, the father's father is entitled.
3. Failing the father's father, the other relations are entitled with some doubt as to their priorities.

Under Sunni law—

Persons entitled.

1. As to the person of a minor very remote blood relations are also entitled to be guardians.
2. As to the property of the minor, only the father and grandfather, and persons appointed by them, are entitled.[1]

Under Shiah law—

Only the father and grandfather, and persons appointed by them, are entitled to be guardians either of property or of the person.

It may be conjectured that the pre-Islamic custom agreed as to both classes of guardians (or rather it recognised no distinction between them), and that Islam introduced the restriction against remote relations being in charge of the property. The injunctions of the Quran have been interpreted by the Sunni authorities as referring to guardianship of property and not to the custody of the person; hence the pre-Islamic rules about guardianship of the person have remained practically undisturbed, so far as the Sunni law is concerned.[2] The Shiahs make no distinction between male agnates and females, in guardianship any more than in inheritance.

§ 3.—Disqualifications: Loss of Right of Guardianship.

(1) General Disqualifications.

(a) Age.

Minor incompetent.

245. A minor is incompetent to act as guardian of any minor other than his own wife or child.[3]

Muhammadan law disqualifies a minor from acting as a guardian for marriage[4] or as executor, though it is not quite clear whether, while a minor acts in the capacity of executor, and until he is removed, his acts are void or operative. The current opinion is that they are not void.[5]

(b) Religion.

Preference to Muslim parent.

246. Subject to section 248 below, if either parent is a non-Muslim, the other is entitled to the custody of the child, whatever its age.[6]

[1] Cf. *Abdul Bari* v. *Rash Behari Pal* (1880) 6 Cal. L. R. 413 (uncle cannot be guardian of property).

[2] See above pp. 7-8.

[3] G. & W. Act, s. 21. In Hindu joint families a managing member may act as guardian for a member of that family, *ibid.*

[4] Bail. I. 47, II. 4.

[5] Bail. I. 669, II. 4, 248-249.

[6] Bail. II. 95.

SECTION 248
Non Muslims disqualified.

247. Subject to section 248 below, no person is entitled to the custody of a Shiah child who is not a Muslim.[1]

Caste Disabilities Removal Act.

248. *Quaere*, whether the provisions of sections 246 and 247 above are abrogated either entirely, or in so far as they affect the right of apostates to the custody of children, by the Caste Disabilities Removal Act XXI. of 1850.[2]

The question in this section involves two points: (1) whether the right to the custody of a child is such a "right" as is contemplated by Act XXI. of 1850; and (2) if it is, then whether the Act applies only to apostates or to all non-Muslims. It has been held that the appointment of a guardian to a minor is not a matter of private "right" as between the parties, and so it is not a question which can be settled by reference to arbitration.[3] But it seems more likely that the Court would consider it to fall within Act XXI. of 1850, so as to remove the disqualification against non-Muslims, as well as apostates from Islam. If so, then in cases where an (apostate or a) non-Muslim is the person that, but for his (change of) religion, would be entitled to be the guardian, is it still in the discretion of the Court to appoint another person, on the strength of the second sub-section of s. 17 of the Guardians and Wards Act, which requires the religion of the minor to be considered in the appointment of guardians? The Courts as a rule have not troubled themselves about these technical details, but in cases of doubt have fallen back on the principle that the paramount consideration to be regarded is that of the welfare of the ward.[4] On this point, however, see below pp. 206-208.

(2) *Disqualifications Affecting Females.*

Mother and females when disentitled to custody.

249. The mother or any other female who would otherwise be entitled to the custody of a child, loses that right in Muhammadan law—

(1) subject to section 248 above, if she apostatizes from Islam;[5] or

(2) if she is immoral, or has committed adultery,[6] or some criminal offence;[7] or

[1] This follows from the previous section but the *Shara'ya-ul-Islam* refers only to the father and mother.

[2] Act XXI. of 1850 is given in full at p. 30 above. In the Guardians and Wards Act, s. 17 (2) the religion of the minor is mentioned merely as one of the considerations to be regarded in the appointment of a guardian; but on the other hand in the first para. of the same section "consistency with the law of the minor" is insisted upon. See below, s. 262

[3] *Mahadeo Prasad* v. *Bindeshi Prasad* (1908) 30 All. 137.

[4] *Bindo* v. *Sham Lal* (1896) 29 All. 210. (Maternal grandmother appointed in preference to father, though it was conceded that "there was nothing against the father;" on the ground that the girl would be happier with her grandfather: reversing the lower Court—*sed quaere*); *Re Gulbai and Lilbai*: *Dhaklibai* (1907) 32 Bom. 50.

[5] Bail. I. 432; Hed. 139. For the Shiah law see s. 246 above. The G. & W. Act. s. 17, mentions the religion of the minor as one of the considerations to be regarded in appointing or declaring a guardian. See below s. 262.

[6] Bail I. 431, *Abasi* v. *Dunne* (1878) 1 All. 598 (prostitute). In (*Mussamat*) *Shahjehan Begum* v. *David Munro* (1850). 5 S.D.A. (N.W.P.) 39, custody was given to an unmarried female living with a Christian. In England the father's adultery does not disqualify him, if he does not bring the child into contact with the woman. *R.* v. *Greenhill* (1836), 4 A. & E. 640.

[7] Cf. G. & W. Act, s. 39 (*f*).

(3) if she is incapable of taking care of the child ; [1] or SECTION 249

(4) if she marries a man who is not related to the child within the prohibited degrees ; [2] provided that after dissolution of such a marriage, her right to custody revives.[3]

The Guardian and Wards Act s. 41 (1) (*d*) and (*c*) seems to assume that the father's and husband's rights alone revive after once being lost in favour of another. It may be that the Act wished to avoid the liability of the custody of the child being changed after being once fixed, save in the two cases specially excepted. It is more probable however that it was drafted on the assumption that no other person had an absolute right to custody.

250. A woman is not disqualified from being the guardian of a minor's property, because she is a 'pardanishin.' [4] **'Pardanishin' as guardian of property.**

In view of the important rights that the mother has relating to guardianship in Muhammadan law, the proposition given above might seem too obvious to be inserted here; but it will be remembered that Muhammadan law refers to the mother merely in regard to guardianship of the person. Cf. s. 259 below.

(*3*) *Disqualifications Affecting Males.*

251. No male is entitled to the custody of a female minor, who is not related to her within the prohibited [5] degrees,[6] or who is a profligate.[7] **Male within prohibited degrees cannot have custody of female.**

This is a rule of Sunni law, and hardly affects the Shiah law, which does not recognise any guardians as of right, except the parents and grandfather. It is submitted, that there being no special mention of this disqualification either in the Shiah books or in the Guardians and Wards Act, the Court in appointing a guardian will not consider this rule as implying absolute disqualification amongst Shiahs, though it may consider it in choosing from rival claimants.

252. Where there is no male agnate entitled to the custody of a female,[8] who has attained puberty, any female may be appointed by the Court as her guardian. **Power of Court to appoint female stranger to be guardian of female.**

See comment to last section.

[1] Cf. G. & W. Act, s. 39 (*b*) (*c*) (*d*) and (*e*). Bail. I. 431 : "A person is not worthy to be trusted, who is continually going out, and leaving her child hungry," citing *Durr-ul-Mukhtar*. In England parents lose their right if they have abandoned or deserted the child, etc. Halsbury, "Laws of England," XVII. s. 256.

[2] As in *Bhoocha* v. *Elahi Bux* (1885), 11 Cal. 574, *Fuseehun* v. *Kajo* (1883) 10 Cal. 15 *Beedhun Bibee* v. *Fuzuloollah* (1873) 20 W. R. 411 ; Bail. I. 432 ; Hed. 138 but not by divorce *Zarabibi v. Abdul Rezzak* (1910) 12 Bom. L. R. 891.

[3] See comment.

[4] *Jaiwanti Kumri* v. *Gajadhar Upadhya* (1911), 38 Cal. 783.

[5] See above, ss. 26 *et seq.*

[6] Bail. I. 433 ; Hed. 138, 139. Cf. the similar restriction as to females, s.249 (4) above.

[7] Bail. I. 433 (last line), 434 (para. 4). Thus the Courts in England may deprive the husband of his right to custody if he has been convicted of an aggravated assault upon his wife, or has deserted her. Summary Jurisdiction (Married Women) Act 1895. Cf. also Prevention of Cruelty to Children Act 1894, s. 6, by which the child may be taken away from both parents.

[8] Bail I. 435 *n.* 1 suggests that the same rule must apply to a male child who is born in *zina*, and whose paternity is not established in anyone : for he has no relations in law. But the Sunni law recognises the mother's relationship to her illegitimate child, see s. 214 above, p. 173 ; and hence she would be entitled to custody till it is 7 years old ; s. 235 above.

SECTION 252 The Court is required by the Guardians and Wards Act, s. 17, to be guided in appointing or declaring a guardian, by what appears to be for the welfare of the minor "consistently with the law to which the minor is subject."

The restriction imposed by the rule of Sunni law given in the section above is of the same nature as that imposed by Act XI. of 1858 (s. 27) and Act XX. of 1864 (s. 31), which governed the law of guardians and minors prior to Act VIII. of 1890. By the said Acts (now repealed), only a female could be appointed the guardian of a female; which, it will be observed, goes beyond[1] the Sunni law, inasmuch as the restriction imposed by it is only against such males as are not within the prohibited degrees, and it is only when there are no such males that the exclusive right is given to females.

(4) *Disqualifications Affecting Parents.*

Father when disqualified.

253. The Court will not interfere with the father's guardianship of his children except on the ground[2]—

(1) of his unfitness in character and conduct ; [3]
(2) of unfitness in external circumstances ; [3]
(3) of waiver of his rights ; [3]
(4) of agreement ; [3]
(5) of the father being out of jurisdiction, or intending to go out of it.[3]

By unfitness of conduct.

"When the natural guardian ceases to be a natural guardian, and shows by his conduct that he has become an unnatural guardian,"[4] he loses his right; as for instance by cruelty to his wife or children ;[5] or by felony ;[6] or adultery ; [7] though adultery by itself is no disqualification, if the woman is not brought into contact with the child ;[8] nor is mere harshness ;[9] nor bad temper ;[10] nor intemperance.[11]

Poverty no disqualification, but desertion or bad character or misapplication of property are.

Mere poverty is no ground for disqualifying the parents,[12] unless it is accompanied by desertion [13] or bad character [14] or by the application of the minor's property to the use of the guardian.[15] So a Hindu mother has been held to lose her right as against Christian missionaries, by not contributing to the expenses of the child for eight years,[16] and a Chinaman not to be entitled to be restored to the custody of a child kept with Roman Catholics for a year and a half.[17] On the other hand, where a father had become a convert to Christianity

[1] See *Fuseehun* v. *Kajo* (1883) 10 Cal. 15; Under Act XX. of 1864 the paternal uncle was held disqualified, though the girl had attained an age when the male agnates are entitled to custody. Of course the paternal uncle, being within the prohibited degrees, would not be disqualified by Muhammadan law.

[2] See Simpson on "Infants" (3rd ed., 1909), 130-146, on which this section is based.

[3] See comment, cf. below pp. 208, 209.

[4] Per Bowen, L. J. *In re Agar-Ellis* ; *Agar Ellis* v. *Lascelles* (1883) 24 Ch. D. 317, 337.

[5] *Ex parte Warner* (1792) 4 B. C. C. 100, *Whitfield* v. *Hales* (1806), 12 Ves. 492.

[6] *Ex parte Bailey* (1838) 6 Dowl. 311.

[7] *Warde* v. *Warde* (1849) 2 Ph. 786.

[8] *Ball.* v. *Ball* (1827) 2 Sim. 35, *March* v. *March* (1867) L. R., 1 P. & D. 437. *R.* v. *Greenhill* (1836) 4 A. & E. 640.

[9] *Blake* v. *Lord Wallscourt* (1846) 7 L. T. 545.

[10] *Re Curtis* (1858) 28 L. J. (CH.) 458.

[11] *Re Goldsworthy* (1876) 2 Q. B. D., 75.

[12] Per Kindersley, V. C. *Re Curtis* (1858) 28 L. J. (CH.) 458, 463.

[13] *Re England* (1830) 1 Russ. & M. 499.

[14] *Ex parte Warner* (1792) 4 B. C. C. 100.

[15] *Ex parte Mountford* (1808) 15 Ves. 445.

[16] *In re Saithri* (1891), 16 Bom. 307.

[17] *Joshy Assam* (1895), 23 Cal. 290.

from Hinduism, and had left the child in the charge of its Hindu grandfather and uncle, for six years, he was held to have lost the right to the custody of the child.[1] See below pp. 208, 209. SECTION 253 Waiver.

The leading English case on the point of the parents waiving or losing their rights is 'Lyons *v.* Blenkin,'[2] in which Lord Eldon laid down the principle that if the father's conduct has raised in the minds of the children expectations, founded on a particular species of maintenance and education, which he himself cannot afford, he cannot afterwards claim such rights over them as will alter the course of their lives, habits, and connections. 'Lyons *v.* Blenkin.'

The Muhammadan law allows terms to be introduced in the marriage contract, and there may be an agreement between the parents relating to the custody of children.[3] By agreement.

The rule of English law that going out of jurisdiction deprives the father of his right to custody, may have to be modified to suit "Indian society and circumstances."[4] It may have more direct applicability where the property is in the charge of the Court of Wards, or the father leaves British India, and not merely the jurisdiction of the Court where the minor resides.[5] By going out of jurisdiction.

4. The mother does not lose her right to the custody of her children by being divorced by the father of the children.[6] Mother not disqualified by divorce.

. As between the father and mother, the mother loses her preferential right to the custody of her children (under section 235 or 242 above) when she marries a second husband,[7] and the father becomes entitled to the custody of the children whatever be their age; but if the father is dead, the mother's right revives.[8] (Shiah law.) Mother's preference over father lost by re-marriage

Explanation—The mother's right above referred to revives on her being divorced by her second husband.[9]

(5) *Disqualifications Affecting the Husband.*

256. The Muhammadan law does not entitle the husband to the custody and possession of a wife who is under the age of Husband when entitled to custody of wife.

[1] *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898) 25 Cal. 881; cf. below, s. 262 comment.

[2] (1821) Jac. 245, 255, 263; and cf. Halsbury, "Laws of England," XVII. s. 251, p. 105.

[3] See above s. 24 (7) p. 60; cf. 35 Vict. c. 12, s. 2.

[4] See p. 45, s. 12 above.

[5] Cf. above s. 235. As to guardians appointed by the Court, see G. & W. Act, s. 39 (*h*). See also Emigration Act XXI. of 1883, ss. 6 (3), (4); 33; 35 (1). For English law see *Re Suttor* (1860) 2 F. & F. 267; *Re Thomas*, 22 L. J. (CH.) 1075, *Re Fynn* (1848) 2 De G. & S. 457.

[6] *Sharh-i-Viqaya*, Vol. II. Book on *Talaq*, ch. on *Hizanat* (*init*). *Emperor* v. *Ayshabai* (1904) 6 Bom. L. R. 536 *Zarabibi* v. *Abdur Razzak* (1910) 12 Bom. L. R. 891, 894.

[7] I. e., after a divorce; see the last section.

[8] Bail. II. 95, 96 ("third"). The mother also loses her right to custody in Shiah law if she refuses to nurse the child without being paid for it at a higher rate than a stranger demands for the service. Bail. II. 96 (*first*).

[9] Bail. II. 96 (*third*). There is some difference of opinion on this point.

SECTION 256 puberty, unless she is, in the opinion of the Court, of such an age as to permit of the marriage being consummated.[1]

Semble, under the Guardians and Wards Act, section 19(*a*)[2] the husband would, in the majority of cases, be considered by the Court to be unfit to be the guardian of the person of the wife, unless, under Muhammadan law, he would be entitled to her custody.

Guardian not to be appointed by the Court in certain cases.

The Guardians and Wards Act, s. 19 (*a*) is as follows : "Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the person—(*a*) of a minor who is a married female, and whose husband is not, in the opinion of the Court, unfit to be guardian of her person."

It may be noted that in England, as soon as a daughter is married, the father's "natural jurisdiction over her, and right to her custody during her infancy," is determined ;[3] a binding marriage can be contracted by a male of the age of fourteen years, and a female of twelve ; a marriage by an infant of more tender years is not void, but avoidable by the infant upon attaining the age for contracting marriage.[4]

§ 4.—Guardians of Property : Testamentary Guardians.

(Sunni law.) Guardian of property—father's and grandfather's right to appoint testamentary guardians of the property of his minor children.

257. According to Sunni law, the father is the guardian of the property of his minor children ; after the father's death, it is part of the duty of the father's executor,[5] to act as such guardian; after the father's executor the paternal grandfather is entitled; and after the paternal grandfather, his executor ; and after the last, the Court [6] may take charge of the property of minors, or appoint a guardian for the purpose of doing so.[7]

Illustration.

H purporting to act as the guardian of K, his minor brother, sold the property of K. "The Governor's agent at Surat and the representative of the ruling authority in the management of the estate, was consulted as to the sale and approved of it," and the Government sanctioned it. *Held* that "the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which a duly constituted guardian might have entered into on behalf of his ward under the rules of Mahomedan law." [6]

[1] See above s. 24 (1) pp. 59, 61-62. Cf. also G. & W. Act, s. 41 (1) (*d*) (*e*) and *Wazeer Ali* v. *Kaim Ali* (1873) 5 N. W. P. 196 ; *Nur Kadir* v. *Zuleikha Bibi* (1885) 11 Cal. 649 ; *Korban* v. *King-Emperor* (1904) 32 Cal. 444. In *re Mahin Bibi* (1874) 13 Ben. L. R. 160, the father had apostatised from Islam, and the mother was living with him ; custody was, in the circumstances, given to the husband though the wife was only 10 years old. In *re Khatiza Bibi* (1866) 5 Ben. L. R. 557, the husband had not paid the *mahr* and so could not have been entitled in any case to her custody : see above, s. 106.

[2] Set out in the comment to this section.

[3] Halsbury. "Laws of England," XVII. s. 251, p. 105.

[4] *Ibid* ; XVII. s. 156, p. 57. XVI. s. 494, p. 273.

[5] An executor may be appointed for a limited purpose on condition that he shall not be executor in other matters (Bail. I. 671) ; and presumably in this manner a testamentary guardian may be appointed. There is some doubt in Shiah law on the point whether the father can appoint a guardian in the lifetime of the grandfather, see below, s. 258.

[6] *Husein Begam* v. *Zia-ul-nisa Begam* (1882) 6 Bom. 467, see above p. 27, and below p. 203 s. 260.

[7] Bail. I. 530, 529-531, see *Abdul Bari* v. *Rash Behari Pal* (1880) 6 Cal. L. R. 413 (uncle has no right).

See comment to next section.

SECTION 258

(Shiah law.) Father and grandfather then their executors.

258. According to Shiah law-

(1) The father and after him the grandfather are guardians of a minor's property,[1] and their survivor may appoint a guardian of the property [1] of his minor children, or grandchildren.

(2) Where the grandfather is living, and the father purports to appoint a guardian for his minor children's property,[1] the Shiah authorities are divided as to the effect of such appointment. The better opinion seems to be that such appointment is of no effect, though some jurists hold that the appointment is valid with reference to one-third of the property.[1]

It will be noticed that the guardianship of property does not, like the guardianship of the person, devolve upon all blood-relations in succession.[2]

Father's right of property.

The father is naturally the guardian of the property of his minor children, and this right is generally taken for granted by the Muslim jurists,[3] though express reference to it is not absent; and it is laid down that the father is to take charge of the earnings of his minor children, but if he is a spendthrift, the judge should take the property out of his hands, and place it with a trustee to keep it for the minor, until the boy arrives at the age of puberty and then deliver it over to him.[4]

Father's right to appoint guardian. (a) Of person (b) Of property.

The Guardians and Wards Act, s. 6, saves the right to appoint a testamentary guardian from being affected by anything in the Act; and

'(Sayad) Shahu *v.* Hapija Begam' [5] seems to be decided on the assumption that the Muhammadan law recognises an absolute power of appointing testamentary guardians both of the person and of property,[6] and that if the power is exercised, no one else can be appointed guardian by the Court under s. 7 (3) of the Act, until the will is proved to be invalid. There are, however, reasons to doubt[7] whether Muhammadan law permits the appointment of guardians of the person, so as to oust the rights of those mentioned in this chapter as entitled by law to have the custody of children. As to Shiah law, the power of appointing testamentary guardians is more clearly defined; only there is some room for doubt, whether the power of appointment refers only to guardians of the property (which seems most probable) or also to guardians of the person.

Executors or Guardians by

In a case decided by the Privy Council[7] in January 1912, their lordships held that the fact that the testator left the whole of his property to his four

[1] Bail. II. 230, 251. The opinion of the minority referred to in s. 258 subs. (2) seems to indicate that guardians of property are alone referred to, and not of the person. It is not easy to decide whether when a testamentary guardian is appointed (*a*) the mother loses her right to the guardianship either of the person [or of the property (if any)—as to which see next section] of the child; or whether (*b*) the mother's right is subject to the right of the testamentary guardian, but has priority over the claims of all other persons, —the latter seems more probable; see comment to s. 259.

[2] See next section and *Abdul Bari* v. *Rash Behari Pal* (1880) 6 Cal. L. R. 413.

[3] Similarly in English law, cf. *Thomasset* v. *Thomasset* [1893.] P. 295.

[4] Bail I. 458, cf. ss 290-292 below.

[5] (1892) 17 Bom. 560 (Bayley A. C. J., and Candy J.).

[6] See above ss. 235, 244.

[7] *Matadin* v. *Sheikh Ahmad* (1912) 14 Bom. L. R. 192, 202.

SECTION 258 grandsons (one of them a minor) in equal shares, without expressly appointing any executor, did not make the grandsons his executors, much less the major grandsons, the guardians of the minor.

Testamentary guardians in English law.

In England, 12 Car. II. c. 24 s. 8 entitles the father by deed or will to appoint a guardian for any of his children until they attain 21 years. "The right of the father himself as guardian is taken for granted although not expressly declared in the Statute."[1]

Mother not entitled to be guardian of her children's property.

259. The mother[2] is not entitled to act as the guardian of the property of her children, unless appointed by the father, or paternal grandfather, or the Court[3]; and she has no power to appoint by will a guardian for her children.[4]

—nor uncle

—nor brother

Similarly it has been held that the uncle[5] cannot be guardian of property, nor can the brother;[6] and consequently the Limitation Act, art. 44, does not apply to their acts.[6] The mother's case is mentioned specifically, as the question frequently arises. See next section, and cf. "In the absence of duly appointed testamentary guardians, the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would 'rest in the ruling power and its administration' (Macnaghten's 'Principles of Mahomedan Law,' 5th Ed., page 304): The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court."[6]

Guardians of person and property.

The authorities cited in the footnotes to the present and the last section seem to refer directly only to the appointment of guardians of the property; but there is no reason to think that the law is different regarding the appointment of guardians of the person, except as adverted to in the comment to the last section.

Executors and guardians

The line is not very strictly drawn by Muhammadan lawyers between "executors" (of the father and grandfather) and guardians (of their minor children and grandchildren), though there are important distinctions as to the persons entitled to be guardians of property and of the person respectively.[7]

Dealings with property of minor by brother or uncle.

It will be observed from the summary given at pp. 194, 195 above, that only the father and grandfather, and after them their executor, are recognised as being entitled to be the guardians of property. Accordingly it has been held that an elder brother cannot sell the property of his minor brothers[6] or sisters,[7] nor an uncle mortgage his niece's property,[8] nor can he claim to be appointed

[1] *Thomasset* v. *Thomasset*, [1893] P. 295, 298.

[2] Bail. II. 232. *Sita Ram* v. *Amir Begam* (1886) 8 All. 324, 329, 339-340 (Mahmood J.) followed in *Baba* v. *Shivappa* (1895) 20 Bom. 199 *Moyna Bibi* v. *Banku Behari Biswas* (1902) 29 Cal. 473.

[3] Bail II. 232 is misleading: The mother may surely be appointed guardian by the father or grandfather. It seems therefore that the words "of the property" must be read into the text; and that the rule must refer to the guardianship of property, as the mother is entitled to be guardian of her children in their infancy.

[4] Macnaghten, "Moohummudan Law," 304. The Hindu law is to the same effect. *Venkayya garu* v. *Venkata* (1897) 21 Mad. 401. But see s. 238 below and comment thereto and *Lyons* v. *Blenkin* (1882) Jac. 245.

[5] *Abdul Bari* v. *Rash Behari Pal* (1880), 6 Cal. L. R. 413.

[6] See p. 201 *n.* 7.

[7] (*Mussamat*) *Bukshan* v. (*Mussamat*) *Ma'dai Koeri* (1869) 3 Ben. L. R. (APP. CIV.) 423.

[8] *Nizamuddin Shah* v. *Anandi Prasad* (1896) 18 All. 373. *Abdul Bari* v. *Rash Behari Pal* (1880) 6 Cal. L. R. 413.

guardian of property in preference to the mother ; [1] and a mortgage was held not to bind the interests of two minor children of a deceased Mussulman though the mother, elder brother and sister of the said minors had executed the conveyance, there being no urgent necessity for the mortgage.[2] SECTION 259

The English case of 'Lyons *v.* Blenkin'[3] suggests a point of view that may have important bearing on certain circumstances. Adoption is not recognised by the law of England any more than by Muhammadan law ;[4] and yet a person may, on the father waiving his right over the child, acquire by the force of circumstances, or, as Lord Eldon puts it, "purchase the power" of educating the children "in the way and under the control and guardianship" which such person has "pointed out," and to which the "parent has consented." So that in the case referred to, Lord Eldon in effect upheld the appointment of guardians for the infant made by the will of their grandmother, who had maintained and brought them up, notwithstanding that the strict law of England[5] permits the father alone to appoint a guardian by will. When, therefore, comparatively distant relations, and even strangers, who have been 'in loco parentis,' acquire a right, little (if at all) short, of the power to appoint testamentary guardians, it is evident that where the mother recommends a guardian in her will, the weight to be attached to the recommendation as "the wishes of a deceased parent,"[6] must bring it almost on the same footing as an absolute right to appoint. This, of course, can only apply where the father has not already made an appointment, and subject to the remarks cited in the comment to the next section below.

Position of testamentary guardian purported to be appointed by the mother or other persons not authorised to do so.

260. Where any person other than the legal guardian of a Mussulman minor, purports to deal with his property, the transaction may be avoided by the minor notwithstanding that the said property was so dealt with in order to pay the minor's debts, and was beneficial to him or necessary for his interest.[7]

Authority of 'de facto' guardian of the person over property.

Quaere whether where an unauthorised ('de facto') guardian of a minor deals with his property out of necessity [or for the payment of an ancestral debt affecting the minor's property [8]] and for the benefit of the minor, such dealing is altogether void or only voidable.[7]

[1] *Alim-Ullah Khan* v. *Abadi Begam* (1906) 29 All. 10, cf. p. 201 *n.* 7.

[2] *Bhutnath Dey* v. *Ahmed Hosain* (1885) 11 Cal. 417; see also *Fakiruddin* v. *Abdul Hussein* (1910); 13 Bom. L. R. 326. Cf. Bail. I. 530-531 : The person having custody of a minor may take possession of a gift on his behalf.

[3] (1821) Jac. 345, 263-264.

[4] See above s. 225 and comment, p. 183.

[5] See above p. 183.

[6] G. & W. Act s. 17 (2). In *Lyons* v. *Blenkin* (1821) Jac. 245, 261, it is a grandmother who "attempts to do that which she could not lawfully do, viz., the father of her grandchildren being living, she appoints a guardian during their minority."

[7] *Matadin* v. *Sheikh Ahmad* (1912) 14 Bom. L. R. 192.

[8] The words in [ ] occur in the Judgment of the Privy Council. *Ibid*, Ancestral debts are not payable by an heir except out of the estate of the ancestor which devolves on the heirs subject to the payment of such debts. See below s. 272 comment, p. 214.

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Distinction between manager and guardian.

In a very recent case [1] the Privy Council observe: "Without some authority their lordships are unable to accept the view that there is no difference between the position and powers of a manager, and those of a guardian." These remarks were called forth by the following expression which occurred in a judgment of Rampini J. referring the case to a full bench, "The acts of a guardian in this country bind the minor. There is no difference between his position and powers, and those of a manager." [2]

De facto guardian.

In a case that was reported after these pages were already in print their lordships of the Privy Council say: "It is urged on behalf of the appellant that the elder brothers were 'de facto' guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a 'de facto' guardian. He may, by his 'de facto' guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." [3] It has been held however in India that when the transaction is for the benefit of the minor [4] or lunatic, it may be upheld [5]; though not otherwise. [6]

§ 5.—*Guardians Appointed by the Court.*

Appointment of guardian by Court.

261. The District and High [7] Courts of British India are empowered to appoint a guardian; [8] or to declare a person to be the guardian of the person or property of a minor, or of both his person and property. [8]

The powers of the Courts in British India to appoint guardians are derived from the Guardians and Wards Act, s. 7, which is as follows:—

Guardians and Wards Act s. 7.

"(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

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

[1] *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1911) 39 Cal. 233, 14 Bom. L. R. 5 (P.C.).

[2] *Mir Sarwarjan* v. *Fakhruddin* (1906) 34 Cal. 163, 166.

[3] *Matadin* v. *Shaikh Ahmed* (1912) 14 Bom. L. R. 192.

[4] Cf. Bail. I. 676.

[5] *Ummi Begum* v *Kesho Das* (1908) 30 All. 462. (Per Stanley C. J., Banerji J.) The wife and mother of a lunatic sold his property to pay his debts; the following cases are referred to: *Mafazzal Hosain* v *Basid Sheik* (1906) 34 Cal. 36; *Ram Charan Sanyal* v. *Anukul Chanya Acharjya*, *ib.* 65; *Majidan* v *Ram Narain* (1903) 26 All. 22. See also *Hasan Ali* v. *Mehdi Hussain* (1877) 1 All. 533 (which is adversely commented upon in *Pathummabi* v. *Vitil Ummachabi* (1902) 26 Mad. 734, 739). On the other hand Rampini and Pratt JJ. have held that the mother is not the natural, nor the *de facto* guardian of her minor children (so far as property is concerned). *Moyna Bibi* v. *Bauker Behari Biswas* (1902) Cal. 473. See Ameer Ali, "Mahommedan Law," II. 476.

[6] A conveyance by a mother on behalf of her minor son was set aside where the sale was neither shown to be necessary nor for the benefit of the minor. *Heerbai* v. *Hiraji Bramji Shanja* (1895) 20 Bom. 116; *Fakiruddin* v. *Abdul Hussein* (1910) 13 Bom. L. R. 326; and see cases cited in comment to s. 259 and also *Moyna* v. *Bauker* (1902) 29 Cal. 973. *Durgaji Row* v. *Fukeer Sahib* (1906) 30 Mad. 197.

[7] Not the other Courts. G. & W. Act. s. 4.

[8] See s. 7 of the G. & W. Act, which is set out in the comment to this section. The High Courts have inherent jurisdiction to appoint guardians of a minor, or his estate, irrespective of the G. & W. Act: *Re Petition of Jairam Luxmon* (1892) 16 Bom. 634 (Farran, J. *dubitante* accepting Mr. Inverarity's argument that though under the G. & W. Act a guardian cannot be appointed of a Hindu minor member of a joint family [*Shan-Kuar* v. *Mohanand Sahoy* (1892) 19 Cal. 301] the High Court may nevertheless do it); *In re Manilal Hargovan* (1900) 25. Bom. 353. Jenkins C. J., Tyabji and Russell JJ.),

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

" the Court may make an order accordingly.

"(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

"(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased [1] under the provision of this Act."

Court of Wards Acts.

By s. 19 of the Act, the Court is not authorised "to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards." The chief Acts relating to Courts of Wards are: (*a*) (i) Act XXVI. of 1854 applying originally to the Presidency of Fort William; it has been repealed in Bengal, by Act IV. of 1870, s. 86; in the North-West Provinces (except as to the scheduled districts), by Act XIX. of 1873; it has also been repealed in Assam by Act V. of 1897 and in Burma by Act XIII. of 1898, s. 18; (ii) Bengal Act IX. of 1879 (Bengal Courts of Wards Act) amended 1881, 1892; (iii) Bengal Act III. of 1881. (*b*) The N.-W. P. Land Revenue Act XIX 1873 (ch. VI.), amended by Act VIII. of 1879, and see Bengal Regulation V. of 1799, s. 8. (*c*) Oudh Revenue Act XVIII. 1876 (ch. VIII) amended by Act XX. of 1890, ss. 3, 12, 28, and 31. (*d*) Central Provinces Courts of Wards Act XXIV. of 1899. (*e*) Panjab Laws Act IV. of 1872 (ss. 34-38) amended by Act XII. of 1878; Act XXVI. of 1854 is still printed in the Panjab and Lower Burma Codes. (*f*) Madras Regulation V. of 1804; Regulation X. of 1831; Act XXI. of 1855; Act XV. of 1874. (*g*) Bombay Act I. of 1905 (the Bombay Court of Wards Act). (*h*) See also Act XXXIV. of 1858, s. 24; and Act XXXV. of 1858, s. 9, for lunatics' estates; and Regulation I. of 1888 (for Ajmere) where Bengal Act IX. of 1879 also extends.

(*a*) Bengal.

(*b*) N. W. P.

(*c*) Oudh.

(*d*) Central Provinces.

(*e*) Panjab.

(*f*) Madras.

(*g*) Bombay.

Procedure under the Guardians and Wards

The procedure for the appointment of guardian under the Guardians and Wards Act may be shortly stated: s. 8 requires that the application should be made by a person who is desirous of being, or claims to be, the guardian or a relative or friend, or by the Collector; s. 10 relates to the form of the application and the particulars to be contained therein, for the purpose of identifying the minor, and his or her circumstances relating to position in life, religion, property, and relatives and residence; the cause for the application has also to be mentioned; s. 11 refers to the procedure to be followed on such an application being made, i.e. for fixing a day for hearing by the Court and for serving notices upon the various persons concerned (parents, 'de facto' guardian, etc.); s. 12 refers to interlocutory orders for production of the minor and interim protection of person and property; after which the Court hears the evidence that may be adduced [2] (s. 13), and appoints a guardian (ss. 15-18); ss. 14 and 16 deal with matters where there are proceedings in more than one Court regarding the person or property of the same minor.

[1] See G. & W. Act, ss. 38-41 and corresponding to ss. 279, 282-284, below.

[2] The Court cannot refuse to do so (*Sayad*) *Shaha* v. *Hapija Begum* (1892) 17 Bom. 560

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Considerations affecting appointment or declaration of guardian by Act.

262. In appointing or declaring the guardian of a Mussulman, the British Courts are guided by the provisions of the law [1] to which the minor is subject,[2] and consistently with that law, by what appears in the circumstances, to be for the welfare of the minor ;[1] provided first that if the minor is old enough to form an intelligent preference, the Court may consider that preference,[3] and secondly, that the Court has no power to appoint or declare any person to be a guardian against his will.[4]

1. Provisions of the law to which the minor is subject.

2. Welfare of minor.

3 Preference of minor

4. Willingness of guardian to act.

Explanation—In considering what will be for the welfare of the minor, the Court must have regard to—

the age, sex, and religon of the minor,[5]

the character and capacity of the proposed guardian, and his nearness of kin [6] to the minor,[5]

the wishes, if any, of deceased parent,[5] and

any existing or previous relations of the proposed guardian with the minor or his property.[5]

1. RELATIVE IMPORTANCE OF THE VARIOUS CONSIDERATIONS IN APPOINTING GUARDIAN.

S. 17 of the Guardians and Wards Act.

This section is based entirely on the Guardians and Wards Act s. 17, omitting subs. (4) which refers only to European British subjects.

Matters to be considered by the Court in appointing guardian.

Subs. (1) of the said section is as follows :

"In appointing or declaring the guardian of a minor the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor."

Welfare of minor.

It will be observed, that for the selection of a guardian all considerations are made subject in the first instance to the provisions of s. 17 itself. Now out of the four other subsections of that section, subs. (3) and (5) are apparently the only provisions to which the Courts can attend in the first instance. For subs. (4) does not apply to Muslims at all; and subs. (2) is merely in explanation of what shall be considered for the welfare of the minor ; and that consideration is by the section itself expressly subordinated to the law to which the minor is subject, inasmuch as the welfare of the minor has only to be attended to "consistently with" that law. After referring as above stated to the provisions contained in s. 17, the first subsection proceeds to say in the second place that the Courts are to be guided by what "appear to be for the welfare of the minor." But in considering this they have, as already stated, to act consistently with the law to which the minor is subject.

[1] G. & W. Act s. 17 (1) ; see comment below.

[2] The law, of course, is not pure Muhammadan law, e.g., the Caste Disabilities Removal Act XXI. of 1850 and some of the provisions of the G. & W. Act itself alter the Muhammadan law.

[3] G. & W. Act s. 17 (3) ; see comment below.

[4] G. & W. Act s. 17 (5), see comment below. Civ. Pro. Code O. XXXII r. 4 (3) is to the same effect.

[5] G. & W. Act s. 17 (2).

[6] Cf. *Sohna* v. *Khalak Singh* (1889) 13 All. 78 (mere propinquity not the only consideration).

he reasons stated above justify, it is submitted, the form in which s. 262 of this work is framed. SECTION 262

2. LAW TO WHICH THE MINOR IS SUBJECT.

Provisions of the law to which the minor is subject.

The provisions of Muhammadan law and the alterations introduced by the British legislature are contained in this chapter. It is submitted that s. 17 of the Guardians and Wards Act is so framed that on its true construction the provisions of Muhammadan law (if any) on the points contained in the two provisos to s. 262 above are repealed.[1]

Conflict between the law by which the minor is governed and the Court's opinion as to what is for minor's welfare.

There are many cases in which the Courts have said broadly that the welfare of the minor shall be the paramount consideration in appointing (or declaring) guardians[2]; and this may afford an explanation of different views taken on the point whether the Courts should consider the welfare of the minor in the first instance, or subordinate that consideration to the law by which he is governed.[3] Sir R. K. Wilson has referred to the words of the Act, to its history and to the decisions of the Courts in support of the view that the law governing the minor is the paramount consideration. To his arguments must be added that the judges are themselves required to follow the law,[4] and not to give decisions in accordance with their own views of expedience, and that it would therefore be almost a contradiction in terms to say that the paramount consideration should be not the law, but the welfare of the minor. For the law is professedly based on a regard for the welfare of the minor; assuming that it fails in its purpose, it is not the function of the judicial tribunals to set right the shortcomings of legislators. The following words of an eminent judge refer directly only to one of the component parts making up the welfare of the minor, viz. freedom from restraint, but they may be taken (with the necessary alterations) to be of general application: "Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists, and where the child is in the hands of a third person that presumption is in favour of the father."[5]

The law itself best safeguards minor.

Minor's welfare to be considered in matters left to the discretion of the judge.

The dicta of the judges, therefore, to the effect that the minor's welfare is the paramount consideration must be understood with the reservation that judges cannot set their own views above those of the legislators, and if the law lays down that a certain person is entitled to the custody of a child without any

[1] See the earlier paragraphs of the comment on this section.

[2] Re *Gulbai and Lilbai* (1907) 32 Bom. 50 (Davar J., following) *Bindo* v. *Sham Lal* (1906) 29 All. 210 (Knox & Richards JJ.). It is submitted that the dicta in these cases are not always quite accurate. Thus Garth C.J. and Macpherson, J., felt bound to declare the grandmother guardian though they thought the uncle far preferable. *Bhoochu* v. *Elahi Bux* (1885) 11 Cal. 574.

[3] Sir R. Wilson, "Anglo-Muhammadan Law," (3rd Ed.) 180-181, agrees with the view expressed above: Mr. Mulla, "Mahomedan Law" ss. 237, 241 (3rd Ed. pp 144, 116, 4th Ed pp. 152, 154) maintains that the "primary consideration for the Court is the *welfare* of the minor, and the provisions of the law to which the minor is subject are subordinated to that consideration."

[4] Note that this expression does not in this connection refer to pure Muhammadan law, but to that law as applicable in British India, with the alterations and limitations imposed on it by the Legislature.

[5] Coleridge J. in *R* v. *Greenhill* (1836) 4 A. & E. 624, 643, cited by Lindley L. J. in *Thomasset* v. *Thomasset* [1894] P. 295, 298: and by Bayley J. *in re Saithri* (1891) 16 Bom. 307, 312.

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reservation (which it may be stated it seldom does) [1] the judges are bound to give the custody to him. Where the law leaves a discretion to the judges, that discretion will of course be exercised primarily with the object of promoting the welfare of the minor. But in doing so the judge will be acting in accordance with the law by which the minor is governed, and which requires the judge to exercise his discretion.[2]

3. WELFARE OF THE MINOR, HOW CONSIDERED.

Welfare of the minor: considerations of age, sex, and religion.

In considering what is for the welfare of the minor, his or her age, sex, and religion are required to be borne in mind. Muhammadan law pays special regard to each of these considerations, and it is presumed that when no person is pointed out by that law as the one entitled to be the guardian, the Courts will go on the analogy of the same principles of preference, with the possible exception of the consideration of religion—as to which there may be some difficulty. Muhammadan

Religion.

English law.

law naturally favours the religion on which it is based,[3] but the preference cannot hold in British India.[4] The rule of English law is that the father is entitled to bring up his children in his own religion, and he cannot contract himself out of it by agreement whether in consideration of marriage or otherwise,[5] and after the death of the father, the child is to be brought up in the religion of its father, or according to his directions, unless he has waived or abandoned his rights[6] or for some other reason it is for the benefit of the child to do so.[7]

Father when disqualified by his religious views.

A learned author has said with reference to English law :[8] "Though there is no case in which the father has been deprived of the custody of his children purely on the ground of his religious principles, yet, if the father's principles manifest themselves in conduct which the law looks upon as vicious and immoral, and he is likely to bring up his children in the same principles, the Court will interfere.[8] Lord Eldon's decision in the case cited has often been the theme of invective. It may be observed, however, that the decision might be justified on other grounds. Shelley had deserted his wife and children and left them for three years to be maintained by her relations, it might therefore well have been held that he had waived his rights by acquiescence;[9] Lord Eldon distinctly disclaims acting on the ground of the father's speculative opinions, his decision was based on the fact that Shelley's principles led him to uphold and practise conduct which the law condemned as vicious, e.g., to uphold the theory that marriage was not a binding institution, to act upon it by deserting his wife and children and

[1] The G. & W. Act s. 4 (1), clauses (*d*) and (*e*), appears to assume that the father and husband alone have an absolute right. Cf. *Bhikno Koer* v. *Chamela Koer* (1896 2 C. W. N. 191, and *Kristo Kishor Neoghy* v. *Kadermoye Dossee* (1878) 2 C. L. R 583; and, of course, there is also the power of removal. G. & W. Act, s. 39.

[2] Cf. *Bhikno Koer* v. *Chamela Koer* (1896) 2 C. W. N. 191.

[3] Bail. I. 185, II. 265 ; see above p. 50.

[4] *Mookund Lal Singh* v. *Nobodip Chunder Singha* (1898) 25 Cal. 881; see above p. 34—*n.* 1.

[5] *Re Boreham, R.* v. *Smith* (1853) 22 L. J. (Q B.) 116, *Andrews* v. *Salt* (1873) 8 Ch. App 622 ; *Re Nevin* [1891] 2 Ch. 299 (C. A.).

[6] *Re Sathri* (1891) 16 Bom. 307, and see s. 253 above as to father's loss of right.

[7] Halsbury, "Laws of England," XVII. ss. 261-264, pp. 112 113.

[8] Simpson on Infants (3rd Ed., 1909) 133-134.

[9] *Shelley* v. *Westbrooke* (1817) Jac. 266. See *Re Besant* (1879) 11. Ch. D. 508, where the mother was not allowed to enforce an agreement by which she was to be given custody of the child because she promulgated atheistical opinions and had published and circulated an obscene book.

living with another woman, and to declare that he would bring up his children in similar views. It is difficult to see how any judge could, consistently with recognised principles, have acted otherwise."[1]

The question is complicated in India by the fact that there is no established State religion here. The fundamental principles of religion and morality underlying all creeds have of course to be accepted.[2]

4. PREFERENCE OF THE MINOR.

Preference on the part of minor.

The Courts do not, as a rule, consider a male child to have attained the age of discretion so as "to form an intelligent preference" before he is 14 years old; nor a female before 16 years.[3] The Guardians and Wards Act does not fix the age of discretion.

Hanafi and Shafi'i law on the point:

The following is translated from the 'Sharh-i-Viqaya':[4]

"The minor cannot be given an option except according to Imam Shafi'i [who considers that the child has the option of remaining with either parent, and his view is based on the tradition that the Prophet (on whom and whose descendants be peace) gave the child the choice between its mother and father, and said, 'go to either as you desire,' and said, 'Oh God, direct him (the child) rightly,' and the child chose its mother]."[5]

5. WILLINGNESS OF THE PROPOSED GUARDIAN TO ACT.

S. 262, subs. (2) Guardian against his will.

The Muhammadan lawyers, in considering the question of the custody of minors, say that a father may be compelled to take charge of his minor children even against his own wish. The rule of Muhammadan law is, of course, repealed in so far as it comes into conflict with the second proviso to the present section, but it must be remarked that the said proviso refers merely to appointment by the Court. On the father's peculiar position and his liability to maintain, see above s. 253 and below ss. 267 and 316 to 319. See also s. 269, p. 213, below.

Consent to act as executor effect of this as to guardianship of property.

As to guardianship of property, Muhammadan law considers it part of the duty of executors, and it may be a question whether by consenting in the lifetime of the testator to act as his executor, one is debarred from declining the trust on the death of the testator, either relating to the entire duties of an executor, or in so far as they refer to guardianship.[6] The Courts would hardly force upon an unwilling person such a charge. The general rule need hardly be adverted to that when a person has once accepted a trust, he cannot at his own option decline to discharge the duties after a time.[7]

[1] See above s. 253, pp. 198, 199. Cf. *Thomas* v *Roberts* (1850) 3 De G. & S. 758; *Re Curtis* (1858) 28 L. J. (CH.) 458, *Re Meades* (1871) I. R. 5 Eq. 98, *Re Grimes* (1877) I. R. 11 Eq., 465.

[2] Cf. *Jamshedji* v. *Soonabai* (1907), 33 Bom. 122, 294 sqq., 10 Bom. L. R., 417, 480 sqq., as to the applicability in India of the attitude adopted by Courts in Ireland on questions of religion: there being no established Church in Ireland.

[3] In *re Saithri* (1891), 6 Bom. 307, where Bayley J. refers in detail to a great number of English decisions; see also *Thomasset* v. *Thomasset* [1894] pp. 295, 298 (Lindley, L.'J.). *Hopkins* (1732) 3 P. Wms. 152; *R.* v. (1860) 3 E. & E. 832, 336, 337 (Cockburn, C. J.) *Re Agar Ellis*; *Agar Ellis* v. *Lascelles*, (1883), 24 Ch. D. 331, 335, 337 (C.A.) *Re Macgrath Infants* [1893] 1 Ch. 143, 150 (C.A.).

[4] Book on *Talaq* ch. on *Hizanat*, II. 169 (Lucknow, 1313 A.H.).

[5] Cf. Hed. 139, where the tradition is "distinguished" on the ground that the Prophet's prayer must have directed the erring choice of a child.

[6] Cf. Bail. I. 666-667; Hed. 697; Bail. II. 250.

[7] G. & W. Act, s. 40. Trusts Acts, s. 46.

SECTION 263
Court may appoint joint guardians.

263. *Semble*, the Court may, if it thinks fit, appoint two or more joint guardians of the person or property (or both) of a Musulman minor ; [1] and where they are so appointed, on the death of one or more of the joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.[2]

See s. 233 above.

By s. 38 of the Guardians and Wards Act on the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court. In England, however, the death of one terminates the right of all, though of course the Court would usually reappoint the survivors.[3]

"Where there are more guardians than one of a ward and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit."[4] It would seem that they must act jointly and each one of them cannot act independently of the other.

§ 6.—Powers Duties and Obligations of Guardians.

(1) Guardian of the Person.

Guardian of the person charged with custody, support, health and education.

264. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and education and such other matters as the law to which the ward is subject requires.[5]

Marriage.

As to marriage see under "Guardians for Marriage," above ss. 59-68, pp. 89-96.[6]

Custody.

The Guardians and Wards Act, s. 25, empowers the Court to have a ward arrested in order to prevent his leaving the custody of his legal guardian. S. 26 requires leave of Court to be obtained before a guardian appointed by the Court (unless he is the Collector, or a guardian appointed by will or other instrument) is authorized to remove the minor beyond the jurisdiction of the Court.

Use of force to defend minor.

"The natural duty of a parent to protect an infant child, justifies acts of personal violence in defence of the child, and upholding and maintaining of the child in a law suit."[7]

[1] G. & W. Act, s. 15 (1).

[2] *Ibid.* s. 38. In England the death of one joint guardian terminates the guardianship of all. Halsbury, "Laws of England," XVII. s. 295.

[3] Halsbury, "Laws] of England," *ibid.*

[4] G. & W. Act, s. 43 (2). It will be noticed that joint guardians have, on a difference of opinion, the power to apply to the Court, though they have not been appointed or declared by the Court, whereas only those who have been so appointed or declared, come under s. 33 (1).

[5] *Verbatim* G. & W. Act, s. 24.

[6] Cf. (*Bai*) *Diwali* v. *Moti Karson*, (1896) 22 Bom. 509, a Hindu case ; where the Court left it doubtful whether getting the ward married falls within the duties of the guardian of the person and property.

[7] Halsbury, "Laws of England," XVII. s. 265, p. 114, citing Blackstone, Commentaries I. 450 etc.

As to the filing of suits and taking legal proceedings, see Civil Procedure Code, Order 32, generally. Rule 4 (2) provides that "Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor ; or be appointed his guardian for the suit ; unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act, or be appointed as the case may be."

SECTION 264 Suits.

265. A guardian of the person has the right to restrain and control the acts and conduct of the ward ;[1] and the father[2] has the right to inflict correction on the child, for disobedience to his orders, by personal and other chastisements, to a reasonable extent.[3]

restrain and chastise.

This and the next section are taken from Halsbury's "Laws of England."[4]

266. The rights mentioned in section 265 may be delegated by the guardian or father respectively to a tutor, or schoolmaster, or other person.[5]

restrain and chastise.

267. Subject to section 262 in this chapter, the father may be compelled to take charge of his child, after it has attained the age when he becomes entitled to its custody.[6]

charge.

The effect of the Guardians and Wards Act may be somewhat doubtful, inasmuch as the duty of the father is allied to his duty to maintain, on which see below ss. 316, 319. He may of course be ordered to maintain the child while it is given in the custody of another person. On the other hand, it is said that where a father is in straitened circumstances and the child's mother refuses to take charge of it without hire, while its paternal aunt is willing to do so, the aunt is to be preferred.[7]

Father's moral duty in England to maintain child.

In England "except under the operation of the poor laws there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation."[8] But there is a moral obligation on the father to maintain the child,[9] the obligation on the mother being less strong ;[10] and this moral duty is recognised in so far that the Court will not make an allowance to the father for the purpose of maintaining his infant child out of the child's property.[10] Ss. 316-319 below supply a curious contrast.

[1] *Fleming* v. *Pratt*, (1823) 1 L. J. (K.B.), 194. A young lady of 18 visited a relation whom the guardian had forbidden her to visit. In a suit for trespass against the guardians who sent officers to fetch her back, *held*, there would have been justification for guardians if the facts had been pleaded.

[2] *R.* v. *Hopley*, (1860) 2 F. & F. 202, 206-207 (Cockburn, C. J.) ; *Halliwell* v. *Counsell* (1878), 3 L. J. 176.

[3] These powers of correction are probably slightly less in the case of the mother ; and still less in the case of other guardians.

[4] XVII. s. 252, p. 107.

[5] *Ex p. M'Clellan* (1831), 1 Dowl. 81 ; *R.* v. *Hopley*, (1860) 2 F. & F. 202, 206 ; *Fitzgerald* v. *Northcote*, (1865) 4 F. & F. 656, 686 (Cockburn, C. J.) See s. 2, p. 31 above.

[6] Bail. I. 431.

[7] Bail. I. 435. Cf. pp. 198, 199, 208, 209, above.

[8] Per Cockburn, C.J., *Bazeley* v. *Forder*, L. R. 3 Q.B. at p. 565. Simpson, "Infants" (3rd Ed.) 152.

[9] Halsbury, "Laws of England," XVII. s. 266.

[10] *Ibid.* and Simpson, "Infants," 240.

SECTION 268
Obligation of mother to take care of child, how limited.

268. The mother cannot be compelled to take charge of her so long as there is any other relative within the prohibited degrees to take charge of it.[1]

Quaere, whether she can be compelled in any circumstances.

See last section and comment thereon and s. 262 proviso (2) above.

(2) Guardian of Property.

(a) Not to benefit by the charge.

Fiduciary relation between guardian and ward.

269. (1) A guardian stands in a fiduciary relation[2] to his ward, and, save as provided by the will or other instrument (if any) by which he was appointed, or by the Guardians and Wards Act, he must not make any profit out of his office.[3]

(2) The fiduciary relation of a guardian to his ward extends to, and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.[4]

The following short Sura of the Quran may be given in full—

In the name of God, the Merciful, the Compassionate.

By the splendour (of the morning)!
And by the still of night!
Thy Lord hath not forsaken thee, nor hated thee.
Verily the life to come shall be better than this present life:
And Thy Lord shall give thee a reward wherewith thou shalt be well pleased.
Did He not find thee an orphan, and sheltered thee?
And found thee erring and guided thee.
And found thee poor, and enriched thee?
—Then as for the orphan, oppress him not.
And as for him who asketh of thee, chide him not away.
And as for the bounty of thy Lord, tell of it.—Quran XCIII.

With the above may be compared the following, where legislative injunctions take the place of devotional gratitude.

They will ask thee concerning orphans: Answer to deal righteously with them is best, and if ye intermeddle with (the management of what belongs to) them, (do them no wrong); they are your brethren. God knoweth the corrupt dealer from the righteous, if God please, he will surely distress you; for God is mighty and wise.
—Quran II. v. 220.

[1] Bail. I. 431

[2] Cf. *Re Cassamally Jairazbhai Pirbhai* (1906), 30 Bom. 591; 8 Bom. L. R. 883.

[3] So the guardian must not make a profit by selling his property to the minor, or buying the minor's property: Bail 681; Hed. 638.

[4] G. & W. Act, s. 20 *verbatim*.

Under the Muhammadan law a guardian of the property is entitled to take "the ordinary hire or recompense for his trouble."[1] See Quran IV. 5 quoted above, p. 188, and compare comment to 344 below. SECTION 269

Sir R. K. Wilson points out that Muhammadan law gives some privileges[2] to the father over his minor children's property, such as giving the father a preference over other creditors, if the father chooses to pawn or sell the minor's property; and that in so far as such privileges are in contravention of the rules contained in the present section, they must be taken to be abrogated, by the Act, the father being a 'guardian' by the definition whether appointed or declared as such or not. But where the father uses or disposes of the property of his children for their maintenance, he is entitled to do so under Muhammadan law (see ss. 290-292 below) and there is apparently no breach of trust (see above, p. 31, s. 2, and 21 Geo. III. c. 70, s. 18, reproduced in the table preceding p. 29.) law.

(b) Care in Dealing with Ward's Property.

270. A guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it,[3] if it were his own;[4] and, subject to the provisions of Chapter III. of the Guardians and Wards Act, he may do all acts which are reasonable[5] and proper for the realization, protection or benefit[6] of the property.[7] **Dealings by guardian with property of ward.**

The Guardians and Wards Act, s. 28, recognises the validity of restrictions on the powers of guardians, imposed on them by the instrument appointing them: and the Court has power (ss. 28 and 32) either to impose or to remove restrictions; s. 29 refers to a general restriction against the guardian mortgaging, charging, selling, making gift, etc., of immovable property. If ss. 28 and 29 are disregarded the disposition is voidable (s. 30); s. 31 lays down the general practice with respect to permitting transfers under s. 29, viz., that they shall be permitted only if necessary or evidently advantageous;[8] the necessity or advantage must be recorded. The Court may, besides, impose conditions requiring its own sanction for the completion of the transfer, or that it shall be at a public auction: or as to terms of the lease, payment of proceeds into Court, etc. **Restrictions on the guardian's power imposed by the person appointing him or by the Court.**

[1] Bail. II. 252; see also Ameer Ali, "Mahommedan Law," I. 577-578; Wilson, "Anglo-Muhammadan Law," 189. G. & W. Act, s. 22, empowers the Court to give an allowance to the guardian for his care and pains.

[2] "Anglo-Muhammadan Law," 189; cf. Hed. 639; Ameer Ali "Mahommedan Law," I. 571-572.

[3] *(Syud) Lootf Hoosein* v. *Dursun Zall Sahoo* (1875), 23 W. R. 421.

[4] Cf. *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727, 733. See also *Lal Bahadur Singh* (1881), 3 All. 437. *Umrao Singh* v. *Dalip Singh* (1901), 23 All. 129.

[5] *Bodh Mull* v. *Gouree Sunkur* (1886), 6 W. R. 16. *Roushun Jahan* v. *Enact* (1866), 5 W. R. 5.

[6] Scott C. J. (then Scott J.) has held that the duty of guardians primarily is to preserve, and not to add to, the property of a minor; *Re Cassamally Jairabhai Pirbhai* (1906), 30 Bom. 591, 8 Bom. L. R. 883.

[7] This section is G & W. Act, s. 27, *mutatis*

[8] Cf. Bail. I 676 sqq., where distinctions are laid down between the cases where there are debts and legacies, and where there are not, and between movable and immovable property, and the consent or want of consent on the part of the heirs who are not minors.

SECTION 271 *(c) Guardian's Dealings with Immovable Property.*

271. The guardian of the property of a minor may either exercise[1] or refuse to exercise[2] the right of pre-emption on behalf of the ward.

Contract imposing personal liability, or for purchase of immovable property

272. (1) A guardian cannot validly contract in the name of a ward, so as to impose on him a personal liability.[3]

(2) It is not within the competence of a manager of a minor's estate, or of a guardian of a minor to bind the minor, or the minor's estate, by a contract for the purchase of immovable property.[4]

or for sale of immovable property.

(3) A guardian cannot alienate the immovable property of his ward, unless there is absolute necessity for the alienation, or it is greatly for the benefit of the ward.[5]

Conditions on which sale of immovable property is allowed:
1. double price,
2. for maintenance,
3. payment of debts of late incumbent,
4. will,
5. to defray expenses,
6. property in danger,
7. property usurped.

The following paragraph from Macnaghten's "Muhammadan Law"[6] was referred to by the Privy Council,[4] apparently as stating the correct law on the point:—

"A guardian is not at liberty to sell the immovable property of his ward except under seven circumstances, viz., first, when he can obtain double its value; secondly, when the minor has no other property and the sale is absolutely necessary to his maintenance; thirdly, when the late incumbent died in debt which cannot be liquidated but by the sale of such property; fourthly, where there are some general provisions in the will which cannot be carried into effect without such sale; fifthly, when the produce of the property is not sufficient to defray the expenses of keeping it; sixthly, where the property may be in danger of being destroyed; seventhly, when it has been usurped and the Guardian has reason to fear that there is no chance of a fair restitution."[6]

In the case referred to[7] there were disputes about the title of the minors to the property, and "by the sale the disputes were put an end to," and the Privy Council thought that "looking at the whole of the transaction, it was within the power of the guardian to make the sale."

Macnaghten's statement is also referred to with approval by the Bombay High Court, in the case cited in the footnote to s. 272 (3).

[1] *Lal Bahadur Singh* v. *Durga Singh* (1881), 3 All. 437. Bail II 180 (paras 2, 4)

[2] *Umrao Singh* v *Dalip Singh* (1901), 23 All. 129 Plaintiff's mother and guardian was held to have acquiesced in a sale, and this was taken as sufficient refusal.

[3] *Waghela Rajsanji* v. (*Shekh*) *Masludin* (1887), 11 Bom. 551; 14 I. A. 89.

[4] S. 272 (2) is taken *verbatim* from *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (1911), 39 Cal. 232: 14 Bom. L. R. (P.C.); S. C. (1906) 34 Cal. 163.

[5] ***Hurbai*** v. *Hiraji Byramji Shanja* (1895) 20 Bom. 116, 121. (*Mussamut*) ***Bukshun*** v. (*Mussamut*) *Doolbun* (1869) 12 W. R. 337, (*Mussamat*) *Syedun* v. (*Mussamut*) *Syud Velayet* (1872) 17 W. R. 239. (*Mussamut*) *Bukshan* v. (*Mussamut*) *Maldai Kooeri* (1869) 3 Ben. L. R. A.C. 423. *Bhutnath Dey* v. *Ahmed Hosain* (1885) 11 Cal. 417, 420 (*ll.* 1-2), 421 (*ll.* 4-7). *Thottoli Kotilan Aliyumma* v. *Kunhammed* (1910), 34 Mad. 527, 532.

[6] Macnaghten, ch. VIII, cl. 14.

[7] *Kali Dutt Jha* v. *Abdul Ali* (1888), 16 Cal. 627, 634, 635.

(d) Acknowledgment of Debt. SECTION 273

273. (1) The Calcutta [1] and Bombay [2] High Courts have held that a guardian has no authority to acknowledge a debt on behalf of his ward, so as to give the creditor a fresh start for the period of limitation. Limitation Act.

(2) The Madras [3] High Court has taken a different view.

Muttusami Ayyar, J., points out that it may be for the benefit of the minor to have the debt acknowledged as he may thereby get time to pay off the debt. In such circumstances the Guardians and Wards Act, s. 27, to which s. 270 above corresponds, would, it is submitted, support the Madras decision.

(3) Ward's Remedies against the Guardian.

274. The ward has all the remedies against the guardian which any other beneficiary has against his trustee; and in particular [4] a guardian may be sued for an account of what he has received in respect of the property of the ward, and be ordered to pay such amount as may be found to be payable by him.[5] as trustee.

(4) Guardian Appointed or Declared by Court.

275. A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him, for its opinion, advice or direction, on any present question respecting the management or administration of the property of his ward.[6] Power to take opinion of Court where guardian is appointed or declared by Court.

The Guardians and Wards Act, s. 33(2) and (3), provide respectively for service of a copy of the petition, and for protection of the guardian if he acts on the opinion, advice or direction given to him on the facts stated by him in good faith. Procedure for doing so.

The powers of a guardian of the person of a female appointed or declared by the Courts do not cease by her marriage; unless the Court is of opinion that her husband is not unfit to be the guardian of her person (s. 41 (1) (*d*) of the Act corresponding to s. 256 above). Right of such guardian not affected by marriage of female ward.

The said privileges are counterbalanced by the liability of having to face an application under s. 43 of the Act (under which the court may make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court); by the restrictions imposed by s. 26 against the guardian removing Duties imposed on guardian.

[1] *Chato Ram* v. *Bitto Ali* (1898). 26 Cal. 51. *Wajibun* v. *Kadir Buksh* (1886), 13 Cal. 292. *Azuddin Hossein* v. *Lloyd* (1883). 13 C. L. R. 112

[2] (*Maharana Shri*) *Ranmalsingji* v. *Vadilal Vakhatchand* (1894), 20 Bom. 61, 74, 75 (Bayley A. C. J. and Fulton J. expressly dissenting from the Madras decision).

[3] *Sobhanadri Appa Rau* v. *Sriramulu* (1893), 17 Mad. 221 and *Kailasa Pudiachi* v. *Ponnukannu Achi*, (1894) 18 Mad. 456.

[4] G. & W. Act, s. 37.

[5] *Ib.* s. 36; s. 35 provides for a suit on the bond into which the guardian may be asked to enter; ss. 36 and 37 explicitly refer to the fact that on the death of the ward or guardian their respective representatives may respectively sue and be sued.

[6] G. & W. Act, s. 33 (1) *verbatim*.

SECTION 275 the ward out of the jurisdiction of the Court, without the permission of the Court, disregard of which may subject him to a fine of Rs. 1,000 or imprisonment for six months (s. 44); and by the liability to give a bond (s. 34) which may be forfeited (s. 35), to file accounts, and to make payments into Court, in default of which he is liable to be fined (s. 45).

How guardian may enforce his rights.

276. A person who is entitled to be the guardian of a minor, may enforce his right by filing a suit for the purpose; or may apply to the Court for a declaration of his right under the Guardians and Wards Acts, section 7, or for delivery to him of the custody of the child under the Criminal Procedure Code, section 491.

The last-mentioned procedure is the simplest, and is based on the English 'Habeas Corpus' proceedings.

§ 7.—Termination of Guardianship.

(1) Attainment of Majority or Marriage.

Emancipation of male child.

277. The right to the custody of a male child ceases to exist in any person after the child has attained majority.[1]

The Muhammadan law would substitute "puberty [and discretion]" for the word "majority," cf. above pp. 46, 47.

As to the Sunni law, it is said that after a child has attained puberty, "if he is of ripe discretion, and may be trusted to take care of himself, he is to be set free and allowed to go where he pleases, but if he cannot be trusted to take care of himself the father should join him to himself or keep him by him, and be his guardian."[2] The Shiah law is similar. "When a child has attained to puberty and discretion, the power of the parents is at an end, and he is free to join himself to whomsoever he pleases."[3]

Emancipation of females.

278. (1) The right to the custody of a female child who has attained puberty (and is a virgin)[4] ceases to exist in any person after she has attained the age of discretion.[4]

Husband's right.

(2) The powers of the guardian of the person of a female ward cease by her marriage to a husband who is not unfit to be the guardian of her person; provided that where a guardian of her person has been appointed or declared by the Court, his powers do not cease, unless the court is of opinion that the husband is not so unfit.[5]

[1] G. & W. Act, s. 41 (1) (*c*); see above s. 229.

[2] Bail. I. 434 (para 2).

[3] Bail. II. 96 (*second*)

[4] Bail. I. 434. If she is not a virgin but "she cannot be safely left to herself the father *ought* to keep her with himself." If "she may be trusted to take care of herself the father has no right to retain her." *Quaere*, whether in a question to be decided by the High Courts any effect could be given to this provision of the law as coming under "the rights and authorities of fathers of families" (21 Geo. III. c. 70, s. 18), see table preceding Chapter II. and s. 2 p. 31, above.

[5] G. & W. Act, s. 41 (1), (*d*) and see above

(2) *Removal of Guardian by Court.*

SECTION 279

279. A guardian appointed or declared by the Court, or appointed by will or other instrument may be removed by the Court[1] under the Guardians and Wards Act, s. 39.

Removal of guardian by Court.

Guardians and Wards Act, s. 39.

The section referred to is as follows :—

" The Court may on the application of any persons interested or of its own motion, remove a guardian appointed or declared by the Court : or

a guardian appointed by will or other instrument,—

Guardians that may be removed.

for any of the following causes, namely :—

Causes for removal.

(*a*) for abuse of his trust ;

Abuse of trust,

(*b*) for continual failure to perform the duties of his trust ;

non-performance of duties

(*c*) for incapacity to perform the duties of his trust ;

incapacity

(*d*) for ill-treatment or neglect to take proper care of his ward;

ill-treatment,

(*e*) for contumacious disregard of any provision of this Act, or any order of the Court ;

contravention of Act,

(*f*) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward;

conviction.

(*g*) for having an interest adverse to the faithful performance of his duties,

adverse interest

(*h*) for ceasing to reside within the local limits of the jurisdiction of the Court;

residence beyond jurisdiction,

(*i*) in the case of a guardian of the property, for bankruptcy or insolvency,

insolvency

(*j*) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject :

law to which minor is subject,

" Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

guardian appointed by will or other instrument,

(*a*) for the cause mentioned in clause (*g*) unless the adverse interest accrued after the death of the person who appointed him : or

adverse interest, person appointing must have been ignorant of it,

it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest ; or

(*b*) for the cause mentioned in clause (*h*) unless such guardian has taken up such a residence, as in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian."

residence beyond jurisdiction, at impracticable distance.

280. *Semble*, where the person entitled by law to be the guardian is, in the opinion of the High Court, unfit to be such, the said Court has inherent jurisdiction to declare or appoint another person as such.

Inherent right in High Court to set aside claim of unfit person to be guardian.

See comment on the next section and s. 261 above with the footnotes.

281. *Semble*, where the person who is entitled by law to be the guardian of a minor has not been appointed or declared by the Court, nor appointed by will or other instrument, and a District Court (other than a High Court) [2] is of opinion that the said person is unfit to be such guardian by reason of any of

appointed or declared.

[1] Cf. Bail. 669 ; Hed. 698.

[2] As to High Court, see s. 289 above.

SECTION 281 **the causes referred to in section 279 above, the said Court may declare the said person to be guardian, and may then remove him; after which it may appoint or declare another person to be such guardian.**

Sec. 39 of Guardians and Wards Act applies only when guardian appointed or declared by Court by an instrument.

It would seem that it is necessary for the District Court first to declare the person entitled by law to be the guardian, before it can remove him, inasmuch as the Guardians and Wards Act, s. 39, empowers the said Courts to remove only such guardians as have been appointed or declared by the Court, or by a will or other instrument. Consequently the District Court can remove (or pass over) a guardian only for the causes mentioned in the said section, which is set out in the comment to s. 279 above.

Court must declare person next entitled.

It is submitted, that under the Guardians and Wards Act, s. 42, and the general policy underlying the act, the Court does not, on the person entitled to be guardian being declared unfit, get plenary powers to *appoint* any other person guardian, but it must *declare* the person next entitled who is not so unfit to be the guardian by law.

The powers referred to in this and the last section very nearly amount to giving the Court discretion to choose the guardian for itself, irrespective of the person that is entitled by law. But in practice there is a great deal of difference between absolute discretion and a power that can be effectively exercised only after the claims of a number of persons have first to be set aside, by categorically holding that they are unfit.

Bindo v. Sham Lal'

It may therefore be doubted whether the decision in 'Bindo *v.* Sham Lal'[1] can be justified on the grounds mentioned in the judgment; for the Judges there state: "It is true there is nothing against the father"; then they say that he has married again, and so "it will be more for the welfare of the minor to live with her maternal grandmother, than with the stepmother." These grounds are not sufficient, it is submitted, to deprive the father of the custody of the child. The same decision might, however, have been arrived at on the ground that the father had abandoned his right over the child inasmuch as he had allowed the girl to be maintained by the grandmother for five years, ever since the death of the mother, without apparently contributing to the expenses.[2]

It is a question that may require consideration whether, when a person who is appointed or declared a guardian by the Court, becomes disentitled to act as guardian by operation of any of the ss. 246-249, above, he need not be removed by the Court, but he gives place to the person next entitled, or whether if the latter desires to act as guardian he must apply to the Court to be declared as such, or take proceedings under s. 276 above.

Resignation of

282. (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application it will discharge him; and if the guardian

[1] (1907) 29 All. 210.

[2] See above, s. 253.

making the application is the Collector, and the Local Government approves of his applying to be discharged, the Court will in any case discharge him.[1] SECTION 282

283. (1) The powers of a guardian of the person cease— Cessation of authority of

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

(*b*) by the Court of Wards assuming superintendence of the person of the ward ; 1.

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

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

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

(2) The powers of a guardian of the property cease— 2. of property.

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

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

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

(3) When for any cause the powers of a guardian cease, the Court may require him, or, if he is dead, his representative, to deliver, as it directs, any property in his possession or control, belonging to the ward, or any accounts in his possession, or control, relating to any past or present property of the ward. Order to deliver property or accounts.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities, save as regards any fraud which may subsequently be discovered.[2] Discharge from liabilities: Fraud.

284. When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.[3] Appointment of successor to guardian

[1] G. & W. Act, s. 40 *verbatim*. [2] *Ibid.* s. 41 *verbatim*. [3] *Ibid.* s. 42 *verbatim*.

CHAPTER VIII.

MAINTENANCE.

§ 1.—Preliminary.

(*1*) *Explanation of Terms.*

285. In this chapter, unless there is anything repugnant in the subject or context,—

Maintenance. (1) "maintenance" includes food, raiment, and lodging ; [1]

Means. (2) a Mussulman is said to have "means to provide maintenance," or to have "the means to maintain," when he or she is possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms ; [2] by "means" is meant "means to provide maintenance ; "

Indigence. (3) a Mussulman is said to be "indigent," or "in indigent circumstances," when he is not possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms ; [2]

Ability to earn. (4) "ability to earn a livelihood" or "ability to earn" implies that the person is able to work for wages in point of health and strength, and in accordance with what is usual among persons of the same rank ; females are not considered to have the ability to earn in any circumstances ; [3]

Necessitous person. (5) a person is said to be "necessitous," when he is both indigent and unable to earn his livelihood ;

Ability to maintain. (6) "ability to maintain" implies the present possession of means to maintain ; but where the law imposes on one person the

When a person can earn the means. obligation to earn (if necessary) the means for maintaining

[1] Bail. I. 437, 422, II. 103 (para. 2).

[2] Hed. 148 ; Bail. I. 461 (citing *Hidaya* and *Kifaya* II. 393-394). The means which are stated to prevent one from begging are "a surplus of 200 *dirhems* over one's necessities." But see comment to this section and cf. Civil Procedure Code O. XXXIII. *r.* 5.

[3] Bail. I. 458.

another,[1] then the person so obliged, is said to have the ability to maintain that other, if he is able to earn the means for providing the maintenance of the said other person ; and notwithstanding that he may have no present means to pay the expenses of the said maintenance ; SECTION 285

(7) a "minor" is a person who has not attained majority under the Indian Majority Act : Minor.

(8) a child is said to be an "infant" if, being a male, he is more than two years old, or if, being a female, she is not more than seven years old ;

(9) a person is said to be "young," so long as he or she has not attained puberty ; person.

(10) a person is said to be "adult," after he or she has attained the age of puberty; Adult person.

(11) "presumptive heirs" means those relations of a living Mussulman, who would inherit his estate if he were immediately to die ;[2] "presumptive rights to inherit" refer to the rights of succession which "presumptive heirs" would have if the person in question were immediately to die; inherit.

(12) two persons are said to be "within the prohibited degrees" where the relationship between them is such that they cannot lawfully intermarry, or where, being of the same sex, the relationship between them is such that they could not have intermarried if they had been of different sexes. relationship.

Rules undefined on many points. Frequently of only moral obligation.

The law of maintenance suffers in point of definiteness on many questions, owing to the fact that the exponents of Muhammadan law had no object in keeping legal rights distinct from obligations of a moral nature. The powers of a Qazi are so different from those of Courts of law in India, that rules which were quite sufficient to guide the Muslim courts, are sometimes hardly capable of being stated in a concrete form, without doing violence to some necessary, but perhaps merely implied, reservation or qualification.

Inapplicability of [illegible] as to [illegible] of maintenance, means and indigence.

On some of the points there can be no complaint that the Muslim authorities have left the law too undefined, but the details about the quantum of maintenance which abound in the texts are hardly applicable to our times and conditions. Similar remarks apply to the rules for determining which persons are to be considered necessitous, and for fixing the standard of means, the possession of which imposes the obligation to provide maintenance.

Precepts against begging.

The following precepts of the Prophet about begging may be cited, as those alone are considered entitled to maintenance for whom it is proper to beg : "Verily it is better for one of you to take your rope, and bring a bundle

[1] E.g. the father is bound to work and earn if he can do so in order to provide for young children, see s. 320 below.

[2] *Nemo est heres viventis* applies in Muhammadan law as much as in any other system, cf. Bail. I. 463, 574 (para. 3); II. 9-10.

SECTION 285

of wood upon your back and sell it, in which case God guards his honour, than to beg of people, whether they give him or not." "Acts of begging are scratches and wounds by which a man wounds his own face." "It was said, 'O Prophet, what makes him in no need of asking,—in having which, it is forbidden to beg?' He said, 'Fifty dirhems of silver, or the value of that in gold.'" "The Prophet said, 'That property with the possession of which it is not right to beg is that quantity of things which supports the night and the morning, that is whoever has food for a day and night, it is prohibited him to beg.'" "That person who has forty dirhems or equal to it in value, then verily he begs in a forbidden way." "Verily it is not for the rich to ask, nor for a strong robust person."[1]

Means, possession of which prevent begging.

Age of majority.

With reference to the nomenclature referring to the different periods of human life, Sir Roland Wilson in his valuable book states that the "matters excepted by the Indian Majority Act, s. 2, evidently do not include maintenance of relatives." And he therefore considers that wherever in this branch of the law a minor is referred to, a minor under the Indian Majority Act is to be understood. But the Indian Majority Act, it is submitted, merely contains a definition of terms, and cannot by itself affect the substantive law. The absence of any general law in British India laying down as a principle the effect of a person being considered a minor, except in regard to contracts, has already been adverted to.[2] A mere definition of English terms (like majority and minority) however authoritative the definition might be, cannot, by itself, affect a system of law (like the Muhammadan law) the expositions of which are contained in a language other than English. The only effect that such definition can have, must be in the nature of a warning to translators, who ought, in future, to be careful not to use the words so defined, unless in the originals, which they are translating, the same notions are referred to as are annexed to the terms by the said definitions. Thus, in regard to the law of maintenance, for instance, the Muslim texts lay down, that until the age when a child is weaned, its rights are of one description, and after it, until the attainment of seven years, different sets of considerations prevail; finally, between seven years and puberty his rights are of another description. Can the definition of majority in the Indian Majority Act extend the last-mentioned class of rights up to the age when a person is said to have attained majority under the Act any more than the said definition can extend the rights given to an infant in arms up to the age of 18 or 21 years? It is true that when the Muslim authors wish to refer to the attainment of puberty they occasionally do so by means of Arabic words, the effect of which might be represented in English by the words "attainment of majority"; but, on the other hand, when the British legislature has adopted a definition of majority which is not determinable with reference to puberty, this cannot possibly have the effect of introducing any change into the original purport of the Arabic words.

Indian Majority Act does not except rights to maintenance from being affected by definition of majority contained in it.

The definition of majority in the said Act cannot affect the divisions of human life known to Muhammadan law.

It might, no doubt, be urged that by the definition in question the legislature must be supposed to have intended to abrogate the substantive law, relating to the matters referred to. As to this argument, in the first place it may be pointed

[1] VI. v, 1, 2.

See pp. 46-47 above.

out that there is nothing to indicate that the Indian legislature intended by the Majority Act to enact that the only division of human life in regard to any law recognised in the British Courts shall be that of minority and majority; and that rights or duties which are annexed by Muhammadan law to any period of life anterior to the age which is defined in the Act as the age of majority, shall in future be continued to the person in question until he attains the said age. If it were so, it might be argued with equal force that, when a testator gives an annuity to a child to be continued until the child attains puberty, then by reason of the Indian Majority Act the annuity must be continued till the child attains majority under that Act.

SECTION 285 —Nor alter the rights annexed to specific periods of life.

It may be recalled that both the English and Roman law divide the period of human life anterior to the attainment of majority into various divisions, annexing distinct rights and obligations to each.

(2) Rights and Obligations of Maintenance.

(a) Relationship as Affecting Maintenance.

286. (1) Under the circumstances and subject to the conditions and priorities hereinafter mentioned,—

Persons entitled to be maintained. under—

(1) Muhammadan law—

(*a*) a Mussulman is bound to provide and entitled to receive maintenance to or from his ascendants and descendants;[1]

(*a*) ascendants and descendants,

(*b*) according to Hanafi law reciprocal rights and obligations relating to maintenance arise also between collateral relations by blood who are within the prohibited degrees of relationship; under Shiah law no such rights and obligations arise;[2]

(*b*) collaterals,

(*c*) the wife is entitled to receive maintenance from her husband; but as a rule no other relation by affinity is obliged to provide maintenance, or entitled to receive it, in his or her own right.[3]

(*c*) wife.

(2) Under the Criminal Procedure Code[4] if any person having sufficient means[5] neglects or refuses to maintain his wife[6] or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, Presidency Magistrate, Subdivisional Magistrate or Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such

(2) Criminal Procedure Code—

(*a*) wife and

(*b*) children, legitimate or illegitimate

[1] Bail, I. 463, II. 103-104.

[2] Bail. II. 102 (para. 4), ss. 334 *et seq.* below.

[3] See below, ss. 294 *et seq.*

[4] Act I. of 1898, s. 488, corresponding to Act X. of 1872, s. 536.

[5] O cours the definition of "means" given in s. 285 (2) above does not apply here.

[6] Does this statutory right inhere in a *mut'a* wife? In *Luddan Sahiba* v. (*Mirza*) *Kamar Kudar* (1882), 8 Cal. 736, 11. C. L. R. 237, it was held that it does. Cf. pp. 65, 177, above.

286 monthly rate not exceeding fifty rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Maintenance under Criminal Procedure Code.

Whether due from mother to children.

"In interpreting the Acts of British India, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females,"[1] and consequently a mother may, apparently, be proceeded against under s. 488 of the Criminal Procedure Code.[2] There does not, however, seem to be any reported case mentioning such proceedings. In England both parents are liable to maintain their illegitimate children, and a woman may, under certain circumstances, be required even to maintain her husband.[3]

Maintenance from wife to husband in England.

Illegitimate children.

Muhammadan law appears to impose no burden upon an illegitimate father;[4] and though the Sunni law recognises the relationship of the mother to her child, even where it is begotten out of wedlock, there does not seem to be any recognition of such a relationship in Shiah law. It would, therefore, seem that an illegitimate child is not entitled to maintenance from either parent under Shiah law; and only from its mother under Sunni law.[4]

(*b*) *Possession of Means and Ability to Earn.*

Absolute right of—

287. (1) Save as provided in this section, no person who is not necessitous is entitled to receive maintenance from another;[5] and no indigent person is obliged to maintain another.[6]

1. wife.

(2) The wife is entitled to maintenance from her husband though she may have the means to maintain herself, and though her husband may be without means.[6]

2. necessitous parents.

(3) Parents and grandparents[7] who are in indigent circumstances are entitled, under Sunni law, even though they are able to earn their livelihood,[8] to receive maintenance from their children, provided that the children have the means to maintain.[9] *Quaere*, whether under the Shiah law the parents and grandparents are so entitled.[10]

3. young children.

(4) Young children are entitled (subject to sections 291 and 292 below) to maintenance from their parents though the latter may be in indigent circumstances.[11]

[1] General Clauses Act X. of 1897, s. 13 (1).

[2] This is pointed out by Sir R. Wilson, "Anglo-Muhammadan Law," 204, s. 148, and see above.

Cf. also French Civil Code, arts. 205-207.

[4] See above, p. 178.

[5] See above, s. 285 (5). Hed. 147, 148: Bail. I. 455, 457, 458, 461, 463, II. 103

[6] See above, s. 285 (3) and Bail. II. 103 (para. 2); cf. "A poor man shall not be compelled to maintain other than four (classes of persons): (i) his minor children, (ii) his daughters who have attained puberty, whether virgin (i.e., unmarried) or *syeeba* (married), (iii) his wife, (iv) his slaves."—Mahomed Yusoof, "Mahomedan Law of Marriage," etc., II. 329 (translation from the *Fatawai Qazi Khan*), and see Mayne's "Hindu Law" 605 (on possession of property), *ib.* 610 (on personal obligation to maintain wife, independently of possession of property).

[7] Bail. I. 462 (para. 4).

[8] Hed. 147-148, cf. Bail. I. 462 (para 2).

[9] Bail. I. 461, II. 103.

[10] Bail. II. 103 (para. 2) and see below, s. 320 and footnotes thereto.

[11] See above, s. 285 (3) and below, s. 303; Hed. 147-148.

Priority in Obligation to Maintain. SECTION 288

288. (1) The obligation to maintain a necessitous Mussulman rests—

Priority of obligation to maintain.

(*a*) according to Sunni law, in the first instance on the children,[1] then on the father, then on the mother, then jointly on the grandparents and grandchildren, and then on the collaterals ;[2]

Ascendants, descendants, then collaterals.

(*b*) according to Shiah law, the obligation rests on the nearest descendants jointly with the nearest ascendants.[3]

Ascendants and descendants.

Explanation I—For the purposes of clause (*b*) proximity amongst ascendants is reckoned on the following basis: The father is considered nearest, then the nearest paternal grandfather (how remote soever), then the mother, and then the nearest maternal grandfather (how remote soever).[4]

Explanation II—According to Shiah law no person is legally obliged to maintain any of his collateral relations.[5]

(2) When the person on whom the obligation to maintain another is imposed in the first instance, is absent, or is unable to maintain, then the person on whom the obligation is imposed in the next instance, may be required to provide maintenance; but the expenses of the maintenance so provided may be recovered from the person whose obligation to maintain has priority, if and when the person so obliged in priority is no more absent, or unable to maintain.[6]

When person primarily liable unable, person on whom liability rests in the next instance to provide; with right to recover.

It will be observed that the Sunnis and Shiahs differ from each other as to the relative obligations of the mother and the paternal grandfather. The Sunnis consider the mother to be liable in the first instance, and then the grandfathers, both paternal and maternal, and the Shiahs put the liability on the paternal ancestors in the first instance, and then on the mother and maternal ancestors. It is easy to surmise that the difference of opinion arises from the conflict between the Pre-Islamic customary rules of succession which entirely excluded the mother (as a female),[7] and the Islamic injunction by which the mother gets a share in the estate, in any case. The difficulty is increased in the Hanafi law by the fact that the relative positions of the mother and grandfather vary greatly in that system ; for while under some circumstances the mother gets a third of the estate, and the grandfather two-thirds of the estate, in other circumstances, the mother gets her share in the estate, but the grandfather is excluded by the father.[7] The

Priority between obligation on the mother and paternal grandfather.

Reason of conflict between Shiah and Sunni law

[1] Bail. I. 463 (last line).

[2] Bail. I. 457-458. The paternal uncle alone is referred to.

[3] Bail. II. 102 (para. 4), 104 (para. 3).

[4] Bail. II. 103-104.

[5] Bail. II. 102 (para. 4), adding "though it is becoming and proper for a person to maintain them, also particularly when he is one who would inherit from them."

[6] For instances see below, ss. 309, 321, 322, 333, 341.

[7] See Chapter on Succession below.

SECTION 288 View that the mother and grandfather should jointly bear expense. Abu Hanifa's opinion: grandfather alone to provide maintenance though mother living.

'Zahir Riwayat' [1] suggests, therefore, that where the mother and grandfather of a minor co-exist (the father, of course, being dead) the maintenance is to be paid in proportion to their rights in the inheritance, i.e. the mother pays a third [2] and the grandfather two-thirds.[3] Abu Hanifa, however, is reported by "Hussun son of Zyad" not to have adopted this view, but to have held that the grandfather alone is responsible for the maintenance. Abu Hanifa's view seems to be based on a precedent set by Abu Bakr.[4]

(4) *Property Liable for Maintenance.*

(a) Property of Absent Persons.

Maintenance out of property belonging to absent persons.

Maintenance of parents, children, and wife.

Application of property by the Court's order.

Without Court's order.

289. (1) When a man is absent, but has left available property, the Court may order maintenance to be recovered out of it for the benefit of the following persons, if they are indigent,[5] but of no others, namely, (*a*) his parents,[6] (*b*) his young sons or adult sons who are unable to earn their living, (*c*) his female children, whether young or adult, (*d*) and his wife.[7]

(2) The Court may also direct the said persons to apply the property in their hands, belonging to such absent son, father, or husband, as the case may be, to their own maintenance.

(3) The said persons may lawfully apply such property for their maintenance without any order from the Court: [8] provided that it consists of such articles as they are entitled to receive for their maintenance.

Father's rights as to movables

(4) The father may, without an order from the Court, sell the movable property of his absent son which is in the possession of the father, and apply the sale proceeds to his own maintenance,

[1] Bail. I. 459. I. Mahomed Yusoof's "Mahomedan Law of Marriage, Divorce, etc.," II. 338, where there is a mother, a brother and a grandfather the last alone is to provide the maintenance. The author then adds: "and this is the view taken by (the first Khaleefa) Abu Bakr Siddeek, on whom be peace." This instance, however, does not enunciate any new principle, as Sir R. K. Wilson seems to think ("Anglo-Muhammadan Law," 210). It is merely the same opinion that is above stated to be attributed to Abu Hanifa. No difference is made, it is evident, by the presence of the brother, for the grandfather in any case is bound to maintain in priority to the brother, who is a collateral. Apparently in the particular instance, which was taken for adjudication before Abu Bakr, the first Khalif, there were a mother, brother, and grandfather co-existing and from the decision reported to be given by the Khalif in that instance Abu Hanifa draws the general conclusion above referred to

[2] Sir R. Wilson suggests ("Anglo-Muhammadan Law," 210), that the mother's share of the maintenance would be reduced to one-sixth when her rights of inheritance are similarly reduced. But the reduction in her share of inheritance takes place only when the propositus (i.e. the person entitled to maintenance) has children—an eventuality that cannot occur, as we are speaking of persons who have not attained puberty; and if we assume that the propositus has children, then the first duty is on the children and not the mother or grandfather of the propositus to maintain him. See subsection (1) of s. 288.

[3] See below, s. 323, dealing with the position of mother and grandfather.

[4] There is another precedent mentioned by Khan Bahadur Mahomed Yusoof, "Mahomedan Law of Marriage, Divorce, etc." II, 338, 1766: which show Abu Hanifa's view to be that

[5] Bail. I. 459.

[6] *Ibid*; Hed. 149.

[7] See as to wife's right, s. 294 below.

and to that of the son's wife and child; but he may not so sell his son's immovable property unless the son is young or insane.[1] SECTION 289

"The father may sell the movable property of his adult son who is absent, but not if he is present. His mother and the Qazi and his other relations have no authority to sell. The Imam (Abu Hanifa) and his disciples are agreed that the father may sell, because the father has, but no one else has the authority to expend thereout. But the father may not sell immovable property, as for instance lands and gardens, so inasmuch as he is prevented from selling the immovable property only of adults, it is evident that he may sell the immovable property of his young and insane children. And there is unanimity on this point."[2]

'Durr-ul-Mukhtar': Father may sell movable property of adult children and both movable and immovable of minors and insane person.

290. Where property belonging to the absent son of an indigent person, is in the possession not of the father, but of a third person, then such third person cannot, without an order of the Court, apply the said property towards providing maintenance for the father; and if he does so, he is liable to account for it to the son.[3]

Except the father no other person may apply another's property for the maintenance of a third person.

Semble, the same rule applies where maintenance is due to any other person mentioned in section 289 above.

(b) *Property of Young Children.*

291. The expenses of the maintenance of a young Mussulman may be taken out of his[4] property if he has any, and his property may be sold for the purpose of maintaining him,[5] notwithstanding that his father may have means or may be able to earn.

Minor's property may be applied for own maintenance.

Explanation—Where the father has already supplied maintenance to his young children, he cannot sell their property to reimburse himself for the expenses of their maintenance, unless he has reserved his right to have recourse to their property.[6]

But not

(c) *Earnings of Young Sons*

292. Where the young sons of a person are able to work and earn their living, the father is entitled to apply their earnings

Earnings of

for their maintenance.

[1] Bail. I. 459. Cf. s. 2 above, and 21 Geo. III. c. 70 s. 18 (see table preceding p. 29 above).

[2] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl*. vi.

[3] Hed. 149.

[4] "Though the word in the original (*subee*) is masculine, I think it includes female children also who have property." Bail. I. 457 *n*. 1, with a cross reference to Bail. I. 155.

[5] Bail. I. 457 (para. 3). In England the obligation of the father to maintain his children arises under the Poor Laws; the Courts refuse to order maintenance out of the children's property where the father is in a position to maintain his infant children. Halsbury, "Laws of England," XVII. 114, and see s. 293 below relating to arrears.

SECTION 292 for their maintenance, but is bound to hold the surplus in trust for them.[1]

Semble, this section is subject to the same reservation as is contained in the *explanation* to the last section.

(5) *Arrears of Maintenance.*

Maintenance cannot be recovered for time that is past except by wife and minor child.

293. When the Court has ordered maintenance[2] for a relative other than a wife [and young child],[3] and a month or more elapses without maintenance being recovered, then no maintenance can be recovered in respect of the time that has so elapsed.[4]

Reason for the rule.

"For this reason that he must have received sustenance during the period that has elapsed: and the maintenance of relatives is due in order to supply them with the necessities for sustaining life, hence when the time has elapsed and their sustenance has actually been supplied, then no maintenance can remain due. And Zail'i has included a young child also with the wife in the exception."[4]

Whether minor children also excepted.

§ 2.—Maintenance of Wife.

(1) Nature and Extent of Wife's Right.

Conditions on which the wife becomes entitled to receive maintenance—

294. (1) The wife who is regularly married,[5] and who has attained an age at which she can render to the husband his conjugal rights,[6] is entitled (while the marriage subsists)[7] to receive maintenance from him, according to her health and position in life and the husband's means;[8] provided that she

[1] Bail. I. 458. "Though one is actually able to work, yet if work is not suitable or proper for him he is held to be weak and unable," so it is explained that "the sons of the better orders . . . . are to be treated as weak," i.e., they are not required to earn their living; "so also students of learning when unable to earn anything; and their right to maintenance from their fathers does not abate while engaged in legal studies." The father is ordinarily the guardian of their property (see ss. 257, 258 above) though "if he be a spendthrift . . . . the judge should take it out of his hands and place it with a trustee to keep for the boy until he arrive at puberty and then deliver it over to him." Bail. I. 458 (para. 1). Legal studies are favoured as law means religion Cf. above pp. 23, 24.

[2] *Semble*, when the Court has not ordered it, *a fortiori* so.

[3] See below, s. 307.

[4] *Durr-ul-Mukhtar*, ch. on *Nafaqa fasl.* vi. Cf. Maine, "Hindu Law," 619: "arrears of maintenance used to be refused by the Madras High Court. But this view has now been overruled."

[5] Not a *mu'ta* wife, see ss. 16, 25 (14) above. Nor "one enjoyed under a semblance of legality." Bail. I. 440. "Whether she be a Mooslim or Zimmee, poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse," Bail. I. 437; Bail. II. 99; see comment and p. 61 above.

[6] Under Hindu law the husband is bound to pay for maintenance of his immature wife, though she stays with her parents: Mayne, 610.

[7] *Shah Abu Ilyas* v. *Ulfat Bibi* (1896), 19 All. 50; *Abdool Futteh Moulvie* v. *Zabunessa* (1881), 6 Cal. 531, and so an order for maintenance by the Magistrate drops on a divorce. *In re Abdul Ali Ishmailji and his wife Husenbi* (1883), 7 Bom. 180. *In re Kasam Pirbhai and his wife Hirbai* (1871), 8 Bom. H. C. R. (CR.), 95; *Re Petition of Din Muhammad* (1882), 5 All. 226 (Mahmood J.) see also the illustration to this section.

[8] See s. 295 below.

SECTION 294

1. puberty.
2. accessibility to husband.
3. obedience.

places, or offers to place, herself in the power[1] of the husband, so as to allow him free access to herself at all times; and obeys all his lawful commands.[2] Where the marriage is irregular merely because of the absence of witnesses,[3] the wife is entitled to maintenance in the same manner and subject to the same conditions as if her marriage had been regular.

Wife's absolute right.

Explanation I—The inability of the husband to provide due maintenance for his wife does not affect her right to receive it.[4]

Husband's right to restrain.

Explanation II—The husband is entitled to restrain and guide his wife's movements in a reasonable manner; but he cannot prevent her seeing her parents, nor her other relations within the prohibited degrees.[5]

Maintenance under Criminal Procedure Code.

(2) *Quaere*, whether an order for maintenance may be made under the Criminal Procedure Code[6] against a Mussulman husband, though the wife has not attained puberty.[7]

After 'mut'a contract.

(3) It has been held that an order may be made under the said code in favour of a woman who has contracted a 'mut'a' with the man.[8]

Illustrations.

(1) H is absent from his wife *W*. *W* appears before the judge offering to place herself within the power of H. This does not make H liable for maintenance till H is apprised of the offer, nor till after the lapse of sufficient time for H's coming to *W* or sending an agent, together with the actual surrender of *W* to H or H's agent.[9]

(2) *W*, the wife of H, is disobedient, but afterwards returns to obedience: W is not entitled to maintenance till H is informed of her submission, and the lapse of sufficient time to allow his coming to her or sending an agent.[9]

Effect of 'Mut'a' on Maintenance.

(3) A Shiah woman *W* made an application for maintenance under the Criminal Procedure Code against H, with whom *W* had contracted 'mut'a.' *Held*, that the fact that under the Shiah law *W* did not have a right to maintenance capable of being enforced by a suit in a Civil Court, did not interfere with *W*'s statutory right to

[1] Such placing herself in the power of the husband is called *tamkin* in Arabic. The wife must reside in the husband's place of residence. Bail. I. 438; II. 97.

[2] Bail. I. 250, 437-438, II. 97,101 (para. 3).

[3] Bail. I. 466 (last line).

[4] Bail. I. 439 (para. 2). Though his means may be taken in account to fix the amount. See p. 231 below and Bail. I. 447, II. 15-18.

[5] Bail. I. 449-450. Her parents may visit her on Fridays; other relations once a month. Hed. 144 is more general about the applicability of these details, see above s. 285 and comment.

[6] See above s. 286 (2).

[7] *Kolashun Bibee* v (*Sheikh*) *Didar Buksh* (1875) 24 W. R. (CR.) 44. Jackson J. did not in this case decide the point, as the wife was only ten years old; and no one was examined on her behalf except herself.

[8] See illustrations to this section.

[9] Bail. II. 101.

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maintenance under the Criminal Procedure Code, but that the question to be determined was whether the period of 'mut'a' had already expired, or the relationship between *W* and H was subsisting.[1]

(4) A Shiah Mussulman sued for a declaration that he had dissolved the 'mut'a' connection which had existed between himself and *W*, by making a gift of the unexpired portion of the 'mut'a,' and that consequently he could not be ordered, under the Criminal Procedure Code, to maintain *W*—*declared* accordingly and *held*, that *W* was under the 'mut'a,' in the position of debtor to H, and the gift of the unexpired portion of the term of the 'mut'a' operated as a release to which the consent of *W* was not necessary.[2]

Maintenance not due unless wife has attained puberty.

Sir Roland Wilson[3] refers in connection with the point whether maintenance is due even to a wife who has not attained puberty, to Hed. 141 where Shafi'i is stated to be of the opinion that she is, and points out that this statement conflicts with the statement contained in the 'Fath-al-Qarib' where the Shafi'ite law is stated to be the same as the Hanafi and Shiah law. The reason of this contradiction is also explained by the same learned author's reference to the 'Minhaj-ut-Talibin,' from which it appears that Shafi'i held the opinion attributed to him in the 'Hidaya' previous to his sojourn in Egypt, but afterwards altered it so as to make it conform with the rule prevailing in the other schools.

Shafi'i's views at first differed from those of Abu Hanifa.

Maintenance not due if marriage irregular.

"Maintenance is due only to a wife who has been regularly married, so that if the marriage is found to be irregular, as for instance if she is found to be in her ''iddat' (at the time of the marriage contract) for another husband, or if the marriage is void on the ground that the woman married turns out to be the foster sister of the man, then the man may demand back the allowance of maintenance: as is stated in the 'Bahr-ur-Raiq.' In an irregular marriage maintenance can be demanded back,[4] provided that it had not become obligatory by reason of an order of the Qazi; and if it is paid by the husband without an order from the Qazi, then it cannot be demanded back. The same is stated in the ''Alamgiri' from the 'Hashiat-ul-Madani.'"[5] Where it has not been ordered to be paid by the judge, it is presumed to be voluntarily given and ranks as a gift.

When maintenance paid to irregularly married wife can be demanded back.

Is 'mut'a' a marriage within Criminal Procedure Code?

The decisions which are given as illustrations (3) and (4) to this section deal with the question whether a woman who has made a contract of 'mut'a' with a man, is to be considered as his wife, within the meaning of the Criminal Procedure Code.

Scale of maintenance. Sunni law. Positions of both husband and wife.

295. In determining the scale of maintenance due from the husband to the wife, according to Hanafi law, the social position of both the husband and wife must be considered.[6] The Shafi'i

[1] *In the matter of the Petition of Luddun Sahiba, Luddun* v. *(Mirza) Kamar Kudar* (1882) 8 Cal. 786, 11 L. R. 237. H was the second son of the ex-King of Oudh, and *W* the niece of one of his wives: 14 Cal. 277.

[2] *Mahomed Abid Ali Kumar Kader* v. *Luddun Sahiba* (1886) 14 Cal. 276.

[3] "Anglo-Muhammadan Law' (third). 407 referring to p. 531 of the *Fathal-Qarib* and Vol. II. p. 85 of the *Minhaj*.

[4] Cf. s. 293 above.

[5] *Durr-ul-Mukhtar*, Ch. on *Nafaqa, fasl.* i.

[6] Bail. I. 441-442; Hed. 140. The wording of the first clause of this section is borrowed from Sir R. Wilson's valuable book.

law is that the position of the husband should alone be considered.[1] The Shiah law is that the maintenance should be determined by the wife's requirements in respect of condiments, food, clothing, residence, service, and implements of anointing ; a due regard being also had to the custom of her equals,[2] among her own people in the same city.[3]

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Shafi'i law, of husband alone. Shiah law, of wife alone.

Many details are given in the texts about the class of maintenance that is due, especially from the husband to the wife, e.g. as to whether one or more servants should be maintained for her, and even as to the quality and quantity of food that she is entitled to receive. It is, for instance, laid down that she is not entitled to perfumes, nor medical attendance, at the expense of the husband.[4]

Particulars of maintenance due. Medical attendance

These details are, in their nature, of little use under the changed circumstances of our times ; and we find in the 'Fatawa 'Alamgiri' itself an indication that modern rules may differ on these points from the "older opinions."[5]

Inapplicability of these detailed rules.

The remarks made above do not apply directly to the question whether the condition of the husband alone, or of the wife alone, or of both, should be the basis of maintenance. Still, the following passage from the same digest must be considered as liable to modification, especially as the Muslim jurists themselves are not unanimous :[6] "When monthly maintenance is decreed and the husband is rich, eating white bread and roast meat, while the woman is poor, or the reverse is the case, the condition of both should be taken into consideration according to one set of opinions, but in the 'Zahir Rewayut' it is said that regard should be had only to the condition of the man, and there are also many opinions in favour of this view. The *fatwa*, however, is said to be in accordance with the other." The 'Hidaya' on the other hand lays down that "in adjusting maintenance, regard should be paid to the rank and condition of both her and her husband," and though Shafi'i is stated to be of the opinion that the Quran requires only the husband's position to be considered, the author of the 'Hidaya' interprets the Quran in a different way, and supports his own view by the authority of a tradition.[7] The view adopted in the 'Hidaya' is also accepted by the 'Sharh-i-Viqaya,' where it is stated as follows : "In fixing upon the amount of maintenance the condition of both parties must be regarded. And this is our (i.e. the Hanafi) view, but according to Imam Shafi'i only the condition of the husband is to be considered. The authority in support of our view is that the Prophet said to Hinda, the wife of Abu Sufian, 'take from his property what is required for thy needs, and the needs of thy child,' which tradition is reported by Bukhari and Muslim and refers the quantum of maintenance to the needs of the wife. It will be found explained at length in the 'Fath-ul-Qadir.'"[8]

Whether the maintenance depends on the social conditions and means of the husband or wife, or both. Conditions of both to be taken into consideration

1. 'Fatawa 'Alamgiri.'
2. The 'Zahir-Riwayat,' of husband alone.
3. The 'Hidaya.'
4. The 'Sharh-i-Viqaya.'

[1] Hed. 140.

[2] Cf. the *mahr-ul-mithl* above, s 97.

[3] Bail. II. 99.

[4] Bail. I 441-142. As to dress I. 448, residence I. 448-449, II. 99. See also Mahomed Yoosuf's "Mahomedan Law of Marriage, Divorce, etc.," Vol. II. 264 *et seq.*

[5] Bail. I. 439 (*ll.* 1-3).

[6] See above pp. 26-27

[7] Hed. 140-141. The tradition is given in the quotation which follows below from the *Sharh-i-Viqaya* and is also to be found in the *Mishcat-ul-Masabih*. Cf. Mayne, "Hindu Law," 617.

[8] *Sharh-i-Viqaya, Talaq*, Ch. on (*admit.*).

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The view supported by the 'Hidaya' and 'Viqaya' would no doubt find favour with the British Courts in India, especially as the ''Alamgiri' states that the 'fatwa' is in accordance with that view.

Analogy of alimony.

Under the Divorce Act IV. of 1869 (which does not apply to Mussulmans) alimony, pending a suit, is not to exceed one-fifth of the husband's net income, for the three preceding years.

Each wife is entitled to a separate apartment.

296. Each wife is entitled to have a separate apartment for herself, free from the intrusion of any person other than her husband.[1]

(2) Duration of Wife's Right to Maintenance.

(a) During Marriage.

to maintenance not lost by wife lawfully refusing access.

297. The wife does not lose her right to receive maintenance under section 294 above, if she refuses access to her husband for some lawful ground.[2]

Wife's right not affected by husband being under puberty, or her own illness, or malformation, or absence with permission.

298. The wife does not lose her right to receive maintenance by the fact that the marriage cannot be consummated owing to the husband not having attained puberty,[3] or to the wife's absence from him with his permission,[4] or her illness,[5] or malformation.

Of course, if the wife has never come into the house of her husband, she is not entitled to maintenance.

(b) During Widowhood.

Widow has no right to maintenance.

299. The wife's right to maintenance ceases on the death of her husband ;[6] provided that, according to some Shiah authorities, the widow has the right, if on the death of her husband she is pregnant, to be maintained until she is delivered, out of the share which the child borne by her is entitled to inherit out of the estate of her husband.[7] But according to what the author of the 'Shara'ya-ul-Islam' considers the most common or generally received Shiah opinion, the widow is not entitled to any maintenance though pregnant.[7]

[1] Hed. 143; Bail. I. 449, II. 99-100. Each wife may also exclude from her own apartment another wife of her husband.

[2] E.g. if she does so for obtaining payment of her dower, Hed. 141 Bail. I. 438; it is also stated that the husband's not saying his prayers is not a lawful ground. Cf. above p. 84 comment to s. 50. She is entitled to refuse to accompany him in his journeys, Bail. I. 439.

[3] Bail. I. 439-440, II. 97-8 (where a dissenting opinion is also referred to).

[4] Bail. II. 97-98.

[5] Khan Bahadur Mahomed Yusoof in his learned book gives some details on this point which may occasionally be of use: "Mahomedan Law of Marriage, Divorce, etc." II. 265-266, ss. 1572-1575.

[6] Bail. I. 452-460, II. 98-99; Hed. 145. *Aga Mahomed Jaffer Bindaueem* v. *Koolsom Beebee* (1879), 25 Cal. 9; 24 I. A. 196.

[7] Bail. II. 98-99, 102, 171. Cf. Bail. I. 453 (last 3 lines, referring to a slave).

In Pre-Islamic times the Arabs excluded widows entirely from inheritance, and to remedy this, an early verse of the Quran [1] provided that widows should be given maintenance for a year by way of inheritance. This provision was revoked by a later verse [2] which gave to widows more extensive rights than mere maintenance for a year,[3] viz., a share in the estates of their deceased husband. That the latter verse revokes the former is a point on which all commentators on the Quran are agreed, but in a case [4] that the Privy Council had to decide this fact was not pointed out to them, and they consequently were unable to understand how it was that the 'Hidaya' and 'Shara'ya-ul-Islam' laid down that no maintenance was due to the widow, in direct contravention to the verse of the Quran. They held, however, that they would not speculate as to the causes of the apparent contradiction but would consider the law to be correctly laid down in commentaries of such antiquity and authority.

SECTION 299
Abrogated verse of the Quran requiring widows to be maintained for a year.

(c) Maintenance after Divorce.

(i) *During 'Iddat.'*

300. (1) According to Hanafi law a wife who is divorced is entitled to maintenance during her ''iddat,' [5] whether the divorce is revocable or irrevocable or triple, and whether she is pregnant or not, unless the marriage has been dissolved for some cause originating from the woman, which is of a criminal nature.[6]

(Hanafi law.) Right to maintenance after divorce during ''iddat.'

(2) According to Shiah and Shafi'i law—

(*a*) a wife who is revocably divorced is entitled to maintenance during her ''iddat';[7]

(*b*) a wife who is irrevocably divorced is not entitled to maintenance;[8] provided that if at the time when such a divorce is pronounced, she is pregnant, she is entitled to maintenance during her pregnancy.[9]

(Shiah and Shafi'i law.) Right to maintenance—
1. during ''iddat' after revocable divorce;
2. during pregnancy after irrevocable divorce.

Illustrations.

(1) H's wife *W* dissolves the marriage by exercising her option of puberty or of inequality : *W* is entitled to maintenance during the ''iddat.' [10]

(2) H absents himself from his wife *W*, and she marries another husband HA, and the marriage of *W* with HA is consummated. Then H returns, and HA and *W* are separated, and *W* has to observe

[1] Sura II. v. 240.
[2] Sura II. v. 234.
[3] The French Civil Code, art. 205 (amended by the law of 9th March 1891) fixes the same period for support to widows and widowers.
[4] *Aga Mahomed Jaffer Bindaneem* v. *Koolsom Beebee*, (1897) 25 Cal. 9 ; 24 I. A. 196.
[5] But not beyond, see p. 234 *n*. 5.
[6] Bail. I. 450-451 ; Hed. 145.
[7] E.g. apostasy on the part of the wife, or her misbehaviour so as to establish supervenient prohibition. See below, s. 302, Bail. I. 451 ; Hed. 145.
[8] Bail. II. 98, 102 (*U*. 4-5), 169.
[9] Bail. II. 98, 170 ; Hed. 145.
[10] Hed. 146 (col. i. para. 2).

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'iddat,' but she is not entitled to maintenance, either from H or HA[1] because she was disobedient to H, and her marriage with HA was void.[2]

(3) H pronounces three divorces against his wife W. Before the expiration of her 'iddat' W marries HA and their marriage is consummated, and then W and HA are separated judicially, on which maintenance is due from H to W according to Abu Hanifa,[3] because W was not disobedient to H (though her marriage to HA was invalid).[4]

(ii) *After 'Iddat.'*

Right to maintenance drops after expiration of 'iddat.'

301. On the expiration of the 'iddat' after divorce the wife's right to maintenance drops, whether based on the Muhammadan law or on an order under the Criminal Procedure Code.[5]

Effect of Apostasy on Right to Maintenance.

Apostasy of wife. Is maintenance forfeited?

302. According to Muhammadan law, if the wife is converted from Islam to another religion, the marriage is dissolved, and she loses her right to maintenance.[6] *Quaere*, whether this rule of Muhammadan law has any, and if so, what, effect in British India.[6]

(3) Revival of Right to Maintenance after Loss.

Revival of right lost by disobedience, etc.

303. (1) Where a wife loses her right to maintenance owing to her disobedience to her husband, or some such other cause which does not dissolve the marriage, her right to maintenance under Hanafi law revives by her ceasing to be disobedient, or by the removal of the said other cause, though she should in the meanwhile have been irrevocably divorced; provided that the period of her 'iddat' has not expired.[7]

(2) Where a wife is revocably divorced, and she apostatizes, her right to maintenance is, according to Hanafi law, lost, and does not revive by her subsequent return to Islam.[7]

(3) According to Shiah law the right to maintenance is lost by apostasy from Islam, but it revives on re-conversion.[8]

Quaere, whether the rules of Muhammadan law contained in this section are repealed to any, and if so, to what, extent by Act XXI. of 1850 in BritishIndia.

[1] Bail. I. 452-453.

[2] Mahomed Yusoof, on Marriage, Divorce, etc. II. 272-273, s. 1594.

[3] Bail. I. 453.

[4] Mahomed Yusoof on Marriage, Divorce, etc. II. 272-273, s. 1595; as to the powers of the Court of Divorce in England to make orders for maintenance see the Divorce and Matrimonial Causes Act, 1853, 732.

[5] So an order for maintenance by the magistrate drops by divorce. *In re Abdulali Ishmailji*, (1883) 7 Bom. 180. *In re Kasam Pirbhai*, (1871) 8 Bom. H. C. R. (CR.) 9. *Re Petition of Din Mahomed*, (1885) 5 All. 226, and see p. 228 *n.* 7 above.

[6] See also ss. 303, 304 below.

[7] Bail. I. 451, 452 (para. 2), 453 (para. 3).

[8] Bail. II. 1 (para.).

SECTION 303
Apostasy of '; right lost if divorce revocable but not if irrevocable.

It is stated that under the Hanafi law if the divorce is irrevocable and the woman apostatizes, her right to maintenance (during ''iddat'') is not lost, except ('ex necessitate rei') while she is in prison for apostasy. In British India she would not be imprisoned for apostasy, and so she would not lose her right to maintenance, even according to strict Hanafi law, on the principle 'cessante ratione cessat ipsa lex.' The Hanafi rule is, however, different where the divorce is revocable, and in the case of such a divorce being pronounced, and the wife then apostatizing, she loses the right to maintenance. This seems to be just the reverse of what one would expect. But perhaps the reason is that the law disapproves of irrevocable divorces, some of which are characterised even as sinful[1]; and therefore, the husband is mulcted in maintenance under all circumstances after such divorces.

Reason.

Shiah law differs:

The Shiah law on the other hand allows the divorced wife maintenance if the divorce is revocable, but not if it is irrevocable,[2] and the reason seems to be that the disapproved kinds of divorces are not permitted under Shiah law, and a considerable part of the ''iddat' expires before any pronouncement of divorce can at all become irrevocable in accordance with Shiah law. Hence divorces, whether revocable or irrevocable, stand on the same footing as far as the approval of the Shiah law is concerned; and consequently it is provided, as might be expected, that a wife should be more favoured during the period when the divorce is still revocable, than after it has become irrevocable.

No revival

Act which has dissolved marriage.

304. Where a wife loses her right to maintenance by [apostasy or] some [other] cause proceeding from herself which dissolves her marriage, her right to maintenance does not revive by her return to Islam, or by the removal of the said other cause.[3]

Quaere, whether in British India a wife retains her right to maintenance, after apostasy.[4]

The reason underlying the section is obvious. The wife deprives herself of the right to maintenance by her own act, and by an act that has the result of severing the tie between herself and her husband. Two questions, however, may arise, (1) whether in British India Act XXI. of 1850 would save the wife's rights, and (2) whether even in cases in which the status of wife is lost and subsequently regained by her, she becomes entitled to maintenance.

(4) *Some Incidents of the Wife's Right of Maintenance.*

(a) *As to Payment of Arrears and Transfer.*

Maintenance due monthly.

305. Maintenance becomes due and is payable to the wife according to Shiah law day by day;[5] the Hanafi books on law contemplate payment by monthly instalments, unless otherwise decreed by the Court.[6]

[1] See ss 135, 142 above
[2] See s 294 above.
[3] Bail. I. 451.
[4] See ss. 302, 303 above.
[5] Bail. II. 100, 102 (first line and *fifth*)
[6] Bail. I. 449; see s. 306 below.

SECTION 306

No valid release or transfer of right to future maintenance.

306. The wife cannot validly release [or transfer [1]] her right to receive maintenance, except after it has become due; and (according to Hanafi law) for one month in anticipation.[2]

It would seem that according to Shiah law as the maintenance becomes due day by day, it cannot be anticipated for more than a day.[3] And this surmise is somewhat strengthened by the fact that in case of divorce the maintenance for the day on which the divorce is pronounced is expressly stated to be due.[4]

Similarly in England the right to maintenance is not capable of being assigned or charged whether it consist of alimony [5] or permanent maintenance after divorce [6] or allowance made in lunacy to the committee of a lunatic.[7]

Wife's right to arrears of maintenance.

307. (1) According to Shiah and Shafi'i law the wife is entitled to maintenance notwithstanding that she has allowed it to get into arrears without having had the amount fixed by the Court, or by agreement with the husband.[8]

(2) According to Sunni law arrears of maintenance are not recoverable unless fixed by the Court, or by agreement between the husband and wife; nor even after they have been so fixed, in case their marriage is dissolved by divorce or by the death of either party; provided that they may be recovered if the judge has decreed maintenance, but not fixed its amount.[9]

Quaere, whether the provisions of Muhammadan law contained in this section refer to adjective law, and are superseded by the law of British India.

Refund of and is not due.

308. (1) According to Shiah and Shafi'i law where a wife has already received maintenance, and it does not actually become due to her, the husband may claim back from her, the whole, or such portion thereof, as did not become actually due to her.[10]

[1] The texts speak of "releasing" alone. It would seem, therefore, that a transfer is *a fortiori* invalid. Cf. also the Transfer of Property Act, s. 6, and *Shumsuddin Gulam Husain* v. *Abdul Husain Kalimuddin*, (1906) 31 Bom. 165, 8 Bom. L.R. 781, where the effect ofs. 69 of the Transfer of Property, Act is considered, and transfers and releases are compared.

[2] Bail. I. 446.

[3] See s. 290 above.

[4] Bail. II. 100 (last line).

[5] *Re Robinson* (1884) 27 Ch. D. 160, 53 L. J. (CH.) 986, 3 W. R. 17 (C.A.)

[6] *Watkins* v. *Watkins*, [1896] P. 222, 65 L.J. P. 74-75, L.T. 636, 44 W.R. 677 (C.A.).

[7] *Re Weld* (1882) 20 Ch. D. 451, 51 L.J. (CH.) 913: 46 L. T. 397, 30 W.R. 385.

[8] Bail. II. 100; Hed. 142-143. Cf. s. 293 ante and see *n.* 10 on this page.

[9] Bail. I. 443-444, 452 (para. 4) *Abdool Futteh Moulvie* v. *Zabunnessa Khatun*, (1881) 6 Cal. 631.

[10] Cf.: "A wife when she has placed herself in the power of her husband is entitled to her maintenance day by day, and if he refuses to give it, and the day passes, her right is confirmed; and so on for other days in succession, though the judge should never have fixed the amount nor made any order in her favour" (Bail. II. 100). In a footnote to this Baillie says, "According to the Hanifites arrears of maintenance cannot be recovered unless it has been fixed by agreement or a judicial decree," and refers to Bail. I. 443. The reason assigned for this rule of Hanafi law is as follows: "because it is due only so far as may suffice according to the necessity (whence it is not so to those who are opulent) and they being able to suffer a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no neces-

SECTION 308 (Hanafi law.)

Where maintenance paid in under order of Court, it be recovered, but not if voluntarily paid.

(2) According to Hanafi law, where the husband has, under an order of the Court, paid to the wife maintenance allowance in advance, in respect of a specified future period of time, and the husband dies, or the marriage is otherwise dissolved before the expiration of the said period, there a part of the said maintenance allowance, proportionate to the unexpired part of the said period of time, may be reclaimed from the wife, or from the widow, as the case may be, by the husband, or by the other heirs of the husband respectively. According to Abu Hanifa and Abu Yusuf such proportionate part of the maintenance cannot be reclaimed if the allowance has been voluntarily paid by the husband. Imam Muhammad holds that the said part may be recovered even if voluntarily paid, where it exceeds the allowance due for maintenance for one month.[1]

Illustrations.

(1) Il gives his wife *W* an allowance for maintenance in advance, and then he divorces her irrevocably ; or *W* (after an irrevocable divorce) claims and is paid maintenance falsely stating that she is pregnant. *W* must refund the maintenance for the period after the divorce.[2]

(2) H says to his wife *W*, "If maintenance does not reach you in ten days you may divorce yourself from me ;" and *W* is rebellious[3] by going to her father's house without his permission within the time. A dissolution of marriage does not take effect, though H should fail to send maintenance to *W* ;[4] because she was not entitled to maintenance and the option to divorce was based upon it.[5]

(3) H divorces *W* his wife three times, but intends remarrying her ; and with that object gives her maintenance during her 'iddat' "and afterwards goes back from his intention ; he may in all cases, according to the most authentic reports, reclaim it, whatever may have been the conditions under which the money was paid, because in such circumstances it is a bribe."[6]

sity of seeking a maintenance from others ; contrary to where the Kazee decrees a maintenance to a wife and a space of time elapses without her receiving any ; for her right to maintenance does not cease on account of her independence, because it is her due whether she is rich or poor. What has been observed on this occasion applies to cases only in which the Kazee has not authorised the parties to provide themselves a maintenance upon the absentee's credit ; but where he has so authorized them, their right to maintenance does not cease in consequence of a length of time passing without their receiving any, because the authority of the Kazee is universal, and hence his order to provide a maintenance upon credit is equal to that of the absentee himself, wherefore the proportion of maintenance for the time so elapsed is a debt upon the absentee, and does not cease from that circumstance. The time here meant is any term beyond a month, and if the time elapsed be short of that term, maintenance does not cease." Hed. 149 (col. ii. para 2) ; cf. Bail. II. 100 (*second*) 102 (*fourth, fifth*) ; Hed. 143.

[1] See p. 236 *n.* 9 above.

[2] Bail. II. 440, 454 ; Hed. 148.

[3] Bail. II. 100, 102.

[4] *Nashiza* in Arabic, Bail. I. 250.

[5] Bail. I. 250.

[6] See ss. 128 *et seq.* above.

SECTION 309

Priority of wife's right to maintenance.

309. The wife's right to maintenance is a debt[1] against the husband, and it has priority over the rights of all other persons to receive maintenance.[2]

But see s. 307 (2) above.

According to the author of the 'Durr-ul-Mukhtar,' "the reason why the maintenance is due to the wife in priority to the child is this—that the wife is the source ('asl,') and the child is a branch."[3]

Person maintaining cannot reclaim expenses of maintenance

Maintenance not claimable as a debt (except by wife).

The rule is different in the case of all persons other than the wife, and in their case the sum expended on maintenance can never be claimed back by the person who has provided it, from the person maintained; "for maintenance is limited to necessities and does not constitute a debt against the maintainer even if the judge should have actually fixed its amount. True, if the judge should have authorized the person entitled to maintenance to borrow on the credit of the maintainer, the amount so borrowed is a debt as against the latter which is obligatory on him to discharge."[4]

Married women may receive maintenance from other than husband, e.g., brother.

The following is an illustration of the effect of s. 288 (2) upon the rights of a wife to maintenance. "It is stated in the 'Siraj' that if an indigent person has a wife and she has a brother with means, then the brother will be forced to provide the wife with maintenance, and when the husband obtains means the brother can recover it back from him."[5] It will be remembered[6] that a brother is not legally obliged under Shiah law to maintain a sister.

(*b*) *Application of Property of Husband to Wife's Maintenance.*

Self-help by wife.

310. The wife may apply to her own use property belonging to her husband which is in her possession; provided that it consists of such articles as she is entitled to claim for her maintenance.[7]

Explanation—The wife cannot sell other property of her husband in order to pay for her maintenance out of the sale proceeds.[8]

"In all cases in which the judge may decree maintenance to a wife out of the property of her husband, she may lawfully take it herself[9] out of the property, without his order, to such an extent as may be justified by common usage. But when the property left by a husband in his own house, or in deposit, is of a different nature from that which a woman is entitled for maintenance, it can neither be sold by herself, nor by the judge on account of her maintenance; and upon this point all are agreed."[8]

[1] Bail. I. 444.

[2] Bail. II. 102 (*sixth*); 103, (para. 2); cf. Bail. I. 462 (*ll* 28-31); see also s. 108 *et seq.* on *mahr*.

[3] *Durr-ul-Mukhtar*, book on *Talaq*, ch. on *Nafaqa, fasl* i.

[4] Bail. II. 103, (para. 1) Baillie's marginal note to this passage is "arrears of maintenance not recoverable." Cf. Mayne, "Hindu Law," 625.

[5] *Durr-ul-Mukhtar*, ch. on

[6] S. 288, *Explanation II*, above.

[7] E.g. money, food and cloth suitable for apparel. Bail. I. 443, cf. s. 285 (1) above.

[8] Bail. I. 443-444.

[9] She cannot give it to another without his permission. Bail. I. 450 (para. 3).

SECTION 3
Traditions as to self-help by wife.

The wife's rights to self-help probably originates from the following tradition: 'Aayeshah said, 'verily Hind-bint Utbah said, "O Messenger of God, verily Abu Sufian is a miser, and does not give me and my children sufficient to live upon, except what I take without telling him." His Highness said, "take what will suffice you and your children." ' '' [1] The following traditions may also be cited, though they apply less directly to the present section. "Jaber-bin-Samurah said, 'the apostle of God said, "When God gives to any one of you great riches, he must first take care of himself, and give to his family and relations what is more than necessary to supply his own wants." ' '' [1] "Abudhar-Ghaffari said, 'the Apostle of God said, "God has ordained that your brothers should be your slaves, therefore him whom God hath ordained to be the slave of his brother, his brother must give him of the food of which he eats himself, and of the clothes with which he clothes himself, and not order him to do anything beyond his power, but if he doth order such a work, he must assist him himself in doing it." ' '' [1]

Pledge of husband's credit by wife.

311. The wife may pledge the credit of her husband for providing herself with maintenance.[2]

Similarly in England the husband's credit may, under certain circumstances, be validly pledged by the wife for necessaries,[3] while even the wife may be made chargeable with the maintenance of the husband, if she has separate property, and if he becomes chargeable to any union or parish.[4]

§ 3.—Maintenance of Ascendants and Descendants.

(1)—Priorities.

Priority to receive maintenance.

312. As between parents and children, children have the preferential right to receive the maintenance which their father has the means to provide.[5]

Children's priority over parents.

313. (1) According to Hanafi law, as between parents, the mother has the preferential right to be maintained by her children.[5]

Mother priority over

(2) According to Shiah law the rights of both parents are equal and the maintenance allowance must, if necessary, be divided between the father and mother equally.[6]

Illustration.

F is infirm, and his son S earns something, but is not able to provide maintenance for F. If there is no surplus food with S, a judicial order cannot be passed against him but as a matter of conscience S may be

[1] *Mishcat-ul-Masabih*, XIII. Ch. xvii., 2. Mathew II, 139.

[2] Bail. I. 443. Cf. s. 294. Cf. Mayne, "Hindu Law," 614: "A wife who is unlawfully excluded from her own home, or refused proper maintenance in it, has the same right to pledge her husband's credit as a wife in England."

[3] *Wilson* v. *Glossop* (1888) 20 Q. B. D. 354.

[4] Married Women's Property Act, 1882 (45,46 Vict. c. 75) s. 20; see Halsbury's "Laws of England," XVI, 318.

[5] Bail. I. 462.

[6] Bail. II, 104 (para. 2).

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required to maintain F. This is when S is alone. If S has a wife and young children, all that he can be compelled to do is to bring F into his family and maintain him like one of them ; and he is not obliged to provide him with separate maintenance.[1]

Sole liability of children to maintain.

314. Where a necessitous person has a son or daughter he or she is alone bound to provide maintenance for the parents and the obligation is not shared by anyone else.[2]

So that if a necessitous person has a son and a father the son alone is bound to maintain.[2]

Maintenance when due in accordance with proportionate rights of inheritance and when otherwise.

Amongst descendants rights of inheritance do not control liability.

Cf. " When the cause of the obligation to maintain is descent and participation (of blood), then if there are two having such participation, of whom one is nearer than the other, in such a case maintenance is due only from the nearer, and not from the remoter, irrespective of their rights of inheritance. Thus if a person has a daughter with the son of a son, or the daughter of a daughter with a brother, then the maintenance is in the first example due from the daughter, and not the son's son; and in the second example from the daughter's daughter and not from the brother; for this reason that rights of inheritance are not the guiding principle here: but, no doubt, rights of inheritance are the index where both are alike as regards proximity; [3] as for instance between the father's father and the son's son; namely, if a necessitous person has a paternal grandfather and a son's son then the maintenance is due from both in proportion to their rights of inheritance, that is, the grandfather has to provide a sixth, and the grandson the rest ; for this reason, that the relationship of both is of the same nature, so that preference cannot be given to one over the other, except on the ground of rights of inheritance ; and when in points of proximity two persons are equal, then the preference of one over the other must be controlled by their rights of inheritance. Here indeed a critic has pointed out that even where proximity is in equal degree the rights of inheritance are a weak index ; and he refers to the case of a necessitous person having a father and a son, both with means, in which circumstances the maintenance has to be provided by the son alone : whereas if rights of inheritance had been the index the father would have had to provide one-sixth of the expenses." [4] The author then refers to a tradition on which the son's sole liability is stated to be based.

Exclusive duty of children to maintain parents.

315. The duty of grandchildren to maintain a Hanafi Mussulman is postponed to the duty of the father of the said person to maintain him.[5]

Illustrations.

(1) N has a son's son Ss and a father F, then F is bound to maintain N.[5]

(2) N has a daughter *D* and a son's son Ss. *D* alone is bound to maintain N.

[1] Bail. I. 462 (para. 3).

[2] Bail. I. 463 (last line); Hed. 147.

[3] Proximity for purposes of maintenance is reckoned on the basis that those who participate in blood, etc., the ascendants and descendants, are nearer than all others.

[4] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* v.

[5] Bail. I. 463 (para. 4); Hed. 147.

(2) *Obligation to Maintain Descendants.*

SECTION 316

(a) *Father's Obligation to Maintain.*

(i) *Maintenance of Young Children.*

316. (1) The father is solely obliged to maintain his children until they become adult.[1]

(2) During the infancy of his children, the father is obliged to provide the mother or other person entitled to the custody of the children, with the whole of the expense of their maintenance.[2]

of infant child

"The expenses of a nurse for infant children, and of the maintenance of the mothers, are due from the father to the mother; and if the mother is absent the infant will be kept in the custody of the person entitled thereto (at the expense of the father)." [3]

including expense of nurse prior to time when father entitled to custody.

317. (1) The mother cannot be compelled by the father to nurse her infant unless no other suitable nurse can be obtained; or unless neither the father nor the infant has any property; in which cases the mother may be compelled to nurse her infant.[4]

infants, mother not compellable thereto.

(2) According to Sunni law the mother is not entitled under any circumstances to receive any hire for nursing her own infant;[5] but according to Shiah law she is entitled to do so.[6]

"If mothers nurse their children for two full years, then it is like any other household duty, like cooking or sweeping, which is an obligation of only a moral nature and not of a legal nature: that is, if they refuse to perform any of these duties they cannot be compelled thereto." [7]

Mother's duties in nature of moral obligations.

Some details are given about the hiring of nurses for a child, including the provision that if a nurse has been hired for a month and after its expiration the child will not take the milk of another woman she may be compelled to renew the contract. Compare the Domestic Servants Act.

(ii) *Maintenance of Adult Children.*

318. Daughters are entitled to maintenance until they are married, unless they have property of their own.[8]

Daughters to be maintained until marriage

319. Necessitous sons are entitled to maintenance, though they are adult.[9]

[1] Bail. I. 455. See s. 285 above.

[2] Hed. 148; Bail. I. 455-456. "If confidence cannot be placed in her, the maintenance is to be committed to some other person to be laid out for the child's benefit." See ss. 235, 236, 240 above.

[3] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* 5.

[4] Bail. I. 455-456.

[5] Hed. 146.

[6] Bail. II. 94.

[7] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* v.

[8] Bail. I. 458; see below ss. 322-328. Cf. Mayne's "Hindu Law," 602.

[9] Hed. 147; Bail. I. 458. Cf. Mayne's "Hindu Law," 609.

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Cf. "The obligation to maintain an adult son, who is unable to earn, as for instance if he is lame of leg, is similar to the absolute obligation to maintain a daughter (whether adult or not) so long as she is not married." [1]

(iii) *Extent of Father's Obligation to Maintain Children.*

Father must earn if necessary.

320. The father's obligation to maintain his children is not affected by his indigence, so long as he has the ability to earn.[2]

Quaere, whether this rule applies in Shiah law.[3]

Maintenance may be recovered back from father. He must earn to maintain his minor children. If indigent and unable to earn, then maintenance may be recovered from uncles with recourse against him.

321. Where the father of necessitous children [4] is himself necessitous,[4] the Court may fix a sum to become periodically due from him as maintenance, to his children, which may be recovered from him if and when he is able to repay it.[5]

"If the father and his young child are both without means, then the father must earn it, and if he is unable to work for his living, then he must get it by asking for alms, so that he may provide for the child; and if his earnings are insufficient then the paternal or maternal uncle must provide them with maintenance and recover the expense thereof from the father if and when the latter is in possession of means." [6]

(*b*) *Mother's Obligation to Maintain her Children.*

(i) *Mother when Liable to Maintain her Children.*

Mother when liable to maintain children.

322. Subject to section 291 above, if the father has no property out of which his minor children may be maintained, but their mother has such property, then she may be ordered to maintain her children, with liberty (unless the father is infirm, and unable to earn the means to provide maintenance for his children) to recover the expenses of maintenance from the father.[7]

Mother's duties when father indigent.

"Where the father is without means, and the mother has means, then she may be ordered to provide maintenance, which will be a debt as against the father and may be recovered back when he has means.[8]

(ii) *Mother when Liable Jointly with Father.*

Maintenance of children

1. during minority on the father alone;

323. The father's obligation to maintain his young children is not shared by any other person; but where the children are adult, and they are entitled to maintenance under section 318 or 319 above, then according to the 'Hidaya' the mainte-

[1] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv.

[2] Bail. I. 456; Hed. 340. Cf. comment to s. 323 below. As to Shiah law see Bail. II. 103.

[3] It is stated in Bail. II. 103 (para. 2) generally that "ability on the part of the *moonfik* or maintainer is a condition of the liability to maintenance," and there does not seem to be any exception to this in the case of the father. See below p. 245, *n.* 4.

[4] See s. 285 (5).

[5] Bail. I. 456; Hed. 148.

[6] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv; see above s. 288 (2).

[7] Bail. I. 457. The father may again reimburse himself from the child's property, but *ex hypothesi* the child has none.

[8] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv.

nance of such adult children has to be borne by the father and mother jointly in the proportion of two-thirds and one-third respectively.[1]

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2. later, on the father and mother jointly.

"No one shares with the father the duty to maintain (even though the father is indigent) in the following cases: namely young children, and disabled adult children, and (unmarried) daughters. Thus also the maintenance of necessitous parents is on their children alone; and this duty is not shared by the uncle or grandfather; and the wife's maintenance is entirely on the husband, and on no one else; and the 'fatwa' is to the same effect, namely that the maintenance of the children, etc., is entirely and solely on the father, unless and until he is in great want. When he is in want he is included amongst the deceased, and in that case the maintenance of the young children will be an obligation on those relatives from whom it would have been due if the father had not been living, provided that the expense of the maintenance may be recovered back from the father. But a mother having means, ought to maintain the children, then, when the father has means, she may recover it back from him. This is from the 'Bahr-ur-Raiq.'"[2]

Father's sole liability to maintain.

(iii) *Mother when Liable Jointly with the Grandfather.*

324. The authorities are divided on the point whether where the mother of a necessitous Hanafi Mussulman has means, any remoter relation[3] is bound to provide any share of the maintenance.

Mother and grandparents.

See s. 288 and comment thereto at p. 226 above and ss. 325, 326 below.

325. Where a necessitous person has both a grandfather and a mother, the maintenance is, according to some Hanafi authorities, including the 'Fatawa' Alamgiri' to be provided by both jointly in the proportion of one-third by the mother and two-thirds by the grandfather.[4] According to other Hanafi authorities including the 'Durr-ul-Mukhtar,' the mother alone is obliged to provide the maintenance.

Quaere: Mother when she co-exists with grandfather.

Semble that the balance of authority is in favour of the view that they are jointly liable.

(iv) *Mother when Liable Jointly with Collaterals.*

326. Where a necessitous person has a mother and an agnatic collateral, there according to some Hanafi authorities[5] including the 'Fatawa 'Alamgiri,' the maintenance has to be

Two Hanafi views.
1. Mother and collatera jointly obliged to maintain.

[1] Hed. 148.
[2] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv.
[3] I.e. whether a grandparent or a collateral.
[4] Bail. I. 464.
[5] As to Shiah law see above 288 clause (b).
[6] "As between the mother and the father's father, if both have means the obligation to provide maintenance is on the mother alone." *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv.
[7] As to Shiah law see above s. 288 (*b*).

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2. Mother alone obliged.

provided as to one-third by the mother and as to two-thirds by the collateral.[1] According to other Hanafi authorities including the 'Durr-ul-Mukhtar,' the mother alone is obliged to provide the maintenance.[2]

Semble that the balance of authority is in favour of the view that they are jointly liable.[3]

Durr-ul-Mukhtar on doubt whether the mother can be jointly liable with a grandfather or with a collateral.

"The author of the 'Bahr-ur-Raiq' considers it a point of difficulty that the lawyers should have laid down that when the mother and paternal uncle of a necessitous person co-exist, then the maintenance is due from the mother and uncle in the proportion of their presumptive rights to inherit, i.e., one-third on the mother and two-third on the uncle. The point is said to be difficult inasmuch as by participation (of blood),[4] the mother is nearer than the uncle, and therefore the rights of inheritance ought to have no bearing on the obligation to maintain; and the said author raises the question whether, when the mother, maternal grandfather, and the paternal uncle co-exist, then the maintenance will be on the mother alone, or in accordance with the rights of inheritance."[5]

(c) Obligation of Grandparents to Maintain Grandchildren.

Grandparents' obligation to maintain grandchildren.

327. Where both the father and mother of a Mussulman are unable to maintain him[6] there his grandparents, whether paternal or maternal, who have means, are obliged to maintain him; provided that where the person so maintained possesses any property out of which he may be maintained, or where he is able to earn his livelihood, the said grandparents may recover the expense of providing the said maintenance from the father of the person so maintained, and the father may reimburse himself by having recourse against the property or earnings above referred to.[7]

(3) *Obligation on Descendants to Maintain the Ascendants.*

(a) Obligation of Children to Maintain their Father and Mother.

Liability of each child to maintain.

328. (1) Children of both sexes are, as amongst themselves, equally liable to maintain their necessitous parents,

[1] Bail. I. 464. Cf. ss. 324, 325 above and 337 (2) below.

[2] See comment to this section.

[3] See comment to s. 328 below.

[4] See comment to s. 314 above.

[5] *Durr-ul-Mukhtar, ibid.* Moulvi Khurram 'Ali, a commentator on it, remarks on this passage that there really is no difficulty inasmuch as in each case the mother alone is liable, i.e., both as against the maternal grandfather and the uncle, citing the *Hashiat-ul-Madina* and tracing the difficulty of the author of *Bahr-ur-Raiq* to the author of the *Qunia*, who is stated to have been misled by a discredited tradition. The present author has not been able to verify the reference to the *Hashiat-ul-Madina*, but while it may be conceded that the view taken by the author of the *Durr-ul-Mukhtar* is more in accordance with principle, still it would appear that in India the books adopting the other view would be considered as more authoritative.

[6] The masculine includes the feminine in this section.

[7] Bail. I. 457. The father alone can apply the property of minor children to their maintenance; the grandfather cannot do it directly see s. 289 (4) above.

SECTION 328 severally, with right to contribution.

provided that the children have means ; but if some only of them have means and the others have not, then the whole expense of the parents' maintenance is to be borne by such of them as have means, the others being liable to pay to the said children their proportionate shares of such expenses.[1]

Liability proportionate to means

(2) It is suggested in the 'Zakhira'[2] that where there are several children of necessitous parents, the children should be ordered by the Court to share the expenses of maintaining the parents, not in equal shares but proportionately to the means of each.[2]

When father able to earn. (Sunni law)

(3) Amongst the Hanafi authorities there is difference of opinion on the point whether children are obliged to provide maintenance for the father where the latter is able to earn for himself ; the better opinion seems to be that they are so obliged.[3]

(Shiah law)

(4) Amongst the Shiah authorities also there is a difference of opinion on the point above referred to ; but the better opinion seems to be that no person is obliged to maintain anyone who is able to earn.[4]

Illustrations.

1. F is necessitous and he has a son S, and a daughter *D*, both having means. S and *D* are both liable to maintain F, and must bear the expenses of F's maintenance in equal shares.[5]

2. F is necessitous and has a son S, who is not able to maintain F and a daughter *D*, with means. *D* is liable to provide F's entire maintenance, but she has a right to ask contribution from S as to half of it.[5]

Son and daughter jointly liable are they to bear in equal proportion?

The 'Fatawa 'Alamgiri' leaves the question somewhat in doubt whether the son and daughter, though their liability to provide maintenance for their parents is alike (i.e., joint), are to provide the maintenance in equal shares. But the extracts which are translated below leave no doubt on the point, that that is the law.

The author of the 'Durr-ul-Mukhtar' states that the principle that the persumptive rights of inheritance should determine the proportionate obligation to maintain, does not apply in the case of persons who participate in blood,[6]

[1] Bail. I. 461.

[2] Cited in the *Fatawa 'Alamgiri*, see translation in the comment to this section.

[3] According to the *Fatawa 'Alamgiri* opinions differ on this point. Bail. I. 462 (para. 3). Hed. 148 (col. i.) states (without reference to any difference of view) that maintenance is due from the child to the parents even though the latter are able to subsist by their own industry. In the case of the mother there can be no question of her earning for herself. Bail. I. 462. See next note.

[4] Bail. II. 103. "Is inability to earn anything by one's own exertions also a condition? It is more agreeable to traditional authority to answer this question in the affirmative." There is no specific reference to the parents.

[5] Bail. I. 461.

[6] As to "participation in blood," cf. pp. 73, 240, comments to ss. 35, 314 above.

SECTION 328 i.e., ascendants and descendants, amongst whom the nearer alone is liable irrespective of his rights of inheritance. But the rule, even when it is stated in this form, and with the qualification referred to, does not by any means govern every case that is mentioned in the texts. There are illustrations given in the 'Durr-ul-Mukhtar' itself [1] which break the rule that its author has laid down. Still it will be found to be a useful guide, and it should be noted that whenever this rule is broken, there are differences of opinion. Thus, for instance, the points are doubtful whether the mother is solely liable or jointly liable when she co-exists with a grandparent or an uncle. It will be remembered that the question cannot arise amongst Shiahs who hold that no collaterals are obliged to provide maintenance.

The following are translations of extracts from authoritative Hanafi books :—

Shares in which children ... provide

"If [2] a person has sufficient means to necessitate payment by him of the poll-tax, he is under an obligation to provide maintenance for his principal relations, [viz.,[3] the father, mother, grandfather and the like] a son and a daughter are in the same position; [in [3] this regard] proximity of relationship is to be regarded, and not the right of inheritance. For instance, if a person has a daughter and a son's son, the whole expense is payable by the daughter. In the case of his having the child of a daughter and a brother, the former has to bear the expense [although [3] the inheritance goes to the daughter and the grandson half and half ; and the whole is taken by the brother to the exclusion of the issue of the daughter]." [2]

Whether relative wealth of each to be considered.

"If a necessitous person has two children, and one is in better circumstances than the other, the second one barely possessing 'nisab,' [4] then maintenance will be obligatory on both children in equal portions ; and if one of the two is a Mussulman, and the other a 'zimmi,' still the obligation will be the same on both. This is in the 'Fatawa Qazi Khan.'"

"Shams-ul-A'imma has stated that our Shaikhs have said that the obligation on both will be in equal shares only then when the wealth of each varies only in a slight degree, but that if the wealth of the two differs greatly then it is incumbent that there should be a similar difference in the share of maintenance that each is required to provide. This is in the 'Zakhira.'" [5]

Indigent descendants not bound to maintain ancestors

"The maintenance of ancestors is an obligation upon such descendants as are bound to give the legal alms," [6] i.e., descendants are not bound to work and earn in order to provide maintenance for their ascendants.

Maintenance of parents, shares in which son and daughter bound to provide.

"The maintenance of parents is due in equal shares, so that if a necessitous father has got a daughter and a son then half the maintenance is due from each of them. This is the true doctrine and the 'fatwa' is in accordance with it, as stated in the 'Fath-ul-Qadir' and the 'Khulasa,' and the reason is that the cause of the obligation to maintain, in this instance, is descent, in which both

[1] Cf p. 244 above.

[2] *Sharh-i-Viqaya* 183 (Book on *Talaq*, ch. on *Nafaqa*).

[3] The comment (*Sharh*) is enclosed in [ ]; the rest consists of the text of the *Viqaya*.

[4] "The *nisab* in question is that, the possession of which forbids the acceptance of alms, or in other words a surplus of 200 dirhems over one's necessities." Bail. I. 461 ; cf. s. 285 (3) above.

[5] *Fatawa 'Alamgiri*, Vol. II. p. 219 (*Talaq*, ch. xvii. *fasl.* v.) This passage has been omitted in his translation by Baillie. Its proper place is at Bail. I. 461 (para. 2, *ll.* 3 *et seq.*)

[6] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* v.

SECTION 328

(the son and daughter) are alike. There is a less authenticated opinion in favour of the view that the son should provide two-thirds of the expense and the daughter one-third. This latter is the view adopted by Shafi'i. Shams-ul-A'imma has stated that children must bear the maintenance of their parents in equal shares only if the difference in the means of the children is negligible.[1]

Right of father to "steal" son's property for maintenance.

The father's rights are placed on a very high footing in a passage that may be translated as follows: "A necessitous father may steal from the property of his son having means sufficient for his (the father's) maintenance in cases where the son does not consent to maintain him, and where the Qazi is absent; and such theft is no crime. But if the Qazi is present, the theft is not permissible; he must in that case make an application to the Qazi who will make an order in his favour. It is so stated in the 'Hashiat-ul-Madani.'"[1]

The rule above referred to can have no application in British India, where the "Qazi" is always present: *quaere*, whether apart from this the right of the father to "steal" under the circumstances would be safeguarded under the head of "rights of fathers of families"—cf. s. 2 above, p. 3. In connection with this the following verse of the Quran may be referred to: "Ye know not whether your parents or your children be nearer to you in usefulness."—Quran IV.

When children unable to provide maintenance they should take the

329. Where children are not able to provide separate maintenance for their parents, they may be compelled to take the parents to live with themselves.

Explanation—A son whose earnings leave a surplus over his own maintenance, is to be considered as able to provide separate maintenance for his parents, unless he has a wife and young children.[3]

(b) Obligation on Grandchildren to Maintain their Grandparents.

Rights of grandparents similar to those of parents.

330. Grandparents, both on the father's[4] and on the mother's[5] side, are entitled to maintenance from their grandchildren on the same conditions as parents.[4]

Indigent ancestors must be maintained though they have the means to earn. Ancestors both cognates and agnates to be maintained.

The point is very clearly dealt with in a passage in the 'Durr-ul-Mukhtar,' of which the following is a translation: "A descendant having means is bound to maintain his indigent ascendants, including a maternal grandfather, as stated in the 'Zakhira'; even though such ascendants are able to earn. Amongst the ascendants are included the father and mother and the paternal and maternal grandparents; but the son's son is bound to provide maintenance for his paternal grandfather only when his father is dead, or indigent; and similarly with reference to the maternal grandfather, when the mother is dead or in want; and the obligation to maintain ancestors in want is irrespective of the ancestors' ability to earn."[1]

[1] r, ch. on *Nafaqa*, *fasl* v.

[2] Merely "food" in Bail. I 462 (*l.* 24).

[3] Bail. I. 462.

[4] Bail. I, 462 (para. 4).

[5] No instance can be found in the *Fatawa 'Alamgiri* where the maternal grandfather is mentioned, but the principle is the same and the rules applying to him must be similar to those applying to the mother; and in the extract cited he is specifically ment is ned.

SECTION 331
Grandchildren alone liable to maintain though collaterals are presumptive heirs.

331. Where a necessitous person has a grandchild, and also collateral relations, the former alone is bound to provide maintenance, though the latter may be presumptive heirs.[1]

Illustration.

N has a daughter's daughter *Dd* and also a full brother FB. *Dd* alone is liable to maintain *N*. If instead of *Dd* there had been a daughter's son DS, he would in the same manner have been solely liable to maintain *N*.[1]

(c) *Joint Obligation on Grandchildren and Grandparents to Provide Maintenance.*

Joint obligation on grandparents and grandchildren: proportion of liability.

332 Where grandparents and grandchildren are jointly obliged to provide maintenance, they have to bear the expenses thereof in the proportion of one-sixth by the grandparent, and five-sixths by the grandchildren.[2]

Illustration.

N is necessitous and has FF a grandfather and Ss a grandson. FF pays one-sixth of the maintenance of N and Ss five-sixths.[2]

Baillie refers only to the case of the grandson and grandfather, but granddaughters must be in the same position. It is unnecessary to consider the case of remoter descendants, and even the illustration that is given postulates the co-existence of persons five generations removed from each other in the direct line: FF is the great-great-grandfather of Ss.

§ 4.—Maintenance of Collaterals under Hanafi Law.

(1) Collaterals who are under Obligation to Maintain.

(Hanafi law.) Obligations on Collaterals.
1. Postponed to that on descendants and ascendants
2. Subject to their having means.
3. Subject to right of recourse against father or property or earnings.

333. Where the lineal descendants[3] and ascendants of a person governed by Hanafi law are unable to maintain him, there (subject to section 326 above), his collateral relations, who are within the prohibited degrees, and who have means, are obliged to maintain him; provided that where the person so maintained possesses any property, or is able to earn his livelihood, the said collateral relations may recover the expenses of providing the said maintenance from the father of the person so maintained, and the father may reimburse himself by having recourse against the property or earnings above referred to.[4]

[1] Bail. I, 463. See above. p 210.
[2] Bail. I, 464.
[3] Bail I, 458, where only ascendants are referred to, showing that the author has in mind a minor person only.
[4] Bail I, 458; see comment to this section and to s. 289.

Illustration. SECTION 333

N, a Hanafi Mussulman, is necessitous, and has a maternal aunt *Ma*, also a paternal uncle's son Pus; both *Ma* and Pus having means; *Ma* is alone obliged to maintain N, as Pus is not within the prohibited degrees.[1]

Baillie refers only to the paternal uncle as being obliged to maintain, but the following translation makes it clear that all collaterals are obliged :—

All collaterals are entitled to maintenance—males and females, agnates and cognates.

"Maintenance is due to the sister, paternal and maternal aunts, and to the daughter of paternal and maternal aunts, whether they are young or have reached puberty, whether in health or in illness ; provided that they are indigent and unmarried, for if they are married then their maintenance will be on their husbands. So maintenance is also due to a male relative (who is a collateral) though he has attained puberty; provided that he is unable to earn, being permanently disabled, as, if he is lame, or blind, or an idiot, or paralytic."[2]

And to male collaterals unable to maintain themselves.

334. No person who is without means, is obliged to maintain any collateral relation.[3]

The effect of this section is that a person is not obliged to earn in order to maintain a collateral.

335. Subject to the effect of the Caste Disabilities Removal Act[4] according to Hanafi law rights to maintenance do not arise between collaterals who profess different religions.[5]

Whether collaterals entitled only when both are Muslims. Act XXI of 1850. No such rule in Shiah law.

The rule is applicable only under Hanafi law. It is restricted in its application to collaterals. The 'Shara'ya-ul-Islam' makes no mention of it in regard to any relations, though it expressly refers to the fact that the wife's rights to maintenance are irrespective of her being a Muslim.[6] It will be remembered that under Shiah law collaterals are not entitled to maintenance from each other.[7]

Difference of religion does not affect rights of descendants or ascendants.

In Baillie the rule is stated as follows : "Maintenance is not due where there is a difference of religion except to a wife, both parents, grandfathers and grandmothers, a child, and the child of a son."[8]

All descendants are however intended to be included in the exception, as is clear from the 'Hidaya,' which refers to children and grandchildren,[9] and explains that "between the child and parent exists a common participation of blood, and he who participates of another's blood, is in fact the same as the participoter himself, and as a man's infidelity is no objection to his providing his own maintenance out of his own property, it follows that the same circumstance can be no objection with respect to one who is a part of him."[9]

'Durr-ul-Mukhtar' on the point.

The 'Durr-ul-Mukhtar' also makes it clear that all ascendants and descendants are to be maintained irrespective of difference of religion: "Maintenance is not due where there is a difference of religion except that to the wife and the

[1] Hed. 148
[2] *Durr-ul-Mukhtar*, ch. on *Nafaqa, fasl* v.
[3] Bail. I. 463 (para. 2, last sentence).
[4] See above p. 30.
[5] Hed. 148 ; Bail. I. 466.
[6] Bail. II. 99.
[7] See s. 286 (1) (*b*) above.
[8] Bail. I. 466.
[9] Hed. 147.

SECTION

ancestors and descendants, maintenance is due whether the ancestors are high like the grandfather or great-grandfather, or the descendants are remote like the grandson and great-grandson." [1]

Caste Disabilities Removal Act does not apply where the loss of right is not penalty for apostatizing.

The law of Islam as a rule penalises apostasy from Islam, and favours those who adopt Islam. But in regard to maintenance the rule is on a different basis.[2] It will be noted that the Hanafi law does not impose a penalty on renunciation of Islam, but it imposes the obligation to maintain and the right to receive maintenance only between persons who profess the same religion. The rule is the same whatever be the cause, and whoever is responsible for the difference between the religions of the parties concerned, and whether it arises from either of them embracing or renouncing Islam. Hence it may require consideration by the courts whether the Caste Disabilities Removal Act is intended to affect the operation of such a rule of law as is above referred to. In its terms the Act can only apply so as to remove the penalty annexed to the renunciation or exclusion from any religion, or to the deprivation of caste. The point is not merely a technical one, concerned with the interpretation to be put on the words of an Act. There is a general principle underlying the rule of Hanafi law: viz., that one person should not be bound to maintain another when the two do not profess the same faith and hence their ways of life may be quite different from each other's.

Principle of the rules of Hanafi law.

Defendant's law to govern the decision of suits.

Assuming that the Act applies in respect of this rule of Hanafi law, its effect has to be considered in connection with another set of principles, viz., the rules as to the law that has to prevail where the personal law governing the parties before the Court is not the same. In such cases, as will be seen by a reference to s. 8 above, the legislature requires either that the law of the defendant should be applied, or that the Courts should act in accordance with justice, equity and good conscience. Thus where a suit is filed in which a Hanafi Mussulman claims maintenance, and the defendant is not a Hanafi, the latter may raise the plea that the rights of the parties in the suit should be determined with reference to the law governing him (the defendant), and that consequently he should not have an obligation imposed on him which his own law does not impose upon him. This is a point that must be determined apart from the Caste Disabilities Removal Act, and apparently before giving any consideration to that Act, inasmuch as the question that has to be dealt with in the first instance is concerned with the determination of the law in accordance with which the suit is to be decided. It is only after it has been decided which law governs the suit, that the Court can determine what are the respective rights and obligations of the parties.

1. Muslim suing non-Muslim for maintenance.

For determining both questions, however, the Court would no doubt consider whether, where the defendant is a convert to his non-Muslim religion, his conversion was genuine or a fraud upon the law.[3] And if it comes to the conclusion that the conversion was not genuine, it will not permit him to commit a fraud upon the law.[3]

Non-Muslim suing Muslim for maintenance.

On the other hand, where the plaintiff, suing a collateral for maintenance, belongs to a religion other than Islam, and the defendent is a Hanafi Mussulman,

[1] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* vi.

[2] Thus it may be remarked that the wife who is of a different religion is expressly stated to be entitled. See. s. 294 and footnote but she loses it by apostasy.

[3] See above, p. 38.

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the Hanafi law as the defendant's law would probably be held to govern the case, and then the question would arise whether the Caste Disabilities Removal Act displaces the rule of Hanafi law by which rights of maintenance are restricted to cases where the parties profess the same religion. Now, if the plaintiff was originally a Hanafi Muslim, and he has been converted to another religion, then it is evident, that the Caste Disabilities Removal Act protects his rights of maintenance, unless it is held that the loss of right was not a forfeiture caused by apostasy within the Act.

(a) When the plaintiff has renounced Islam.

Where, however, the defendant is a convert to the Hanafi sect of Islam from another religion or sect, then can he be allowed to contend that the Hanafi law should not be applied to him seeing that he has chosen to place himself under that law ? And then, if it is held that the Hanafi law is on this point altered by the Caste Disabilities Removal Act, it would seem that he would be obliged to maintain the non-Muslim plaintiff. For in such a case the ruling of the Court would in effect be that in accordance with the Hanafi law (as it has to be enforced in our Courts) the defendant is liable to maintain the plaintiff though the plaintiff does not profess Islam, and the defendant could, it is submitted, not be heard to object to that law being applied to him under which he has chosen to place himself by adopting his new religion, nor would be allowed to say that his law was different from the interpretation that the Court would put upon it even though that interpretation be affected by the Caste Disabilities Removal Act.

(b) When the defendant is a convert to Islam.

It does not seem necessary to go over the same ground which has just been covered in order to consider cases in which the person claiming maintenance is not a Mussulman.

3. Both plaintiff and defendant being converts

It may be pointed out in conclusion that similar questions may arise when one of the parties is a Shiah and the other a Hanafi, for the former sect does not recognise the obligation to maintain collaterals.

336. No person is liable to maintain any relative who is not related within the prohibited degrees by consanguinity.

Illustrations.

(1) N has a maternal uncle MU, and the son of a paternal uncle SPU. MU is alone bound to maintain N, though SPU is the presumptive heir to the exclusion of MU. [1]

(2) In illustration (1) if, instead of SPU, there were the foster brother of N, he also would not be obliged to maintain N,[1] though the foster brother is within the prohibited degrees of relationship, because the prohibition is not by consanguinity.

337. (1) No person is obliged to maintain a collateral relation so long as the person to be maintained has any descendant or paternal ascendant able to maintain him.

Collaterals not to maintain if any ascendant

(2) The obligation of collaterals to provide maintenance when they co-exist with the mother (or a maternal ascendant [1])

SECTION 337 is subject to the difference of opinion which is referred to in section 326.

(2) Liability how Shared amongst Collaterals.

Proportion of liability.

338. Where the maintenance of a Mussulman is to be borne by his collateral relations, they have to bear it proportionately to their presumptive rights to inherit.

Illustration.

N is necessitous and has one full sister *Fs*. one consanguine sister *Cs*, and one uterine sister *Us*. Then *Fs*, *Cs*, and *Us*, will have to bear jointly the expense of maintaining N, *Fs*, paying three-fifths, *Cs* one-fifth and *Us* one-fifth respectively.[1]

Where one presumptive heir unable to

liability shared by the others.

339. Where one of several presumptive heirs[2] of a Mussulman is not able to provide the share of the maintenance due from him under section 338, there the said share has to be provided by the other presumptive heirs[2] in proportion to their respective presumptive rights to[2] inherit.[3]

Where all existing pre- heirs main- next set of pre- sumptive heirs to maintain—

340. Where none of the presumptive heirs of a Mussulman is able to provide maintenance, the obligation to maintain devolves upon those collaterals who would become presumptive heirs if all the existing presumptive heirs were to predecease the person who is entitled to be maintained.[4]

Sharing proportionately to what their presumptive rights would be.

341. The collaterals referred to in section 340 are obliged to bear the expenses of the maintenance in the proportion in which they would be presumptively entitled to inherit, if all the existing presumptive heirs were to decease, and then immediately thereafter the person who is entitled to be maintained were to decease ;[4] provided that the said collaterals may recover back the said expenses from the existing presumptive heirs if and when they have, or any of them has, the means to repay the said expenses.[5]

With right of recourse against existing presumptive heir.

Illustration.

N is a person entitled to maintenance, and has a paternal uncle PU, a paternal aunt, *Pa*, and a maternal aunt *Ma*, Then PU alone is obliged to maintain N ; If PU has no means, then *Pa* and *Ma* are both liable.[6]

[1] Hed. 148.

[2] See above, s. 285 (11).

[3] Hed. 148 ; Bail. 464. *Semble* the same rule would apply if one of the presumptive heirs is "absent" or cannot be found ; see comment to s. 34, Bail. I. 464 (para. 2

[4] See comment. Bail. I. 464.

The rule is thus stated in the 'Durr-ul-Mukhtar': "It is stated in the 'Qunia,' on the authority of the 'Hashiat-ul-Madani,' that when the nearest relations within the prohibited degrees, on whom the obligation to provide maintenance rests, are absent, then the next in degree who is present, may be ordered to provide maintenance; with liberty to recover the expenses thereof from the nearer (absentee) when he returns; so that if a necessitous person has a full brother and a consanguine brother, and the full brother is absent and cannot be found, then the authorities may order the consanguine brother to provide maintenance, and then when the full brother returns, the consanguine brother will be able to recover back what he had expended."[1]

SECTION 342
Where nearest collateral absent there next one may be ordered to provide maintenance with right of recourse

Illustration.

342. Where the obligation to maintain a necessitous Mussulman is upon his collateral relations, and one or more of the presumptive heirs is or are not within the prohibited degrees or the cause of the prohibition is other than of blood relationship; there such presumptive heir or heirs are not obliged to provide maintenance; and their liability devolves upon such persons as would have been liable under section 339 or 340, if the said presumptive heir or heirs had been unable to provide maintenance.[2]

Devolution of obligation when a collateral
1. is not presumptive heir, or
2. not within prohibited degree.
3. not prohibited by consanguinity.

Illustrations.

N[3] is necessitous and has—

(1) a son S who is unable to maintain N. *or*
(2) a daughter *D*, who is indigent and unmarried; } *and* N *has also*—

(*a*) a full brother FB, a consanguine half-brother CB, and a uterine half-brother UB; *or*

(*b*) a full sister *Fs*, a consanguine half-sister *Cs*, and a uterine half-sister *Us*.

(1) (*a*) When N and S co-exist with FB, etc., N must be maintained jointly by FB and UB; the former providing 5 parts and the latter, 1 part; but the maintenance of S is to be paid by FB alone.

(2) (*a*) When N and *D* co-exist with FB etc., they must be maintained by FB alone.

(1) (*b*) When N and S co-exist with *Fs*, etc., N must be maintained jointly by *Fs*, *Cs* and *Us*, providing respectively 3 parts, 1 part and 1 part; but S is to be maintained by *Fs* alone.

(2) (*b*) When N and *D* co-exist with *Fs*, etc., they are both to be maintained by *Fs* alone.[3]

§ 5.—Maintenance of Relations by Affinity.

343. A Mussulman is not bound to maintain his son's wife unless his son is young and has neither means nor ability to earn.[4]

Son's wife

[1] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* vi.
[2] Bail. I. 464.
Bail. I. 464-465, and s. 338 above.
Bail. I. 458 (para. 3).

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Cf. next section which deals with the right of the father's mother to be maintained and comment thereto. The 'Fatawa 'Alamgiri' is not as definite on the point covered by the present section as it is on that covered by the next. It is translated by Baillie as follows: "It is also incumbent on a father to maintain his son's wife when the son is young, poor or infirm. It is stated however in the 'Mubsoot' that a father cannot be compelled to maintain the wife of his son." [1]

Father's wife not to be maintained.

344. A Mussulman is not obliged to maintain his father's wife, who is not his mother, unless his father is weak and infirm, and has not the means to maintain her.[2]

Maintenance of daughter-in-law.

The following is a translation of an extract from the 'Durr-ul-Mukhtar': "It is stated in the 'Mukhtar' and the 'Multaqa' that maintenance is due to the wife of the son from the father of the son, if the latter is a minor and indigent or disabled; and if the husband is absent his father will be ordered to provide the wife with maintenance.[3] In the same way the mother will be ordered to provide maintenance, with liberty to recover it from the father, when he returns; and in the same way the son will be ordered to provide maintenance for his mother, with liberty to recover it from her husband, when he returns after his absence, whether he be his own father, or stepfather; and similarly a brother will be ordered to maintain the child of his absent brother with liberty to recover it from the absentee when he returns; and in the same way maintenance will be ordered as against the remoter relatives when the nearer are absent, with liberty to recover from the [nearer] absentee when he returns." [4]

Instances when maintenance is to be provided

liberty to recover from the one primarily iable.

Only blood relationship gives right to maintenance

This section and the preceding one illustrate the broad principle that only blood relationship gives the title to maintenance in Muhammadan law. The stepmother has to be maintained only in so far as the son has to provide necessaries to his father. Now, it is the duty of the father to maintain his wife, the wife's maintenance being a debt on him (see s. 309), and so it is supplying part of the father's necessities to maintain the stepmother.

English law.

In England also the liability to maintain poor relations applies to blood relations only,[5] and a man is not bound to maintain his wife's mother. In deciding to this effect, Pratt C. J. said, "By the law of nature a man was bound to take care of his own father and mother, but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by Act of Parliament, and that can be extended no further than the law of nature went before, and the law of nature does not reach to this case." [6]

Support due to parents "by the law of nature."

French Code gives reciprocal rights of support to father-in-law. and son-in-law. This provision held contrary to policy of the laws in the United States.

By the French Civil Code, however, it is provided that sons-in-law and daughters-in-law owe support to their father-in-law and mother-in-law "who are in want," but the right "ceases on a second marriage by the mother-in-law" etc. The right is reciprocal.[7] But "a judgment in accordance with this provision having been recently obtained from the French Courts, the American

[1] Bail. I. 458, (para. 3).

[2] Bail. I. 461 (para. 2).

[3] Liberty to have recourse to the husband seems to be implied. See ss. 288, 309-311.

[4] *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* iv.

[5] Under the Poor Relief Act (1601) 43 Eliz. c 2, s. 6. Campbell, "Ruling Cases," XXI, 337.

[6] *Rex* v. *Munday* (1718), 1. Strange 190.

[7] French Civil Code, artt. 205-207, translation by Henry Cachard.

Courts refused to give effect to it in the United States, as being contrary to the policy of the laws in that country."[1]

RIGHT OF EXECUTOR TO MAINTENANCE.

Maintenance of 'wasi.'

Durr-ul-Mukhtar on maintenance due to 'wasi' (or guardian) out of estate of

The following is a translation of a passage that occurs in the 'Durr-ul-Mukhtar': "If a person is engaged in the affairs of another then the maintenance of the former is due from the latter, as for instance the maintenance of the Qazi and Mufti and their families is due from the public treasury . . . and in the same way the maintenance of an executor ('wasi')is due from the estate of the deceased during the period that the executor is engaged in the affairs of the minor: So it is stated in the 'Zail'i.'"[2] The rule of Hanafi law that the 'wasi' may take the expenses of his maintenance from the minor whose property is in his charge, cannot, it appears clear, have any effect in British India, inasmuch as in his capacity both as guardian and as executor he is considered as a trustee and as such he will not be allowed to derive any sort of benefit from his office.[3]

[1] Holland, "Jurisprudence," 218, referring to *Journal du Droit Int. Privé* VI. 22.

[2] *Durr-ul-Mukhtar*, ch on *Nafaqa*, *fasl* i.

CHAPTER IX.

GIFTS.

§ 1.—Preliminary.

(1) Explanation of Terms.

Declaration of gift. Immediate unconditional transfer without consideration.

345. (1) When a Muslim signifies his willingness to make an immediate and unconditional [1] transfer without consideration [1] of the ownership of, or of rights in, existing and specified property to another, with a view to obtaining the assent of that other to such transfer, he is said to make "a declaration of gift." [2]

Donor.

(2) The person making the declaration of gift is called the "donor," the person in whose favour the gift is declared is called the "donee," and the property or rights of which the gift is made is or are called the "subject of gift." [3]

Donee. Subject of gift.

Acceptance of gift.

(3) When the donee signifies his assent to the declaration of gift, he is said to "accept the gift."

Valid gift.

(4) A gift is said to be "valid" when the transfer of property or rights which is purported to be made, is operative in law, and when the donee is, by reason of the gift, entitled to retain, or to be placed in possession, of the said property, or has the rights vested in him, which are so purported to be transferred. [4]

Void gift.

(5) A gift is said to be "void" when the transfer of property or rights which is declared, or purported to be made, is of no effect in law.

[1] Hed. 482 (col. i); Bail. I. 507, II. 203. If there is a condition, it is not enforceable, as being repugnant to a *hiba* If a *hiba* is made from any pious or religious motive, it is considered to bring a consideration with it, and it becomes a *sadaqa*, on which see below. A religious motive therefore does not invalidate a gift, but has the effect of making it irrevocable. The dicta of Beaman J, therefore in *Jainabai* v. *R. D. Sethna* (1910) 34 Bom. 604, 609; 12 Bom. L. R. 346; *Cassamally* v *Currimbhai* (1910) L. R. 717, 771, 772 are misleading.

[2] Bail. I. 507, II. 203. The declaration or proposal of gift may be in the past tense, as in *Ill* (1).

[3] In Arabic *wahib*, *mauhub-lahu* and *mauhub* respectively.

[4] Bail. I. 507, 508, II 204; Hed. 482. As possession is an essential of a valid gift in Muhammadan law, it can seldom happen that the donee is entitled "to be placed in possession," but it may happen where a gift has been accepted (with possession) by one person on behalf of another.

TABLE SHOWING INCIDENTS AND STAGES OF 'HIBA' AND ''IWAZ.'

'HIBA.'	'HIBA BIL 'IWAZ.'	'HIBA BA SHART UL 'IWAZ.
(1) D makes declaration of the 'hiba' of an article, **G**, to R,		(1) D makes a declaration of the 'hiba' of an article, **Gs**, to R— stipulating that R should give, by way of ''iwaz,' an article, **Is**, to D,
(2) R accepts the 'hiba' of **G**,		(2) R accepts the 'hiba' of **Gs**,
(3) D transfers **G** to R— (*A*) The transfer is revocable, and **G** remains in the hands of R as the subject of a 'hiba,' and— (*B*) R is not bound to make any return to D—		(3) D transfers **Gs** to R— (*A*) The transfer is revocable, and **Gs** remains in the hands of R as the subject of a gift, and— (*B*) R is not bound to make any return to D (either of **Is**, or of anything else)—
(4) and if R does not make any return—	(4) still, if R offers to make a gift of **I**, as a return for **G**,—	(4) and if R does not offer to make the stipulated return—
G remains in R's possession as the subject of a simple 'hiba'		**Gs** remains in R's possession as the subject of a simple 'hiba,' which may consequently be revoked.
	(5) D is not bound to accept **I** as a return for **G**—	(4) but if he offers to make the stipulated return- D is bound[1] to accept **Is** as an ''iwaz for **Gs**—
	(6) If D does not accept **I**, **G** remains in R's possession as a simple 'hiba.'	(6) If D accepts **Is** as a return—
	(7) After R takes possession of **I**— **G** and **I** belong to R and D irrevocably, as the subject of a 'hiba bil 'iwaz,' and of an ''iwaz,' respectively.	(7) and R gives possession of **Gs** to D— **G** and **Is** respectively, belong to R and D with the incidents of a sale.

[1] This point is somewhat doubtful. See below. p. 326 *n.* 2.

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Illustrations.

(1) D says to R, I have given you, or made you the proprietor of, this. This is a declaration of gift.[1]

(2) The following are express forms of declarations of gift (which have been appropriated to the purpose) :[2]

"I have given this thing to thee."

"I have invested thee with the property of it."

"I have made it to thee."

"This is to thee."[2]

(3) The following are implied forms of declarations of gift:

"Thy garments is this piece of cloth."

"I have invested thee with this mansion for thy age."

(4) D says to R, "I have mounted thee on this beast." This is a loan, unless D intends thereby to make a gift.

Declaration and acceptance by implication.

"Even when the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct, it would be sufficient."[3] "If a man give a thing to another saying, 'I give this to thee,' and the donee takes possession without saying a word, it is valid."[4]

Where the declaration is in the form of a gift 'in futuro,' it may be invalid as such, but may operate as a will.[5] But if the words are "I have adopted A B to succeed to my property," it is neither a deed of gift nor a will.[6]

(2) *Constituents of Gift.*

Constituents of gift:
1. Declaration.
2. Acceptance
3. Possession.

346. Where the donor makes a declaration of gift, and the donee accepts the gift,[7] and the donor transfers possession of the subject of the gift to the donee without any consideration, the gift is complete; provided that[8] where a father [or other guardian[9]] makes a declaration of gift in favour of his minor child [or other ward[9]] no acceptance is necessary by the child[10] [or ward[9]].

Inchoate gifts.

Confusion is frequently caused by referring to a gift as having been made, when what is meant to be expressed is that a declaration of gift has been made, or that a person has purported to accept a gift, in regard to which a valid declaration may or may not have been made, or that a transfer is purported to be made with or without a valid declaration or acceptance. It is only when all the three elements, viz., declaration, acceptance, and transfer are present, that a gift can be said to be made.

English law.

In English law there are three modes in which a gift 'inter

[1] Bail. II. 203, *Kavarbai* v. *Alam Khan* (1910), 7 Bom. 170.

[2] Bail. I. 509. (*ll.* 7-10), II. 203, (*ll.* 7-10), and see pp. 49-50 above.

[3] Ameer Ali, I. 62. citing *Raddul Mukhtar* IV. 777.

[4] *Ib.* I. 63, citing *id.* IV, 781; and see below under s.409, from *Jami'-ush-Shittat.*

[5] *Kasum* v. *Shaista Bibi* (1875), 7 N. W. 313.

[6] *Jeswunt Singhjee Ubby Singjee* v. *Jet Singhee Ubby Singjee* (1844) 3 Moo. I. A. 245; 6 W. R. (P.C.) 46.

[7] A gift is not valid without verbal acceptance: Bail. I. 545 (*l.* 17) which explains the effect of Bail. I. 507 (*l.* 6); Bail. II. 204 (*ll.* 1-2).

[8] Hed. 482 (col. ii.); Bail. I. 507-508, II. 204; *Kamarunnissa Bibi* v. *Husaini Bibi* (1880) 3 All. 266.

[9] See below ss. 396-399 (about possession).

[10] Bail. I. 510 (*ll.* 18-20), 529 (para. 2).

vivos' can be perfectly made, namely (1) By deed or instrument in writing, (2) by delivery, in cases when the subject of the gift admits of delivery, (3) by a declaration of trust, which is the equitable equivalent of a gift.[1] SECTION 346

"If a man says, 'this thing is to my little child, such an one,' it would be lawful and complete, without acceptance." [2] Acceptance unnecessary by minor.

(3) Oral Gift.

347. Subject to the Indian Registration Act, neither the declaration nor acceptance of a gift need be made by a Mussulman in writing, whether the subject of the gift is movable or immovable.[3] Gift may be made orally.

§ 2.—Legal Incidents of Gift in British India.

(1) 'Hiba' under Muhammadan Law.

(a) Interest transferred under 'Hiba.'

348. (1) The legal effect of a 'hiba' or gift strictly so called is that it transfers the immediate and absolute ownership of the subject of the gift to the donee; [4] and (except as provided below) where the property which forms the subject of the 'hiba' is purported to be transferred to the donee with conditions, or restrictions as to its use, or disposal, or alienation,[5] the conditions or restrictions are void, and the 'hiba' is absolute.[6] Legal effect of 'hiba.'

(2) According to Hanafi law (save as hereinafter provided), the donor, by making a declaration of gift, is conclusively presumed to have intended to transfer the whole of his interest in the subject of the gift, and any restriction that is purported to be annexed to the donee's full ownership in the subject of gift is held to be void, as being repugnant to the expressed intention of the donor.[7] (Sunni law.) transfer all his interest in subject of gift.

(3) According to Shiah law, the use of the word 'hiba' or gift in a declaration by the donor does not conclusively prove his intention to part with all his interest in the subject of gift to the donee, but the intention of the donor has to be gathered, as far as possible, from the whole of the declaration; and if any limitations are imposed on the (Shiah law.) his interest of

[1] Halsbury, "Laws of England," XV, 409, s. 873.

[2] Bail. I. 510 (*ll.* 18-20). 529 (para. 2).

[3] Macnaghten, 198-199 (case 2), *Kamarunnissa Bibi* v. *Husaini Bibi* (1880), 3 All. 266 (P.C).

[4] So that the creation of limited estates (below ss. 90 *et seq.*) cannot be called making a *hiba*; nor strictly speaking can a *hiba* be said to be made where the donor does not have the *dominium* over the subject; and consequently cannot transfer the *dominium* even though he transfers all the rights he possesses.

[5] (*Nabob Amiruddaula Muhammad Kakya*) *Hussain Khan Bahadur* v. *Naterl Srinivasa Charlu* (1871) 6 Mad. H. C. R. 356 and see *ill.*

[6] Bail. I. 508 (*ll.* 1-5).

[7] Bail. I, 508, 509; Hed. 488, 489.

SECTION 348 donee's ownership of the subject of gift, they are to be given effect to, unless they are opposed to any law.[1]

Illustrations.

(1) D makes a gift of a house to R, and RA for their residence, and that of their heirs, generation after generation, declaring that if R and RA sell or mortgage the house, D and his heirs will have a claim on the house, but not otherwise. *Held*, that under both Sunni and Shiah law R and RA take an absolute estate.[2]

(2) D says to R, "this mansion is to thee 'ʾumri' [i.e., for thy age, 'ʾumr'], or 'hyati' [for thy life 'hyat'], and when thou art dead, it reverts to me,"—in which case, in Sunni law, the gift is lawful, and the condition void.[3] In Shiah law it would constitute a life-estate.[5]

(3) D says to R, "this gift is to thee, and to those that follow after thee." In Sunni law it would be a gift of an absolute estate to R, "the latter words being treated as a surplusage."[4] In Shiah law R would have a life-estate, if it is held that the intention was that the latter words should be words of limitation.[5]

(4) D makes a gift to R on condition that D has an option of cancelling the gift for three days. The gift is valid, but the option is void.[6]

(5) D gives to R, a female slave, and stipulates that R should not sell her; or that R should sell her to a particular person, or restore her to D after a month. All these gifts would be valid absolutely under Sunni law.[7] Under Shiah law the last would be a valid gift for a limited period.[8]

(6) D says to R: my mansion is thine 'ruqba': meaning thereby: if thou diest it is mine, if I die it is thine[9] [i.e., that it will belong to R if he survives D] This may be interpreted (*a*) as a suspension of the gift upon a contingency, viz., the decease of D, in which case the gift

[1] See comment; cf. the following translation from a Shiah text, which occurs while the author is dealing with the forms in which limited interests (*sukna* ʾ*umra* and *ruqba*) may be created: "The contract implies the utterance of any of the following formulae: 'I give you the house'.. for your life .. by *sukna* or *umra* or *ruqba*.. or the utterance of any the following formulae: 'I have made *hiba* to you of the *corpus* of this house, on condition that if you die before me, the same shall revert to me, and that if I die before you the same will continue to be yours.' It has been said that this (last formula) must obviously (be interpreted to) mean, that the *corpus* of the property is permanently settled, as is related. . . on the authority of the Sunni jurists." *Jawahir-ul-Kalam* II. 618.

[2] *Nasir Husain* v. *Sughra Begum* (1883) 5 All. 505; cf. *Suleman Kadr* v. *Dorab Khan* (1881) 8 Cal. 1; 8 I. A. 117; cf. below s. 408, *ill.* 2 (stipulation that income may be returned).

[3] Bail. I. 509, II. 203; cf. *Suleman Kadr* v. *Dorab Ali Khan*, 8 Cal. 1; 8 I. A. 117, 121, 123; Hed. 309.

[4] Bail. I. 510.

[5] Bail. II. 226-227. *Banoo Begum* v. *Mir Abed Ali* (1907), 32 Bom. 172.

[6] Bail. I. 537. Of course D has general powers of "revocation" (as distinguished from "cancellation"). This *ill.* occurs twice in the *Fatawa ʿAlamgiri* and is omitted in Bail. I. 509 (*l.* 1). See however about *mahr*, s 442. The Muhammadan law as to the release of debt is the same as that of gifts; but it would be governed in India by the Contract, Limitation, and Transfer of Property Acts.

[7] Hed. 488; Bail. I. 538.

[8] See below ss. 447 *et seq*.

[9] Bail. I. 58 (*ll.* 4-7).

is void (as Abu Hanifa and Imam Muhammad hold) or (*b*) as a gift of a house with the condition of 'ruqba' "in which case the gift is valid absolutely and the condition void" (so Abu Yusuf holds) [1] or (*c*) as a special class of limited interest which the Shiah law permits.[2]

1. THE TERM 'HIBA' EXPLAINED AND DISTINGUISHED.

'Hiba' implies grant of absolute estate.

'Hiba' according to the 'Fatawa 'Alamgiri' "is of two kinds, 'tumleek' and 'iskat,' which means literally to cause to fall or extinguish."[3]

"When," says Syed Ameer Ali,[4] "a grant is made with the word 'hiba,' it implies, generally speaking, the grant of an absolute estate, for 'hiba' is defined to be an act by which one person transfers to another, gratuitously, without the motive of 'kurbat,'[5] i.e., of pleasing God, accompanied by immediate transfer, constructive or actual, the entire and absolute property ('milk'[6]) in a certain thing. Such a transfer in the Arabic language is also constituted by the words 'an-nahila'[7] (a present) and 'al-atîa.' In Hindustani the word 'atîa' is equivocal, and so are the words 'dêna' and 'bukhshnâ.' When grants are made with these words, the intention of the grantor must be examined from the context of the deed and surrounding circumstances, viz., whether he intended an absolute gift, or to convey only a limited interest."[8]

The meaning of 'milk,' as given by Richardson in his Arabic and Persian Dictionary, is "possessing, having dominion." Kasimirski is very clear and explicit about the absolute and physical nature of the dominion: "1. Tenir une chose, après l'avoir saisir avec la main ('av. acc.') 2. Contenir quelque chose, se rendre maître de quelque chose. 3. Posséder quelque chose, être en possession de . . . ('av. acc. de la ch.')," etc. Then as regards 'tamlik' Richardson explains it as "constituting possessor, appointing master, or chief, giving in perpetuity," and Kasimirski "1. Mettre quelqu'un en possession de quelque chose, ('av. acc. de la p. et acc. de la ch.') 2. Faire quelqu'un roi."[8]

Not every transfer without consideration is a 'hiba.'

These definitions may make us doubt whether 'hiba' can be taken to be the generic term for transfers without consideration, and whether strictly speaking the term 'hiba' can be applied to a transfer of rights not amounting to 'dominium,' without consideration, though the donor may transfer all his interest in the subject of gift.

It would have been more accurate to have restricted the term 'hiba' or gift to those transfers without consideration which have reference to 'tamlik' or full ownership, giving to other voluntary transfers their appropriate designations in Muhammadan law. However that may be, the Courts in British India have not followed the minute distinctions of the nomenclature of Muhammadan lawyers; and the term gift is applied to all transfers without consideration and 'hiba' is considered as the exact equivalent of "gift."

Another question arising in this section is of some interest. Long before the Courts had to decide whether rights in property could be subject of gifts they were familiar with the passage in the 'Hedaya' and other books of

[1] Hed. 488 (col. i. para 3).
[2] See below s. 446 *et seq.*
[3] Bail. I. 508.
[4] "Mahommedan Law," I. 112. This passage occurs in the chapter dealing with the Shiah law of gifts.
[5] Lit. approach (to God).
[6] *Milk* is explained more fully in the next paragraph.
[7] Spelt *nuhulut*, Bail. II. 203, *nuhla*, Bail. I. 91.
[8] Cf. also Bail. I. 507 *n.* 3; 508 *n.* 2.

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Sunni law (and they were not aware that the Shiah law was to the contrary) that a person cannot create a life-interest by way of gift or rather 'hiba.' So it was clear that one class of rights could not be disposed of by way of gift, and it raised a doubt whether a gift could be made of any interest less than full ownership : Had the doubt been restricted to the propriety of applying the word 'hiba' to such transfers, it would perhaps have been not without some justification. The result, then, seems to be that if a person has only a limited estate in property, he can make a gift of his interest in the property, but if he has the full ownership, he cannot under Hanafi law make a gift of a smaller interest ; in other words that a donor can only make a gift of the whole of his interest in the subject of gift, but cannot make a gift of rights which do not exhaust his interest in the subject of the gift. These remarks are made subject to the considerations which are referred to in under ss. 444 *et seq.* below.

Donor may transfer less than full dominion where his own interest is such.

Whether the rule refers merely to interpretation of formulae of 'hiba.'

Again, since in British India a Sunni Mussulman may acquire title to a life or other limited estate in property, and such an estate is transferable, the objection to a Sunni making a gift of a life-estate cannot be that such an estate is not known to the law by which he is governed. The real difficulty seems to be that certain expressions in the texts have been so translated as to make it appear that life-estates are unknown to Sunni law, which expressions perhaps had reference only to the interpretation of formulae of 'hiba.' Life-interests are as well known to the Sunni law as they are to Shiah law: they could easily be created, and were frequently created, in 'waqfs' and it is only by a novel interpretation of the law of 'waqfs' that that mode of dispositions has been restricted in British India to charitable dispositions.

2. THEORY OF THE MUHAMMADAN LAW OF 'HIBA.'

Invalidity of conditional gifts based on general principle that gifts are voluntary.

The theory of the Muhammadan law of gifts is a simple one, and the interdependence of one rule in it on another, is always close. The whole of it may, indeed, be apparently summed up in the words, "'hiba' is a voluntary[1] transfer of property."[2] It follows, as a corollary, (1) that no donor can be forced to take any step towards the completion of a gift, whether that step consists of giving possession, or of any act necessary to transfer possession (as a partition and division of the property). It follows equally (2) that the donee cannot be forced to do anything which he may have promised to do in return for, or in consideration of, the gift—for the gift being not enforceable, the consideration for the donee's promise fails, and the donee's promise is as much a bare agreement without consideration, as the original gift. Next, it follows (3) that if a person declares a future gift, he is free to make the gift on the future occasion, or not, as he pleases (see next section). But on the other hand, (4) where the voluntary nature of the gift is altogether taken away, either by the act of the parties, or by

Also of contingent gifts.

[1] Revocability is one of the main characteristics of a "voluntary" transaction in the eyes of the Muhammadan lawyers; an "obligatory" transaction being frequently opposed to a "revocable" one: Cf. Bail I. 508 (para. 3), 549 (*l.* 6), 550 (*ll.* 3; 20-25), II. 211 (*ll.* 9-11), 212 (para. 2), 226 (para. 2), 227 (*ll.* 4-15).

[2] Compare the definition of gift in Roman l as n alienation "which is made without the law compelling you to do it."—'quod nullo jure cogente conceditur.' Digest L. xvii. 82. Cf. Hunter's "Roman Law," 318: "They are completed when the giver has openly declared his intention whether in writing or not . . . . If no delivery took place, they should be fully and completely valid; the necessity of delivery should rest upon the giver." Justin. II. vii. 2.

external circumstances, it can no more remain revocable, and where there is any return or consideration for the gift, of course it cannot be considered voluntary any more. The first kind of consideration or return that is mentioned is (i) the return from God—or "approach to God." It is this that makes a 'sadaqa' or a 'waqf' irrevocable. The importance of this principle can only be realised when it is remembered that the primary mission of the Prophet was to destroy superstition, and to bring about a spirit of reverence and religion amongst the ungodly Arabs; [1] this rule is but an examplification of what was sought to be impressed upon them—that no return could be greater than that of being brought nearer to Allah, of whom they were constantly taught to say there is no God but 'The God,' and that an act done with His name on one's lips cannot be considered as a light or informal act. (ii) Secondly, gifts become irrevocable where the return consists in this, that the loose ligaments of family relationship that prevailed amongst the Arabs (if it can be called relationship) are closelier tied—hence gifts between relations cannot be revoked. (iii) Finally, where there is what would be called valuable consideration in English law, the gift may be transformed into a sale.—And such consideration may be stipulated for at the time that the gift is made, or it may be an after-thought.

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Reason why gifts are normally revocable.

and why some are irrevocable.

3. CONDITIONS ANNEXED TO GIFTS.

The statement is frequently made crudely that where any condition whatever is annexed to a gift, the condition is void, and the gift valid absolutely. Grounds are furnished for the statement by such passages as the following: Gift "is not cancelled by vitiating conditions; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void." [2] "Gift is a contract by which the property of a substance is transferred immediately and unconditionally without any exchange, and free from any pious or religious purpose on the part of the donor." [3] But in the same texts we find the following: "when a gift is made on a condition of an 'iwaz' or exchange all the conditions of a gift attach to the 'iwaz' in the beginning." [4] Again, "if a person give something to another on condition of that other giving something to him in exchange for it . . . a deed of this nature is in its original a gift." [5] And it is said that "if again a reciprocal gratuity were actually stipulated for at the time of the contract, the condition would be valid." [6] The latter passages are generally either entirely ignored, or are presumably considered to be inconsistent with the earlier portions, and as of no effect,—why the principle of interpretation should be that applicable to deeds 'inter vivos,' and why not that of wills, not being explained. Those, on the other hand, who think that the two classes of passages are inconsistent, and that the authors of the texts have inadvertently allowed them to come in, take no account of the circumstances under which the authors of these books acquired their knowledge of law, and devoted themselves to its constant study,[7] not to refer to their eminence as jurists. It is sub-

Conditions th be to gifts.

Conditions of s b gifts.

[1] See above pp. 5-6, and p. 6 *n.* 2.
[2] Bail. I. 509.
[3] Bail. II. 203.
[4] Bail. I. 534.
[5] Hed. 488 (col. i.).
[6] Bail. II. 208. The passage proceeds to say that the gift remains revocable, while the donee is not bound to give the stipulated return.
[7] Cf. above p. 94, s. 61. One or two inadvertences have, it is true, been referred to before (p. 105, s. 87, p. 157, s. 167); but those consist of allowing excerpts to be included in a digest from two authorities, who take opposite views on a controversial point.

SECTION 348 mitted that such conditions in a gift are invalid as are referred to in the section above; while such conditions as can be brought under the terms of a stipulation for a return are valid—as will appear from the later sections of this chapter. It must, however, be pointed out that Shiah law permits a part of the subject of the gift to form the subject of the 'iwaz' or return, whereas Sunni law does not permit it; but it must also be noted that the Privy Council have held that the produce of the subject of the gift is distinguishable from, and does not form part of its 'corpus'—see below, section 352.

(b) Time when 'Hiba' comes into Operation.

Gift 'in futuro' **349.** *Where the declaration of a gift purports to transfer the subject of the gift to the donor at a future time or contingently on the happening of a future event, the gift is void.*[1]

Explanation—A Mussulman cannot make a gift in contemplation of death in the mode and with the effect provided by section 178 of the Transfer of Property Act.[2]

Contingent gift explained and distinguished.

There is a good deal of ambiguity in the expression conditional or contingent gifts, the former of which may mean either (i) that the transfer of property by way of gift is purported to be suspended on a condition, and cannot take effect unless that condition is fulfilled—which class of gifts are void under Muhammadan law,—or (ii) that there are certain conditions and restrictions as to the use or disposition of the property forming the subject of gift, or that obligations are annexed to the ownership of the said property.

Reason why contingent void.

Contingent or conditional gifts, in the sense of gifts which do not operate at all unless some contingency or condition is fulfilled, are, as above stated, void in Muhammadan law. It must be remembered that one great distinction between gifts in English and in Muhammadan law is, that in the former revocability is not an incident, unless specially provided for; in the latter revocability is normally an incident of all gifts, though there are so many exceptions to the general rule that a gift is seldom revocable in practice. But the conception of a gift in Muhammadan law is that it is voluntary, and that as there is no compulsion to make it, so there is no obligation to let it continue in force (so to say), after it has been made. Where, therefore, the donor purports to make a gift which is to operate at some future time, or on the happening of a future event, in the eyes of Muhammadan lawyers it is nothing different from a mere promise to make a gift in future, or on the happening of the event; 'ex hypothesi' the promise in question is (1) gratuitous and therefore not enforceable; (2) moreover, the promise has reference to making a transfer of property or of rights, which transfer could have been revoked, even if it had actually been made. It may thus be compared to the possibility upon a possibility of English law, being uncertainty heaped upon revocability. Hence it is not diffi-

[1] Bail. I. 508; Macnaghten 50; *Amtul Nissa Begam* v. *Mir Nurudin Hussein Khan* (1896), 22 Bom. 489; *Yusuf Ali* v. *Collector of Tipperah* (1882), 9 Cal. 138; *Chekkone Kutti* v. *Ahmed* (1886), 10 Mad. 196; *Abdoola* v. *Mahomed* (1905), 7 Bom. L.R. 306; *Roshun Jahan* v. *Enaet Hossein* (1866) 5, W.R. 4, affirmed 2 Cal. 184; 26 W.R. 36; 3 I. A.

[2] *Meer Ashruff Ally* v. (*Mussl.*) *Nusseebun Bebee* (1863) 2 Hay. 163; Marsh 315 (*Syed Shah*) *Ashadoollah* v. (*Mussa. Beebee*) *Shaiba Jhasorn* (1868) 2 Hay. 345. See comment.

cult to understand that a contingent or conditional gift (defined as above) could have little effect in Muhammadan law (even if it were held to be valid[1]) beyond that of expressing a mere intention to make a gift in future; if that intention is persevered in, Muhammadan law requires it to be given effect to when the time comes for it to take effect.[2] There is however one exception to this rule: For where the condition on which the operation of the gift is suspended is the death of the donor, the disposition constitutes a particular species of gift, namely a bequest[3] and it may operate as such in Muhammadan law.[4] SECTION 349

With reference to a conditional gift in the second sense above referred to, viz., where the use or disposition of the subject of gift is purported to be restricted by obligations sought to be imposed on the donee, compare the last section, and the rules about "stipulations for a return," below ss. 407 *et seq.* It is pointed out in the 'Jami'-ush-Shittat' that "when a return has been stipulated for in the following manner, 'I give you this to be your property, on condition that you do this work,'" it being meant that there is a contract "dependent on a stipulation, then in such a case the gift may become void because the contingency made originally is necessary to be given effect to."[5] Conditions restricting use or disposition of subject of gift, void.

When a 'donatio mortis causa' is purported to be made, it must either be considered as a gift (provided that the transfer has been completed,[6]) or it may sometimes take effect as a legacy,[7] and the incidents of one or the other must be annexed to it. It may be that it fails as a contingent gift, or has effect only as to one-third of the estate (as a legacy).[8] 'Donatio mortis causa.

(*c*) *Possession under Invalid Gift.*

350. Where a gift is not valid, but the donee is in possession of the subject thereof, the donee is under Hanafi law responsible to the donor for its loss, destruction, or deterioration.[9] Possession of invalid gift with respon-

Quaere, whether the rule of law above referred to is affected, and if so to what extent, by sections 151, 152, of the Indian Contract Act.

Illustrations.

(1) D gives to R nine 'dirhams' and says, "three of them are in payment of your right, three as a gift, and three in 'sadaqa.'" R loses them all: he is under Hanafi law responsible for the three that were a gift; because the gift was invalid (being considered a gift of an undivided part of a whole), but not responsible for the 'sadaqa,' as alms of an undivided share is valid.[9]

[1] Under the Transfer of Property Act, s. 126, "a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void, wholly or in part, as the case may be."

[2] An instrument merely expressing a desire that a person should have a chattel without any delivery of the chattel, will not in England pass any property therein: *Douglas* v. *Douglas* (1869) 22 L. T., 127.

[3] *Jotindro Mohun Tagore* v. *Ganendra Mohan Tagore* (1872) L.R., I.A., SUPP. VOL., 47.

[4] See below on wills: *Kasum* v. *Shaista Begum* (1875) 7 N. W. 313; and cf. *Jeswunt Singhjee*; *Ubby Singjee* v. *Jet Ubby Singjee* (1844) 3 Moo I. A. 245; 6 W. R. (P.C.) 46

[5] *Jami'-ush-Shittat*, 381.

[6] *Sharifa Bibi* v. *Ghulam Mahomed Dastagir Khan* (1892) 16 Mad. 43.

[7] See below on (gifts in *marz-ul-maut.*)

[8] See page 264, *n.* 3 above.

[9] Bail. I. 518 (para. 2). See s. 381 below on validating a gift of *musha'* by dividing and giving possession.

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(2) D gives half a mansion by way of gift to R, and delivers it (without dividing the subject of gift); its sale by R would be valid according to the 'Mabsut' of Imam Muhammad.[1]

Apart from the effect of the Contract Act, the principle does not seem to be very strictly observed in the 'Fatawa 'Alamgiri' either.[2]

"If possession is taken of land given by an invalid gift, and it were then made a 'waqf,' it would be lawful, the donee being responsible for the value."[3]

(2) *Incidents of Gifts under the Law of British India.*

(a) *Effect of the Law of Contracts.*

Transfer of property made for natural love and affection is governed by Contract Act.

351. Where the declaration and acceptance of a gift are contained in a document which is registered under the law for the time being in force for the registration of documents in British India, and made on account of natural love and affection between parties standing in a near relation to each other, they constitute in British India a contract,[4] and are governed by the Indian Contract Act, and not by the Muhammadan law of gifts, except in so far as provided by section 1 of the said

Illustration.

H puts his wife *W* into possession of certain property, with the conditions: (*a*) that *W* should collect the rents and profits of the property during her lifetime in lieu of her dower debt; (*b*) that if *W* predeceases H, the dower debt shall be deemed to be paid up (no matter what portion may have been realized by that time); and the properties shall revert to H; (*c*) that if H predeceases *W*, the properties will be *W*'s absolutely. H predeceased *W*. *Held*, that this was neither a hypothecation nor a will nor a 'muhabat,' and that the property belonged absolutely to *W*.[6]

Operation of law in British India.

Sometimes it is not easy to decide how the law operates on a particular transaction or state of facts. From a reference, however, to the Acts which are tabulated at the commencement of the second chapter, it would seem that the course to be followed in British India in the majority of cases is to turn to the real nature of the transaction, however it may be denominated in any system of law; and then to see if any legislative enactment which is applicable to the parties governs the case.[7] Subject to such an enactment the Muhammadan law and usage will prevail; either because the subject is specified as being governed by the Muhammadan law, or under the head of justice, equity and good conscience. It may, however, still be of importance to determine whether a particular transaction

[1] See p. 265, *n.* 9, above.
[2] Bail. I. 520 (*ll.* 17—21).
[3] Bail I. 554 (*ll* 15—17).
[4] Cf. Contract Act, s. 25.
[5] Which provides that any incident of any contract not inconsistent with the provisions of the Act, is not affected by the Act. Cf. *Mahamad* v. *Hasan* (1906), 31 Bom. 143, 149, 150. Cf. *Rahim Baksh* v. *Muhammad Hasan* (1888), 11 All. 1, 2, 4 (para. 4), 8 (*ll.* 1-8).
[6] *Mubarakunnissa* v. *Mansab Hasan Khan* (1911), 33 All. 421.
[7] Cf *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (o. c). 27.

is to be classed under one head or the other, in order to determine whether it was intended to be included under one legislative provision or under another. SECTION 351

Where a gift was purported to be made "in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him," and it was stated that the said Muhammad Hasan was standing in a near relation to the donor, the question of its validity was decided "upon the principles of the Muhammadan law of gift, which admittedly governs this case." It does not appear whether the deed of gift was registered. No allusion is made to the Contract Act, but the Transfer of Property Act, s. 54, is referred to in the judgment.[1] Gifts in consideration of natural love and affection. Past favours.

Nor is the above mentioned case the only one where what appears a gift is governed by the Contract Act; thus where subscriptions are promised for a public or charitable object and on the strength of the promise, liabilities are incurred by the promoters of the object, such subscriptions may be recovered by suit;[2] or where there is a compromise, there being consideration for the transfer of property, though the transfer may take the form of a gift, it is a contract, and the conditions will be enforced;[3] or where a dispute between a Shiah husband and wife about 'mahr' is referred to arbitrators, and they transfer the absolute ownership of the husband's property 'in praesenti' to the wife under a registered award, though the husband does not give possession to her, reserving (as the award permits him to do) the use of the property to himself during his life, the wife becomes owner of the property.[4] Other cases. Promised subscriptions when recoverable.

(b) Effect of the Law of Trusts.

352. Where a gift is purported to be made by a Mussulman, and the donee gives an undertaking to do something, the gift and the undertaking may form valid considerations for each other, and may be enforced in the Courts of British India, as an agreement raising a trust, and constituting a valid obligation to perform the undertaking.[5] Condition to gift may be enforceable as trust.

'UMJADALLY *v.* MOHUMDEE BEGUM': DISTINCTION BETWEEN 'CORPUS' AND PRODUCE.

This section is based on the following passage in a judgment of the Privy Council. The significance of the several grounds taken by their lordships is apt to be overlooked. Each of the grounds is, therefore, marginally noted with some particularity. Their lordships say: "It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahomedan law, reserving not the dominion over the 'corpus' of the property, nor any share of dominion over the 'corpus,' but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan law. The text of the 'Hedaya' seems to include the very proposition and to negative it. The thing to be returned is not identical but something Gift referring to 'corpus' not produce. Q. 1. Whether incomplete? A. Produce distinguishable from 'corpus': hence reservation of produce does not affect completion of a gift of

[1] Cf. p. 266 *n.* 5 above.

[2] *Kedar Nath* v. *Gorie Mahomed* (1886) 14 Cal. 64.

[3] *Abbu-bekar bin Haguda Hajisaba* v. *Maibibi*, (1869), 6 Bom. C. A. (A. C. J.) 77; and cf. *Mahummadunnissa Begum* v. *J. C. Bachelor* (1905) 29 Bom. 428.

[4] *Muhammad Talib Husain* v. *Inayat Jan* (1911), 33 All. 683; cf. *Ingan Lal* v. *Muhammad Husain* (1891) 13 All, 409.

[5] (*Nawab*) *Umjad Ally Khan* v. (*Mussumat*) *Mohumdee Begum* (1867) 11 Moo. I. A. 517, 548; 10 W. R. (P.C.) 25. Cf. (*Nawab*) *Ibrahim Ali Khan* v. *Ummat-ul-Zohra* (1896) 19 All. 267; 29 I. A. 1.

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Q. 2. Whether it is a gift with a repugnant condition?—

A. (*a*) If so Muhammadan law would defeat condition, not gift.

(*b*) But in India the agreement on valid consideration, hence even condition enforceable as contract.

Intention of parties must be given effect to if not unlawful

The passage from the 'Hidaya' applicable on general principles.

different. See 'Hedaya' tit. 'Gifts,' Vol. III. Book XXX. p. 294,[1] where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use [of the whole indivisible article] for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life is to be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahomedan law defeats not the grant, but the condition. Hedaya, tit. 'Gifts,' Vol. III. Book XXX. p. 307. But as this arrangement between the father and the son is founded on a valid consideration,[2] the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust,[3] and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the 'Hedaya,' and the transfer is complete. The Mahomedan law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion, unsupported by authority; but it is to be observed, that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties."

This decision of the Privy Council must influence the law of gifts in many directions, which will be considered later. In this place, however, it must be pointed out that the Privy Council rely upon the quotation from the 'Hedaya' merely for meeting the argument that the gift was bad because (1) it had not been completed and (2) that in its terms it was such that it could not have been completed. They do not rely upon it when considering the second objection to the gift, viz., that it ought to be treated as a conditional gift. To this second objection their reply is twofold, (*a*) that the Muhammadan law would defeat the condition, and not the gift, and (*b*) that in India the condition would be enforceable as raising a trust.

(*c*) *Effect Transfer of Property Act.*

Transfer of Property Act

353. Sections 5 to 53, and 122 to 128 inclusive of the Transfer of Property Act[4] do not affect any rule of Muhammadan law; but the rest of the Act applies to Mussulmans.

[1] Hed 483 (col. ii. para. 3) · This passage refers to the rule of Hanafi law that a gift of an undivided part of property which is not capable of division is not void. To this rule the objection is raised, that the reason why undivided parts of property are not allowed to form the subject of gift, is that "the donor incurs a participation in the property"; and that this reason would apply to indivisible property as much as divisible property. The author of the *Hidaya* replies to this objection in the words cited by the P. C. Those words, therefore, are a justification of the relaxation of the doctrine of *musha'* in cases where the property is indivisible.

[2] Neither the Contract Act I. of 1872 nor the Trusts Act II. of 1882 had then been enacted.

[3] Sir R. Wilson says: "Here the ground seems to be entirely shifted, and the transaction regarded not as a gift in the ordinary sense of the term, but as a transfer for consideration. in the language of Muhammadan law, a *hiba bil 'iwaz*." [A *hiba bil 'iwaz* is not a transfer for consideration, but consists of two reciprocal gifts.] "But, with submission, it seems hardly consistent with principle, or with ordinary use of language, to treat the return of a part of a thing as consideration for the transfer of the whole [see s. 408 on subject of *'iwaz*] and the income . . . is, to all intents and purposes part of that property . . . I do not pretend to understand the reasoning by which the conclusion was reached." "Anglo-Muhammadan Law," 335, s. 315.

[4] I.e. Chapters II. and VII. "Transfers of Property by Acts of Parties," and "Gifts" respectively. See s. 129 of the Act.

(*d*) *Effect of the Law by which the Donee is Governed.* SECTION 354

354. Where a Mussulman makes a gift to a donee who is governed by a law of property other than Muhammadan law, the subject of gift is impressed with the incidents of that law, and does not continue to be subject to the incidents of Muhammadan law, after the completion of the gift.[1] Law of donee.

Thus where one Uttotti, a Mussulman, in order to make a gift to his wife and children, purchased property in the name of his wife Ayissa, though the property was purchased in the name of Ayissa alone, it was found that the gift was intended for her children as well, and it was held, that, as she was governed by the Marumakkattayyam law, the property became the exclusive property of Ayissa, and her children, but with the incidents of 'tarwad' property.[1] Example.

It need hardly be stated that "the principles applicable to a purchase by one member of a joint Hindu family from another, are not applicable to Muhammadans."[2] Property, held by Muslims who are governed by Hindu law may however be subject to the incidents of Hindu law, and not of Muhammadan law, as where a Khoja or Memon governed by Hindu law, possesses joint ancestral property. Joint family property. Khoja or Memon.

(*e*) *Effect of Equity, Justice and Good Conscience.*

355. Equitable doctrines and principles prevailing in England, such as that by which the defective execution of a deed is aided, may be applicable to a gift governed by Muhammadan law, especially where it is made through a trust. Equitable doctrine of defective execution.

Illustration.

On the 7th January 1886 one JP, a Khoja Mussulman, executed a deed of trust with a life-interest to himself, without impeachment of waste; after himself upon trust to pay the net income to N (then his only son), subject to certain rights of residence, and payments of allowances to the wife and daughters of JP. "In the event of N having a son, there was to be a re-arrangement in respect of all that followed in the settlement; failing male issue to N, then the corpus was to be divided into ten portions, which were given to various donees, four-fifths being directed in that event to charity . . . A. the end of the settlement there was the usual revocation clause appropriate to all English voluntary settlements, in common form. Thereunder the settlor or donor reserved to himself full power of revocation during his lifetime, signed by writing, and also power to declare new trusts by such signed or any other writing." On the 28th October 1886, another son C (the plaintiff), was born to JP, who then became desirous of altering the trusts, and a new trust deed was prepared on the 21st July 1887, approved on the 24th,

[1] ***Pattatheruvath Pathumma*** v. *Munnam* ***Kunniyil Abdulla Haji*** (1907) 31 Mad. 228; ***Kunhacha Umma*** v. *Kuthu Mammi Haiee* (1892), 16 Mad. 201, 204 (para. 4), 206, 207 (F. B.); see also *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* (1906), 29 Mad. 322.

[2] *Mahamad* v. *Hasan* (1906), 31 Bom. 143.

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engrossed on the 29th, and taken on that day for execution. A blunder was discovered in the engrossment, and it was to be re-engrossed, but before this could be done and executed, JP died, i.e., at 7-30 p.m. on the 29th. By the new deed, after the death of PJ, N and C were to hold the trust properties as members of a joint and undivided Khoja family. During the lifetime of JP and N, they were respectively in possession, of the trust properties : it was alleged by the defendants that they were in possession as trustees, but the court held it to be proved to be otherwise. C, on coming of age, filed this suit for a declaration that either the first deed was altogether void, or he was entitled to be placed in the same position in which he would have been if the new trust had been declared. *Held* (*a*) that the life-interests in favour of JP and N were valid ;[2] (*b*) the general rule is that the power of revocation is inherent in the donor of every gift with "innumerable exceptions" ; (*c*) that the gifts following N's death were contingent, and therefore void ; (*d*) that the defective execution of the new trust should in this case be aided, as it was defective not through any fault on the part of the person intending to execute it, but by reason of an act of God, and that therefore the second deed ought to be effectuated by the Court to the extent of making it binding upon the conscience of the trustees.[1]

Applicability of English law

From one point of view the present section is merely the application of s. 12 above : It has however to be noted that the principles of English law can be applied more freely with reference to those topics on which the Muhammadan law is not expressly required by the legislature to be enforced, but is enforced by the Courts either as equity, or as a religious institution or usage: and the law of gifts is enforced as equity in Bombay. See table preceding p. 29 above.

'Cassamally v. Currimbhai.'

Certain remarks in the extremely important judgment which is the basis of the illustration given above require consideration : It is said "if there were any hope of expecting from the vast entanglement of the Mahomedan law anything like consistent principles or intelligible classifications or accurately expressed notions, it certainly would appear to me that, considering the requisites of a gift are, amongst others, finality and completeness 'in praesenti,' then it might and ought to follow that an announcement on the donor's part that he might at any time during his lifetime revoke the gift would make the donation entirely invalid." This remark is based on a misconception of the theory of Muhammadan law of gifts, see above pp. 261, 262, from which it is evident that its very theory requires that the gift should be completed, and that it should be revocable; it also illustrates the danger of considering that the Muhammadan law can be understood from isolated passages and extracts relating to any particular point that has to be decided. Then again it is said that "it is almost impossible . . . to arrive at any clear understanding of what the real underlying principles of that law upon many of the questions which in an advanced civilization have large and practical importance and are supposed to be answered by a reference to that law, really are. The English Courts are constantly making Mahomedan law for themselves . . .

Revocability of gifts is not opposed to the theory of law.

[1] *Cassamally Jairajbhai Pirbhhai* v. *Sir Currimbhai Ebruhim.* (1911), 36 Bom. 214 ; 13 Bom. L R. 717.—JP represents Jairajbhai Pirbhai ; N, Nur Muhammad, his elder son ; and C his second son, the plaintiff.

which, while it may flatter the conservative prejudices of good Moslems, does not in the least resemble anything which the authors of the Moslem Law had themselves laid down ; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions, with their now highly complex social needs and requirements." First, as regards the difficulty of understanding the law, it must be admitted to be very great. It is presented in British India mostly in the shape of reports of decisions on a set of specific circumstances brought before the Courts. The discussion on the law before the Courts consist in the great majority of cases of the citation of passages from books brought to the notice of many concerned perhaps for the first time, without any attempt at a wide and general survey of the subject : such a survey being considered as much out of place in Indian Courts as in English Courts, where the judges are dealing with their own law, and with one particular branch of it,[1] with which they are familiar in every detail through having practised it for many years. If the original authorities on Muhammadan law are searched, they appear extremely uninviting, without having any punctuation or division into paragraphs or difference of types, or marginal or footnotes.[2] Secondly with reference to the allusion, conscious or unconscious, to the controversy whether judges make the law or merely interpret it, it would be presumptuous (even if it were possible) in this work to attempt to contribute to the literature dealing with it ; but in so far as the allusion is based on the assumption that this mode of making the law is a peculiarity of English law, not shared by Muhammadan law, it would probably not have been made, had the first general principles enunciated in the Quran, or 'Sunna,' and the effect given to them in the practice of the Prophet or by his approval, followed by the extension of it through 'ijma'' and 'qiyas,' and the development of it by 'ihtihsan' or 'istislah,' and finally the full result of it as expounded in the 'fatawa' of the Qazis—had these stages in the growth and development of Muhammadan law been present to the mind of the learned judge, he may then have been induced to take the view that has been consistently put forward in this work, which is opposed to every criticism, on the basis that the expositions of the principles of Muslim Jurisprudence to which lives were devoted, as to a task of religious duty, should contain any inconsistencies of so glaring a nature as may be discovered on such casual attention being given to it as it generally receives at present. He might also have then come to believe that the prejudice is on the part of those who think that because it is a characteristic of English law to expand, it must be a characteristic of Muhammadan law to be absolutely rigid, and that all expansion of the latter must be from forces brought to its aid from English law. Then, with reference to the conservative prejudices of good Muslims being flattered by the expositions of their law in the English Courts, can the learned judge's remarks be supported in the light of the criticisms levelled against the expositions of Muslim law by even so

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Original texts.

Expansion through decisions.

Forces of expansion within

Decisions of English Courts.

[1] E.g., common law, or criminal law, or equity.

[2] The early printed books, before printing became a fine art in Europe, and the MSS. of a prior date, present the same characteristics. Even when an English lawyer refers to the more ancient authorities on his own law, expressed in his own language, he is called, with more or less contempt, a black-letter lawyer.

SECTION 355 exalted a tribunal as the Privy Council, and even on a question which seems to Mussulmans so elementary as that of 'waqf ba farzandan'? But prejudices apart, it is submitted that the first duty of the Court is to grasp the real principles of Muhammadan law, such as they are, and then introduce any new principle, if necessary or expedient.

Method and consistency of Muhammadan law

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

Muhammadan law and modern wants.

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

Though the remarks made above have seemed necessary in order to justify the very existence of Muhammadan law in British India no objection can, it is submitted, be taken to the points decided in the case referred to (except in so far as the inadvertence mentioned in the footnote[1] is concerned). It is clear that the expansion of Muhammadan law must in India necessarily take its colouring from English law. Yet it would be an extreme hardship on the Mussulmans if the whole foundation of their law were liable to be shaken and made uncertain on the ground that the law is unintelligible, or inconsistent, or primitive.

(*f*) *Creation of Joint Tenancy.*

Joint tenancy.

356. *Semble*, a gift may be validly made of undivided [immovable[2]] property to two or more Mussulman donees as joint tenants (without discrimination of shares); and where an intention is shown on the part of the donor to give the property in

[1] "A Muhammadan may devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner, the usufruct of the property." (*Ib.* p. 762.) The word *waqf* is no doubt inadvertently used. Under a *waqf* except according to Abu Yusuf's exposition of Hanafi Law, the settler cannot reserve any benefit to himself. Hed. 237; Bail. I. 667, II. 218. The parties in *Cassamally's* case being governed by Shiah law it would have been invalid if it were held to be a *waqf* (which it certainly was not); as all the parties were interested in upholding the validity of the life interest (see *ib.* 739 Inverarity *arg.*), the point no doubt escaped the attention of the judge.

[2] The decisions on which this section is based do not seem to refer expressly to immovable property. But they are in terms based on the English law and joint tenancy is an incident of real (or immovable) property.

the whole subject of gift to each of the donees, it will be given effect to as creating a joint tenancy.[1] SECTION 356

In a Bombay case [2] it was stated that the property had been bequeathed to GR and GA as joint tenants, and that on the death of GA the tenancy was not severed, but that it continued between GR and the heirs of GA; then GR made a gift of the whole property to GM, and it was held that this gift was valid, subject to the right of GA's heirs therein.

(g) Creation of Vested Remainder.

357. It has been assumed by the Privy Council [3] that a Mussulman may by deed confer a definite estate like what would be called in English law a vested remainder in succession to a previous life estate.[3] Vested remainder.

§ 3.—Parties to a Gift.

(1) Competence of Donor.

358. No person can make a valid gift who has either not attained puberty, or is not of a sound mind.[4] *Quaere*, whether a gift purported to be made by a person who has attained puberty, but who is a minor under the Indian Majority Act is valid, or voidable, or void. Competence of donor. Puberty Minority.

The question as to the effect of the Indian Majority Act on the age of competence as to various matters has been previously discussed, and need not be repeated here.[5]

It may be pointed out that English law differentiates between the acts of minors and of lunatics. A gift by an infant is merely voidable,[6] but by an idiot or lunatic so found is void.[7] Under Muhammadan law gifts by infants and by lunatics are alike void.

It need hardly be said that a married woman does not occupy a special status in Muhammadan law, and that gifts by her are in the same category as by any other person [8]

359. Where a Mussulman who is in insolvent circumstances purports to make a gift with intent to defraud, defeat, or delay his Insolvent circumstances.

[1] *Rajabai* v. *Ismail Ahmed* (1871), 7 Bom. H. C. R. (O.C.J.) 27. (per Sargent J.) See also *Valimia Alimia* v. *Gulam Kadar Mohidin* (1869), 6 Bom. H. C. R. (A C.) 25, and s. 379 below.

[2] *Golam Jafar* v. *Masludin* (1880), 5 Bom. 238, 239 (*l.* 7 of para. 4).

[3] *Umer Chander Sircar* v. *Mussumat Zahoor Fatima* (1890), 17 I. A. 201. In this case both parties contended that the vested remainder was good: and the only question at issue was whether it was capable of attachment; so that the remarks of the P. C were *obiter*. The question of limited interests is considered at length below. See ss. 444 *et seq.*

[4] Hed. 525 (col. ii.); Bail. I. 508, II. 203 (*ll.* 10-13). In *Amtul Nissa Begum* v. *Mir Nurudin Hussein Khan* (1896), 22 Bom. 489, the gift was originally by a minor, ratified after attaining majority.

[5] See pp. 46, 186, 222-223, above.

[6] *Zouch* d. *Abbot* and *Hallet* v. *Parsons* (1765) 3 Burr. 1794; *Allen* v. *Allen* (1842), 2 Dr. & War. 307.

[7] *Elliot* v. *Ince* (1875), 7 De. G. M. & G. 475; *Re Walker* [1905], 1 Ch. 160 (C.A.)

[8] Cf. *Luteefoonissa Bibee* v. *Rajaoor Ruhman* (1867) 8 W. R. 84.

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(2) The Donee of a Gift.

(a) Competence.

Competence. **360.** Any person capable of holding property may be the donee of a gift.

(b) Gift to Heirs and Children.

Gift to heirs. **361.** (1) There is no distinction between the legal incidents of a gift, whether the donee is persumptive heir of the donor or not.[2]

Unequal gifts to children abominable. (2) It is lawful[3] but abominable for a Mussulman to prefer one child over another in making gifts,[4] unless preference is given to a child who is superior in religion or learning,[5] without any intention of injuring any of them. Where a gift is made by a Musulman of the whole of his or her property to one child, it is lawful judicially, but it is sinful to do so.[6]

This section may be of some applicability where equitable reliefs are asked for.[7] In law the gifts referred to are valid, and as the law allows alienation so as to defeat succession, "the design to alter, and so in one sense to defeat the disposition of property, is simply a design to conform to the law, while working out an unforbidden design."[8]

(c) Gift to Unborn Person.

Gift to unborn person. **362.** A gift to a person not in being is void[9] but limited interests may be created in favour of persons who are not in being; provided that when the interest given to such persons opens out they are in being.

1 Void in in Shiah law. There does not seem to be any reference to unborn persons in the texts, except where limited interests are dealt with. As the 'hiba' or gift of the whole

[1] See, however, Macnaghten, 217 (case 15) APPX. p. 441, No. 45. *Azimunnissa* v. *Dale* (1871) 6 Mad. H. C. R. 456, 468, 469. See also Ameer Ali, I. 16-18. The Transfer of Property Act, s. 53, applies to prior as well as to subsequent transferees: that section does not apply to Muslims. Cf. (*Nabob Ameruddaula Muhammad Kukya*) *Hussain Khan Bahadur* v. *Nateri Srinavasa Charlu* (1871) 6 Mad. H. C. R. 356 *Doe, dem. Ramtonoo* v. *Bibee Jinut* (1843) 1 Fulton 152. Cf. *Chunder Madhub Doss* v. *Ameer Ali* (1876) 25 W. R. 119.

[2] *Meyajee Alleebhoy* v. *Metha Nuthoo* (1832), See. Rep. 80; Morley Dig. I. 267 (s. 46).

[3] *Golam Jafar* v. *Masludin* (1880), 5 Bom. 238, 242-243, where the intention was to "disinherit" one of the sons.

[4] Bail. II. 205 (*ll.* 6-8,) 26-27; I. 529.

[5] See *ante* pp. 24, 50.

[6] Bail. I. 529.

[7] *Nizamuddin* v. (*Mussumat*) *Zabeda Bibi* (1874), 6 N. W. 338, 340, 341. Cf. *Cassamally* v. *Sil Currimbhai* (1911), 36 Bom. 214.

[8] (*Nawab*) *Umjad Ally Khan* v. (*Mussumat*) *Mohumdee Begum* (1867), 11 Moo. I. A. 517, 10 W. R. (P.C.) 25. *Mahomed Zuhurul Huq* v. *Butoolun* (1864), 1 W. R. 79: *Khajooroonissa* v. *Rowshan Jehan* (1876), 2 Cal. 184; 3 I. A. 26; W. R. 36. affirming 5 W. R. 4.

[9] *Chekkonekutli* v. *Ahmed* (1886), 10 Mad. 196. *Abdul Cadur* v. *Turner* (1884), 9 Bom. 158. *Mahoumd Shah* v. *Official Trustee of Bengal* (1909), 36 Cal.. 431. Ameer Ali, I. 26. See below s. 449; Cf. s. 485

ownership requires that the donee should take possession, it follows that such a gift to an unborn person is invalid. SECTION 362

A gift was purported to be made, subject to a prior life interest, to one Pathuma "and to children born to her." It was held[1] that the gift to Pathuma was void, (1) because it was contingent, being subject to the life-interest; and (2) assuming that a gift would be valid subject to a previous life-interest, it would be invalid, because (*a*) gifts to all unborn children must be contingent, (*b*) the gift to Pathuma could not be defined as it would depend on the number of children that might be born to her, and "no one could make seisin for an indefinite number of future children."[1] Example.

Future illegitimate children cannot in England be donees of gifts[2] on the ground of public policy. English Law.

(*d*) *Gift to Mosque or other Institution.*

363. A gift may be made to a mosque or other institution.[3] Gift to 'masjid' or other institution.

"A man gives money for the repairs of a 'masjid,' and for its maintenance, and for its benefit. This is valid; for if it cannot operate as a 'waqf' it operates as a transfer by way of gift to the 'masjid' and the establishing of property in this manner to a 'masjid' is valid, being completed by taking possession. . . If he say 'I have given my mansion to the masjid,' it is valid as a transfer requiring delivery. If he should say, 'this tree to the masjid,' it would not belong to the 'masjid' until delivered to the manager of the 'masjid.'"[3]

(*e*) *Gift to Person holding Fiduciary Relation.*

364. Where the donee stands in a fiduciary relation to the donor, or the relation between the parties is such that the donee is in a position to dominate the will of the donor,[4] the Court will not give effect to the gift but will declare it void,[5] unless the donee can show to its satisfaction that the donor had competent and independent advice in making the gift.[6]

(*3*) *Agents of Parties.*

365. An agent may be validly authorised by the donor to make a gift, and to transfer possession of the subject of the gift on his behalf.[7] Agency in gifts.

[1] See p. 274, *n.* 9 above.

[2] *Hill* v. *Crook* (1873) 6 H. L. 265; *Crook* v. *Hill* (1876) 3 Ch. D. 573; *Ebbern* v. *Fowler* [1909] 1 Ch. 578 (C. A.).

[3] Bail. I. 607 (para. 2); Cf. *Ismail Arif* v. *Mahamed Ghous* (1893) 20 Cal 834; *Banubi* v. *Narsingrao* (1906) 31 Bom. 250; 9 Bom. L. R. 91 (penult. para. of judgment).

[4] Cf. Indian Contract Act, ss. 16, 19A. and English books on equity on the subject. Only a few cases are cited below to illustrate the incidence of this well-known principle.

[5] It is not void *ab initio*: *Allcard* v. *Skinner* (1887) 36 Ch. D 145.

[6] *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H C.R. (O.C.J.) 27. *Sumsoodin* v. *Abdul Hoosein Kalimuddin* (1906), 31 Bom. 165 (relating to release by daughter of her right to inherit). Cf. also *Nizamuddin* v. *Zabeda Bibi* (1874) 6 N. W. 338 (*Moulvie*) *Wajeed Ali* v. (*Moulvie*) *Abdool Ali* [1864] W. R. 121, 127 (col. ii, para. 1).

[7] *Fatawa 'Alamgiri*, *Hiba* ch. XI., giving instances and details which seem unnecessary, or inapplicable in British India (Cf. *Mohinuddin* v. *Manchershah* (1882) 6 Bom. 650 (662, last 2 sentences, para. 3) Ameer Ali, I. 26.

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It may be of interest to note here the case of 'Gangbhai *v.* Thaver Mulla,' in which a Khoja lady, Rahimatbai, devised "one-fourth to be disposed of in charity as my executors shall think right." The disposition was held to be valid, and Sausse C. J. directed a scheme to be framed.[1]

§ 4.—Subject of Gift.

(1) What may be Transferred by way of Gift.

Gift allowed of any property

366. A gift may be made of any existing property,[2] whether capable of or incapable of manual delivery, and [where the property is immovable,] whether the donor's rights over it amount to full ownership, or consist of merely a limited interest in it.[3]

Subject of gifts must be in existence.

Explanation I—The subject of the gift must be in existence, at the time when the gift is purported to be made,[4] otherwise the gift so purported to be made is void. A gift cannot be made of anything to be produced in future,[5] notwithstanding that the means of its production may be in the possession of the donor.[6]

Subject of gift must be owned by donor, and under his control.

Explanation II—The subject of the gift must be owned[6] by the donor, and under his control[7] at the time the gift is made.

Illustrations.

(1) D purports to give to R "the fruit that may be produced by my palm tree"; "what is in the udder of this sheep": "the butter in milk"; "the oil in sesame"; "the flour in wheat," and D authorises R to take possession of the subject of the gift. The gifts are invalid in each case,[8] in Sunni law.[9]

(2) D says to R, "I give thee the pearl which I have lost, recover and take it." According to Abu Yusuf this is a void gift, being the gift of a mere speculation. Zuffer, however, holds it to be valid.[11]

[1] (1863) 1 Bom. H. C. R, 71.

[2] But not services nor natural love and affection. *Rahim Bakhsh* v. *Muhammed Hasan* (1888) 11 All. 1, 5 (para. 2), 6 (paras. 2, 3).

[3] *Mullick Abdool Guffoor* v. *Muleka* (1884) 10 Cal. 1112. *Anwari Begum* v. *Nizamuddin Shah* (1898) 21 All. 165, 171 (*ll.* 1-7); and cf. *Kekewich* v. *Manning* (1851) 1 De. G. M. & G. 176, (C.A.) (Knight Bruce L. J.) 187, 188. See also *Mahomed Faiz Ahmed Khan* v. *Ghulam Ahmed Khan* (1881) 3 All. 490; 18 I. A. 25; *Sahibunnissa* v. *Hafiza Bibi* and *vice versa* (1887) 9 All. 213 (gift of pension under Pensions Act, s. 7, cl. 2, valid).

[4] Bail. I. 508.

[5] E.g., Rs. 4,000 annually out of an undivided share in jahgir villages, *Amtul Nissa Begum* v. (*Mir*) *Nurudin Hussein Khan* (1896) 22 Bom. 489.

[6] *Mahomed Noor Khan* v. *Hur Dyal* (1866) 1 Agra 67: widow holding possession of her husband's property in lieu of dower cannot make a gift of it.

[7] Bail. I. 529.

[8] Bail. I. 508 (*ll.* 10-15). In Hed. 484 (col. i. para. 1) it is stated that flour which is not yet ground, or oil which is not yet pressed, being not in existence at the time of gift, the gift is altogether void; whereas gifts of milk in the udder, of wool on the goat's back, of grain or fruit upon the ground, and of fruit upon trees, are gifts of undefined parts (*musha'*) and hence capable of being validated by subsequent division and possession.

[9] Some of them are invalid on the ground of *musha'* which doctrine is not known to Shiah law.

[10] Macnaghten, 201, (case 6); *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (1868) 9 W. R. 257; *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, 3 (para. 2), 8 (para. 8), 9 (paras. 2, 3), 11 (para. 2).

[11] Ameer Ali, L. 87, citing *Fatawai Qazi Khan*, IV. 285.

(3) On the 1st of January D purports to make the gift of a house to R, and puts R in possession of it. On the said date the house does not belong to D, but to X. On the 1st of February, X dies, and D inherits the house. On the 1st of March, D sells the house to Y. The sale is valid because the gift was void.[1]

(4) In *illustration* (3) if D had made the gift on the 2nd of February, believing that X was living, and that the house belonged to X, the gift would, nevertheless, have been valid, and the sale void.[1]

Muhammadan law allows transfers of rights in property without consideration.

This section is quite in accordance with texts on Muhammadan law, where we find it stated, e.g., that "as the profits of a thing may be transferred by a person during his lifetime, with or without consideration, so they may in like manner be transferred after his death."[2] There were, however, doubts expressed on the point in the Courts of India, which may have been justified owing to the notion that the term 'hiba' is exactly equivalent to "gift," and that the former expression connotes all transfers of property or rights without consideration, which were known to Muhammadan law. 'Hiba' is defined as conferring a "right of property"[3] ('tamlik' from 'milk' ownership), and it is stated in the 'Hidaya' that "'hiba' in its literal sense signifies the donation of a thing from which the donee may derive a benefit."[4]

Donor must own and possess subject of

"'At common law a man could not grant what he had not': Perkin's Profitable Book (translated 1642), where the doctrine is stated in all its crudity;"[5] similarly in Muhammadan law a gift of property, not at any time in the possession of the donor, but in that of a trespasser (and consequently never delivered by the donor to the donee) is void,[6] and the fact that the donor had brought an action to recover the lands forming the subject of the gift (pending which action, he died) does not make the gift valid,[7] nor does the execution of a deed of gift, the subject of which are lands in the possession of a third party, who claims them adversely to the donor, give the donee a right to sue for the lands after the death of the donor.[8] But where a mother makes a gift of her one-sixth share of inheritance in her daughter's estate, to the children of the daughter, and authorises the donees to take possession, and "in fact they do take possession," the fact that the mother herself has never been in possession does not invalidate the gift.[9]

Gifts of rights in

A gift has been held to be validly made where its subject has consisted of shares in villages which were under attachment by the Collector for arrears of revenue; of rights in 'zamindari' lands,[10] of 'zamindaris,' shares in 'zamindari' lands let out to tenants, 'lakhiraj' property let out to tenants, 'malikana' rights,[11] and rights to collect rents and profits; and of a right to

[1] Bail. II. 207.
[2] Bail. I. 652.
[3] Bail. I. 507.
[4] Hed. 482. See above.
[5] *Tailby* v. *Official Receiver* (1883) App. Ca. 523, 525 (argument of Counsel).
[6] *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1.
[7] Macnaghten, 201 (case 6).
[8] *Meherali* v. *Tajudin* (1883) 13 Bom. 156.
[9] *Mahomed Bukah Khan* v. *Hosseini Bibi* (1888) 15 Cal. 689, 702; 15 I. A. 81; and cf. *Kalidas* v. *Kanhya* (1884) 11 Cal. 121, 131; 11 I. A. 218.
[10] *Sajjad Ahmad* v. *Kadri Begum* (1895) 18 All. 1.
[11] *Mullick Abdool Guffoor* v. *Muleka* (1884) 10 Cal. 1112. A *malikana* right is "the right to receive from the Government a sum of money which represents the *malik's* share of the profits of a revenue-paying estate when from his declining to pay the revenue assessed

SECTION 366 receive rents of shares in revenue-paying villages[1] and a right to receive one-third share of the profits of certain villages after payment of Government revenue, village expenses, and costs of collection.[2] "Similarly," says Mr. Ameer Ali, "under the Mahommedan Sovereigns assignments of revenue which were called 'Suyurghûl' grants, were often transferred by the grantees."[3]

Of course, where the subject of gift consists of rights in property not amounting to full ownership, all the control that the donor is required to have is the authority to transfer the rights in question.

Donor's powers

367. *A Mussulman may give the whole of his property by gift to any person;*[4] *and his expectant heirs cannot avoid the gift, even though the gift may have the effect of evading the Muhammadan law of succession.*[5]

...pectant ...
...' rights.

Gifts made in death illness are governed by the law of wills. See below.

(2) Rights in Property as the Subject of Gift.

Property may be transferred subject to limited interest.

368. The grantor or grantee of a limited interest in property under section 446 below may validly dispose of or transfer his interest in the subject of the grant by way of sale or gift or other mode of alienation.[6]

Explanation—Where a limited interest in any property has become vested in the grantee, the transfer or alienation of the said property by the grantor does not affect the said interest,[7] and the transferee or alienee of the said property takes it subject thereto.

Illustration.

By a consent decree it was ordered that a certain house be held and enjoyed by *U* for life, and after her death it be sold and the net proceeds divided amongst RA, RB, RC, RD, RE and RF. RA purported to take a transfer of the interests (under the decree) of RC and RD on the 11th of January 1898, of RE and RF on 11th June 1903, and of RB on 27th March 1905. The last transfer alone was made after the death of *U* (who died on 2nd December 1903). *Held*, (*a*) that a vested remainder may be created under Muhammadan law, (*b*) that life estates are known to Shiah law, (*c*) that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, or otherwise, provided that there is no

by the Government or from any other cause his estate is taken into the *Khas* possession of Government or transferred to some other person who is willing to pay the rate assessed." *Ibid.* 1125 Cf. *Rameshwar Singh* v. *Sec. of State for India* (1911) 39 Cal. 1, 20-24. (P.C.)

[1] *Muhammad Mumtaz Ahmed* v. *Zubaida Jan* (1889) 11 All 460; 16 I. A. 195.

[2] *Jiwan Baksh* v. *Imtiaz Begum* (1878) 2 All. 93.

[3] "Mahommedan Law," I. 28.

[4] Cf. *Mt. Suherbun* v. *Sheikh Khoda Buxsh* (1835) 6 S. D. A. Rep. 44; Morley, I. 268; s. 50.

[5] (*Nawab*) *Umjad Ally Khan* v. *Mohumdee Begum* (1867) 11 M. I. A. 517, 546; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All. 439, 33 I. A. 68; *Gulam Jafar* v. *Masludin* (1880) 5 Bom. 238.

[6] Bail. II. 227 (para. 2). *Banoo Begum* v. *Mir Abed Ali* (1907), 32 Bom. 172, 178. 4, 5, 9.)

[7] *Ibid.* (Exhibits 6, 7, 8).

interference with the particular estate, and (*d*) that it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.[1]

369. The right to collect a specified share of the rents of undivided land may validly form the subject of a gift, and section 375 below does not apply to it.[2]

Authority to collect specified share of rents may be subject of gift.

370. Where the subject of the gift is mortgaged, and the mortgagee is in possession, a gift purporting to give the mortgaged property is invalid, unless constructive possession of the mortgaged property be given to the donee in accordance with section 395 below; and a gift may be validly made of the equity of redemption by the donor completely transferring it.[3]

property and equity of redemption.

This section seems to follow so clearly from ss. 367, 369, and 395 that it would have been unnecessary to state the proposition contained in it, had it not been for the decisions which are referred to below, one of which lays down, and the other has been supposed to lay down, otherwise.

Gift of mortgaged property when the mortgagee is in possession.

It will be noticed that the answer to the question whether a gift can be made of mortgaged property when the mortgagee is in possession of it, rests on whether or not such possession can be given of the mortgaged property as is required to validate a gift. It has been said "that the owner of property which is in the possession of a mortgagee . . . cannot make a gift of it," that where the mortgagee has been in possession "it follows as a necessary consequence that the mortgagor "was not in possession and could not, therefore, under Mahomedan Law pass it by way of gift."[4]

'Mohinuddin v. Manchershah.'

The remarks cited above were made in a case where the facts were as follows: In 1871 certain lands were mortgaged to one Manchershah. After the mortgage, one Nurbibi claimed to be a coparcener with the mortgagors, and as such entitled to a share in property of which the said lands formed part, and she obtained a decree for partition in 1876. In execution of that decree the said lands were measured and marked out with pegs, as the land which fell to Nurbibi's share. Manchershah, the mortgagee, protested against this, but Nurbibi took no steps to eject him, or "to get rid of his lien on the land in his possession."[5] On 10th February 1877 she purported to make a gift of the land to Mohinuddin. Subsequently the mortgagee having obtained a decree against his mortgagors, proceeded to attach the land. Mohinuddin (the alleged donee of the gift) applied unsuccessfully to have the attachment raised, and then brought a suit to establish his right of proprietorship in the lands (through the gift) and for a declaration that the mortgagee was not entitled to sell and attach

[1] *Banoo Begum* v. *Abed Ali* (1907) 32 Bom. 172.

[2] *Ameeroonissa* v. *Abadoonissa* (1875) 2 I.A. 87; 15 Ben. L. R. 67; *Jiwan Buksh* v. *Imtiaz Begum* (1880) 2 All 93. *Kasim Hussain* v. *Sharifun Nissa* (1883) 5 All 285; *Mullick Abdool Gaffoor* v. *Mulcka* 10 Cal. 1115, 1126. Cf. Bail. 1. 521 (paras. 1, 2); also *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) 15 Cal. 689, 702, 15 I. A. 81. *Rahim Baksh* v. *Muhammad Hasan* (1888)

[3] See comment.

[4] *Mohinuddin* v. *Manchershah* (1882) 6 Bom. 650 per Melville J. at p. 661, per Pinhey J. at p. 650-658.

[5] *Ib.* p. 659, per Pinhey J.

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them. Sir R. K. Wilson points out that the question of the validity of a gift of an equity of redemption was not the main issue, and could not have been so, unless Mohinuddin had simply asked to be allowed to redeem the property, or to have the surplus proceeds of the sale handed over to him; but that he as a matter of fact claimed to stop the sale, and to be put in possession of the land without paying off the mortgagee. The learned author for this reason says that the case is not an authority for the proposition that a gift of an equity of redemption is invalid. It must, however, be pointed out that that proposition formed the principle of decision of both the Judges whose opinion prevailed, and in the words of Lord Halsbury, "you cannot get rid of observations such as these in the learned Judges' judgment by saying that they are 'obiter.'"[1]

'Ismail v. Ramji.'

Sir Roland Wilson is, however, of opinion[2] that the same point "was directly in issue in another case,"[3]—in which, on examination, it will be found that it did not arise at all. In that case the question was twofold: (1) whether possession had been given; (2) whether the gift had not in any event been revoked. The second question was answered in the affirmative; this was in itself sufficient to decide the case. As regards the first question it was held that direct physical possession was not given, because it could not be given, but it was also found that there was no transfer to the name of the donee, and that no constructive possession had been given to the donee. The point whether a gift of mortgaged property in possession of the mortgagee is 'per se' invalid (if the point was argued) was not decided, and could not be decided: for the question of the sufficiency or otherwise of such constructive possession as is possible in the case of mortgaged property, which is in the actual possession of the mortgagee, did not arise, the Court having found that even such constructive possession had not been given. On the other hand, the Court referred to constructive possession as a possible alternative which the law allowed.[4]

Indeed, the remarks in the judgment referring to constructive or symbolical possession are sufficiently definite to make this case, in the opinion of the learned editors of the Bombay Law Reporter, an authority for the proposition that constructive possession is recognised in Muhammadan law.[5]

It would, therefore, appear that Mohinuddin's[6] case is the only (and it is not a direct) authority, for the proposition that an equity of redemption cannot be the subject of gift when the mortgagee is in possession. But with reference

[1] "Of course one is familiar with the observation that such and such an opinion expressed by a learned judge was not necessary for the decision of the case. But where a distinction is being drawn between what is lawful and what is not, and when, as in this case, the observations form part of the reasoning by which the conclusion is arrived at, it appears to me that whichever way the decision may be, one part of the judgment is as much an authoritative exposition of the law as the other." *Allen* v. *Flood* (1898) A. C. 1, 76.

[2] "Anglo-Muhammadan Law," 329.

[3] *Ismail* v. *Ramji* (1899) 23 Bom. 682.

[4] *Ismail* v. *Ramji*, 23 Bom 682. In *Mohinuddin* v. *Manchershah* (1882) 6 Bom. 650, 651, the Court said: "The possession which she obtained was only such symbolical possession as could be obtained under s. 224 of Act VIII. of 1859," i.e. the Civil Procedure Code, according to which delivery of land in the occupancy of ryots may be made by the Court ordering a copy of the warrant to be affixed in some conspicuous place, and proclaiming, by beat of drum, the substance of the decree. Compare with this 23 Bom. 684 (*ll.* 6-7)

[5] See headnote (1899) 1 Bom. L.R. 177, 178.

[6] (1882) 6 Bom. 650.

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to this case it was remarked by Mahmood J.,[1] "I may respectfully say that it probably carries the rule of seisin too far." Mr. Ameer Ali [2] says with reference to the case of 'Mohinuddin *v.* Manchershah': "The view taken by the majority of the judges is founded upon an erroneous impression of Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing to preclude the mortgagor from granting his equity of redemption to another." [3] The opinions are, it is submitted, directly supported by the extract from the 'Fatawa 'Alamgiri' which is given in the comment to s. 400, pp 308-309 (Hiba, Chapter XI., last sentence), and it would appear more in accordance with the trend of the more recent cases to say that when the property is in the possession of a mortgagee it can form the subject of gift, and the same kind of possession is required to complete the gift, as is given in cases where the property is in the occupancy of tenants, or of any other person not holding adversely to the donor—i.e., that the gift may be completed by the donor conveying the equity of redemption to the donee, giving notice to the mortgagee that the legal estate had been transferred by him, and letting the donee exercise all the rights of the legal owner.

disapproved.

The following translation is given as it might throw light on the incidents of a mortgage under Muhammadan law :—

Muhammadan law of 'Rahn' or mortgage.

"As to the conditions of 'Rahn': It should be a concrete thing in possession [4] (of the pledgor) which is capable of being taken possession of (by the pledgee) and which could be validly sold, whether it be part of an undivided property [5] or divided property belonging to a single individual, and thus if one mortgages a debt it will not be valid, and so also if he mortgages the use of anything such as the 'sukna' of a house, and the service of a slave. . . And if he mortgages a thing which is not in his possession, it would not be valid. It would rather depend on the permission of the real owner of it, and if he mortgages a thing which he possesses along with another thing, which he does not own, he might do so in regard to the thing that he owns, and as regards the share of the co-sharer he is to depend on his permission (of the owner), and if a Muslim mortgages wine, it would not be valid although it may be in the possession of a 'zimmi' . . . . . and if he mortgages a plot of 'kheraj' land it would not be valid because it does not specifically belong to any individual, so it would not be valid to mortgage any buildings or any implements or trees that stand on it, and if he mortgages anything which cannot possibly be given possession of, as a bird in the air and fish in water, its mortgage would not be valid, and so also if it be such a thing as can be given possession of, but he has not delivered it, and so also if he mortgages with a Kafir a Muslim's slave, or a religious book ; (and some say it is valid) . . . and if he mortgages a 'waqf' it would not be valid. Mortgages are valid during the time of option (during sale)."[6]

[1] *Rahim Baksh* v. *Muhammad Husain* (1888) 11 All. 1, 10. Mahmood J. also pointed out the "distinction between cases where . . from the nature of the gifted property itself, actual possession could not be given to the donee, and cases where such possession might be given to the donee, or actual possession held by the donor."

[2] "Mahommedan Law," 61.

[3] *Anwari Begam* v. *Nizamuddin Shah* (1896) 21 Cal. at p. 170 (per Blair and Aikman JJ.)

[4] *'Ain mamluk* in Arabic.

[5] *Musha'* in Arabic.

[6] *Shara'ya-ul-Islam, Rahn*, Ch. II. p. 184.

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(3) What cannot be Subject of Gift.

'Spes successionis.'

371. The expectation of succeeding to the estate of a living Mussulman cannot validly form the subject of a gift.[1]

Vested remainder.

Explanation I—If the heir's interest has become vested after the death of the ancestor, that heir's interest may be transferred.[2]

Consent to bequest.

Explanation II—A vested remainder in succession to a previous interest, though it may be made liable to be displaced by the happening of some future event, is not such an expectancy in succession by survivorship, or other merely contingent, or possible, right or interest, as cannot be transferred.[3]

Explanation III—This section is subject to the rule of Shiah 'Ithna 'ashari' law under which the expectant heirs of a living person may empower him by will to dispose of property exceeding the bequeathable third of his estate.[4]

Illustrations.

(1) *D*,[5] in the lifetime of her father R, executed a document purporting to be a release addressed to him, in which, after reciting that *D* had a right of inheritance in R's property, and a claim to receive ornaments which *D*'s mother had directed R to give to *D*, she purported to relinquish the said rights and claims in consideration of Rs. 9,000 credited to her name by R in his account books. The document further purported to provide that *D* would have no right or claim on the property of R on his death, that *D* was to receive Rs 250 every year during the lifetime of R as interest on the said sum of Rs. 9,000, and that though she may withdraw portions thereout for urgent purposes, the principal could be demanded only on the death of R for the purpose of purchasing property yielding income, or of depositing the same with interest: and that R "may give to his heirs" the whole of his property subject to a charge for the said Rs. 9,000. The document was signed by *D* alone. R died intestate; and then *D* sued for her share in R's estate, contending that she was not bound by the said document on the ground that it was: (i) void 'ab initio' under Muhammadan law, and otherwise under the law of British India, as *D* purported to give up a mere expectancy, or (ii) that it was voidable (*a*) being an unconscionable bargain by reason of its gross inadequacy of consideration, (*b*) because *D* was an ignorant 'pardanashin' female, and (*c*) R misused his parental authority. *Held* by Jenkins C. J. and Beaman J. (reversing Chandavarkar J.) that *D* was entitled to succeed to R's estate on the following grounds:—(i) The

[1] *Sumsoodin* v. *Abdul Husain* (1906) 31 Bom. 165 (purporting to be a transfer for consideration). See *ill.* (1).

[2] *Muhammadun-nissa Begam* v. *J. C. Bachelor* (1905) 29 Bom. 428 (case of contract, not gift).

[3] See *ill.* (2) to this section.

[4] See Chapter on Wills.

[5] *Sumsoodin* v. *Abdul Husain* (1906). 31 Bom. 165; 8 Bom. L. R. 781. (Chandavarkar J. *ibid.* 252). D is Kalimuddin Amiruddin (whose estate was in question). R Fatmaboo, wife of Gulam Husain Abdul Ali.

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Transfer of Property Act, s. 6 (*a*), provides that the chance of an heir-apparent cannot be transferred; though the section does not apply to Muslims, the Muhammadan law does not conflict with it.[1] By parity of reasoning there cannot be a release of such a chance;[2] nor can the principle that equity considers that to be done which ought to be done apply, where applying it would defeat the provisions of the law (Contract Act s. 23), and to hold by an application of that principle of equity, that the chance had in this case been effectually transferred, would be to defeat the provision of law contained in the Transfer of Property Act, s. 6 (*a*), which consists of a special exception made with reference to such chances: such chances being the first and only exception made in the Act to the general law laid down in it that future property may be transferred.[3] The chance cannot be bound, any more than it can be transferred.[4] (ii) *D* being a 'parda nashin' lady it was requisite that the document should be explained to her; but that it was never explained to her, nor (as her acts showed) understood by her, nor had she any independent legal advice. nor had *D* received any benefits under the document, understanding either that she got the Rs. 9,000 only conditionally, or that the document purported to deprive her of Rs. 25,000 which she would otherwise be entitled to receive as inheritance. (iii) There was undue influence, and abuse of parental authority on the part of R.

(2) On 26th January, 1871, D purported to grant property to his wife *R*, on the terms that if *R* had a child by D, it was to be taken as a perpetual 'mokurruri': in case of no child being born to *R* by D, it was only to be a life 'mokurruri' in favour of *R*, and after *R*'s death it was to go to RA and RB (D's sons by another wife). During the lifetime of D and *R*, a creditor of RA attached RA's right, title, and interest in the said property (no child having been born to *R* by D). Soon after, D died; and on the 22nd September, 1879, the said interest of RA was sold. *Held* that RA had a definite interest in the property like what is called in English law a vested remainder, which did not fall within the description of an expectancy, or of merely a contingent, or possible right or interest.[5] The Privy Council also wished to "guard themselves against being supposed to concur in an argument . . . to the effect that if between the time of attachment, and the time of sale, events should happen which would have the effect of accelerating or enlarging the interest of RA, the judgment-debtor, as it stood at the time of attachment, that aug-

Citing (*Mussumaut*) *Khanum Jan* v. (*Mussumaut*) *Jan Beebee* (1827), 4 S.D.A. 210; *Abdul Walid Khan* v. *Mussumat Nuran Bibi* (1885), 12 I. A. 91, 101.

[2] Citing *Kemp* v. *Kelsy* (1720) Prec. Chan. 545.

[3] "There is nothing fantastic in this: though future property could be bound in equity, yet we find Lord Eldon in *Carleton* v. *Leighton* (1805), 3 Mer. 667, 671, saying that the expectancy of an heir-apparent was not capable of being made the subject of an assignment." *Sumsooddin's* case: 31 Bom. 173.

[4] *Sham Sunder Lal* v. *Achhan Kunwar* (1898), 25 I. A. 183, 189; *Nand Keshore Lal* v. *Kanee Ram Tewarij* (1902), 29 Cal. 355; *Manickam Pillai* v. *Ramalinga Pillai* (1905), 29 Mad. 120; *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54.

[5] *Umes Chunder Sircar* v. (*Musumat*) *Zahur Fatima* (1890) 17 I. A. 201, 208, 209; 18 Cal. 164 Cf. above s. 357, p. 273 & *n*. 3.

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mented interest would not pass by the sale, which purports to convey all that the judgment-debtor has at the time."[1]

Can release operate as consent to will?

The reasoning on which 'Sumsoodin's' case has been decided has been summarised in *ill.* (1) to this section. Attention must be drawn to one or two points. First, that Kalimuddin (R) left no will. Where a will and a document purporting to be a release co-exist, the latter may, under certain circumstances, operate as a consent to the will, in accordance with Shiah 'Ithna 'ashari' law, under which (though not under Sunni law) the heirs may give, during the lifetime of the testator, such consent to a will as is necessary for validating it, if it disposes of more than the bequeathable third,—though that may involve the question (which has still to be decided) whether such consent may validly be given, in general terms authorising any will to be made, or whether the consent must have specific reference to a will already made.

If it does it causes exclusion of heir.

Two considerations (amongst others) must affect the answer to that question: (i) such a release, if taken as a general consent to the will, has a double effect, for it not only enhances the portions of the other heirs, but also excludes the releasing heir from inheritance: Now bequests to an heir (within the bequeathable third) do not require the consent of the other heirs under the 'Ithna ashari' law, but exclusion of an heir from inheritance is strongly opposed to the policy of the law. Bearing these considerations in mind, it would seem that, though the judges make no reference to the circumstance that the 'Ithna 'ashari' law permits the chance of succession to be "bound" in one particular manner, viz., by the heir consenting to the ancestor bequeathing more than a third—still that circumstance could not have altered the decision in 'Sumsoodin's' case; but it is conceivable that in some other case it may affect the result.

Does heir's power to consent to will in life-time of testator make his expectant rights transferable?

This question leads to another consideration: (ii) The decision under reference applies accurately no doubt to the Sunni law, which does not empower any person to make a testamentary disposition (a) of more than the bequeathable third, (b) or so as to disturb the relative shares that his heirs take under the general law; and according to which the apparent exception to this rule is none in reality, for the heirs can validly consent to a will infringing it only after the death of the testator, at which time they have already become entitled to the estate, and then their consent can operate to all intents and purposes as a gift by themselves. The statement, therefore, that the right of an expectant heir cannot, under any circumstances, be bound, is an accurate statement of the Sunni law. Is it equally accurate in regard to 'Ithna 'ashari' law? Can that question be answered in the affirmative consistently with the provision that an 'Ithna 'ashari' Shiah may consent to his ancestor making a will of more than the bequeathable third, and in derogation of the consenting heir's expectant right?

Release and transfer not always the same.

Finally, with reference to the statement that what cannot be transferred, cannot, by parity of reasoning, be released, attention may be drawn to the other clauses of the Transfer of Property Act, s. 6: Clause (*b*) expressly excepts (from the rule prohibiting a transfer of a right to re-entry) the release of such a right. Under clause (*c*) an easement cannot be transferred apart from

[1] *Umes Chunder*, v. *Zahur Fatima* (1890) 17 I. A. 201 208; 18 Cal. 164.

the dominant heritage. Can it be said, that by parity of reasoning, the owner of the dominant heritage cannot release the easement, and that an easement can only be extinguished by transferring the dominant heritage to the owner of the servient heritage. Again, "a mere right to sue cannot be transferred" —cf. clause (*e*)—but it can certainly be compounded for; and is that different from releasing for a consideration? Similar remarks would seem to apply to some of the other clauses of s. 6. Muhammadan law does seem to differentiate between the release and transfer of rights[1]; and the rules applying to the one are different from those applying to the other. SECTION 371

A mere expectancy, such as a 'spes successionis' to property cannot be transferred in England by way of gift (either at law or in equity)[2]; though an assignment of it for value would be supported in equity as a contract.[3] English law.

372. Services cannot form the subject of a gift;[4] provided that a gift may be made of 'mahr,' notwithstanding that its subject consists of services.[5] Services.

373. Natural love and affection cannot form the subject of a gift.[6] and affection.

The proposition seems to be too plain to require to be stated, except for the fact that natural love and affection take the place of consideration under the Contract Act, s. 25; and for some remarks in 'Solah Bibi *v.* Kurim Bibi.'[7]

'MUSHA" AS SUBJECT OF GIFT.

The gift of an undivided part of property ('musha'') which is capable of division, is invalid under Hanafi law. The objection however is not so much that such part is not a proper subject of gift; but it has reference to the transfer of possession being necessarily incomplete owing to the property being undivided. Hence the rules relating to the doctrine of 'musha'' (which are somewhat complicated) are treated under a special head, midway between the law relating to the subject of gift, and to transfer of possession. 'Musha' cannot be subject of gift on the ground of imperfect possession.

§ 5.—The Gift of 'Musha'.'

(1) The 'Musha'' Doctrine under Hanafi Law.

374. According to strict Hanafi law where the subject of a gift consists of a 'musha'' or undivided part of a thing,[8] the gift Gift of 'musha'' (or undivided part of property) invalid if the property capable of division. Except in the cases provided in sections 369, 377-379.

[1] Bail. I. 522, 523, II. 208; Hed. 332, 448, 451, 489.

[2] *Re Ellenborough, Towney Law* v. *Burne* [1903] 1 Ch. 697; *Meek* v. *Kettlewell* (1842) 1 Hare 464, affirmed (1843) 1 Ph. 342. *Re Tilt, Lampit* v. *Kennedy* (1896) 74 L. T. 163 (per Chitty. J.) 164.

[3] *Tailby* v. *Offl. Receiver* (1888) 13 App. Ca. 523, 548.

[4] *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1, 5 (para. 2), 6 (paras. 2, 3).

[5] See s. 94, p. 110 above.

[6] *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. I. 5 (para. 2) (paras 2, 3). (per Mahmood J.) Cf. *Ussud Ali Khan* v. (*Mussamat*) *Olfut Beebee* (1868) 3 Agra 237.

[7] (1871) 16 W. R. 175, 176 (per Paul J.) A *hiba bil 'iwaz* is, as so often, the stumbling block.

[8] But to definite shares in zamindaris, the nature of the right in which is defined, and regulated by the public Acts of the British Government, so that they form, for revenue purposes, distinct estates, each having a separate number in the Collector's books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a definite

SECTION 374 cannot be completed, unless (if the property is capable of division) the part forming the subject of the gift is divided off, [1] and separated from the rest [2]; and possession is then given to the donee of the part so divided off; [3] provided that a gift of undivided property is valid where one of the donees is a minor son of the donor.[4]

Indivisible property.

Explanation I—Where the subject of gift forms part of property which is incapable of being divided off, or is of such a nature that some kind of benefit or advantage can be derived from it so long as it is undivided, which cannot be derived from it after division, there the gift may be validly completed without the said part being divided off.[5]

Shafi'i and Shiah law.

Explanation II—According to the Shafi'i [6] and Shiah [7] law the gift of 'musha'' or undivided property is valid, provided that possession of the subject of gift is given to the donee by the donor vacating it, or withdrawing from its control and permitting the donee to control it.[7]

Illustrations.

(1) D purports to make a gift to R of his share in a house, the share being unknown; the gift is invalid according to Hanafi law.[8]

(2) D makes a valid gift of a house to R. Subsequently he revokes the gift to the extent of half, or other undivided share in it. The gift remains valid to the extent that it is unrevoked.[9]

(3) D makes a gift to R of half of his horse. The gift is valid.[9]

share of the rents from the raiyats, and having a right to this definite share and no more, the rule of Muhammadan law as to *musha'*, which makes the gift of undivided property invalid, does not apply. *Ameeroonissa Khatoon* v. *Abadoonissa Khatoon* (1875) 2 I. A. 87: 15 Ben. L. R. 67; 23 W. R. 208. *Sajjad Ahmad Khan* v. *Kadri Begum* (1895) 18 All. 1. *Kasim Hossein* v. *Sharifunnissa* (1883) 5 All. 285. So a definite share in a pension under the Pensions Act XXIII. of 1871 s. 7, cl. (2) can be assigned. *Sahibunnissa Bibi* v. *Hafiza Bibi* and *vice versa* (1887) 9 All. 213. Cf. *Rahim Bakhsh* v. *Muhammad Husen* (1888) 11 All. 1, 12.

[1] The division or separation need not be made by the donor himself: "if the donor authorizes the donee to make the division with his partner this makes the gift complete (*kamil*)," *Raddul Mukhtar* IV. 780, cited Ameer Ali. I. 44. This refers primarily to a gift to two persons jointly.

[2] E. g. in the case of the two anna share in *Abdul Aziz* v. *Fateh Mahamed Haji* (1911) 8 Cal. 518.

[3] Hed. 483, Bail. I. 512 (*ll.* 11-12), 515 (para. 2) 516 517 (para. 3) and *note*.

[4] *Wajeed Ali* v. *Abdool Ali* [1864] W. R. 121. But see comment.

[5] Hed. 480, 483; Bail. I. 512 (*ll* 4-7), e g. "a small house or a small bath," Bail. 512 (*l.* 7). Where a staircase, privy, and door are used in common by the occupants of several adjoining houses, the right to use them is not capable of being divided, and a gift may be made of a share in the said rights together with one of the said houses *Kasim Husain* v. *Sharifunnissa* (1883) 5 All. 285. Cf. *Sharifa Bibi* v. *Ghulam Mahomed Dustagir Khan* (1892) 16 Mad. 43.

[6] Hed. 483.

[7] Bail. II. 204 (para 6); Ameer Ali, I. 111, citing *Mabsut. Golam Jafar* v. *Masludin* (1880) 5 Bom. 238.

[8] Bail. I. 515; Hed. 483 (col. ii.); Macnaghten, 211. So even the gift of an undivided moiety was held to be void: *Emnabai* v. *Hajirabai* (1888) 13 Bom 352. But see *Sahiba Begum* v. *Atchamma* (1868) 4 Mad. H.C R. 115.

[9] Bail. I. 517. Cf. English case where a quarter of a horse was given: *Cochrane* v. *Moore* (1890) 25 Q. B. D. 57 (C. A).

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(4) D gives to R his house with all its right and boundaries, which include a party-wall or a right of way, held in common with others. The whole gift is valid.[1]

(5) D makes a gift to R of a share in a 'malikana.' The gift is valid as the 'malikana' is incapable of division.[2]

(6) Two persons jointly make a gift of a house to one man : the gift is valid according to all schools.[3]

(7) A gift to two persons jointly is valid according to the two disciples, but not according to Abu Hanifa.[3]

(8) D makes a gift of half of his property to the widow and daughter of his predeceased son. If the subject of gift consists of divisible property, the gift is invalid, unless it was divided off and the share of each donee given to her, but if it was indivisible, it is valid.[3] If the donees were paupers, or in indigent circumstances, the gift would be valid in any circumstances.[4]

(9) D and R are partners, and D makes a gift to R of D's share in the partnership stock, capable of division ; the gift is stated to be invalid in the 'Hedaya',[5] but it would seem to be valid.[6]

(10) The gifts of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees are each invalid under Hanafi law.[7]

(11) D makes a declaration of gift to R of half of a mansion, which can be divided off : and D purports to give R possession of the half : then D purports to make a gift of the other half, and again purports to give R possession of the said other half : both the gifts are invalid[8]—*sed quære*.[9] If, however, both declarations had been made first and after both declarations, possession had been purported to be given under both declarations at the same time, then there would have been a valid gift of the whole of the mansion.[8]

(12) D was possessed of a large number of shares in six companies, and of 19 pieces of freehold land and buildings thereon ; he notionally divided the whole of his property into a thousand shares, and gave to R, RA, RB, RC, and RD, 100 of such shares each ; and to RE, and RF, 25 shares each. *Held*, concurrently by the Rangoon Divisional and Appellate Courts, and by the Privy Council, that the gifts were valid, as the property could not be considered to be divisible.[10]

'Musha''[11] in Arabic means undistributed or common ; in legal language it refers to undivided portions of property, and in particular to such property with reference to its forming the subject of a gift. 'Musha'' explained.

The principle underlying the doctrine is shortly that the subject of gift must be transferred as completely as possible, and that when it is capable of division Doctrine of 'Musha'.' General principle : donor must do everything—

[1] Bail. I. 518. *Kasim Hussein* v. *Sharif-unnissa* (1883), 5 All. 285, where a staircase, privy, and door were held in common.

[2] *Mullick Abdool Gaffoor* v. *Muleka* (1884) 10 Cal. 1112, 1126.

[3] Hed. 484 (col. i.).

[4] Macn. 211 (case 12).

[5] Hed. 483. (col. ii.) ; Macnaghten, 211.

[6] See s. 377.

[7] Hed. 484 (col. i.) ; Macnaghten 205 (citing *Sharh-i-Viqaya*).

[8] Bail. I. (*ll.* 13-20).

[9] See s. 382 (confining Musha').

[10] *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 11 (para. 1), 17 (para. 4), 23.

[11] From *sha'* to leave undivided.

SECTION 374 to transfer subject of gift to donee, i.e. he cannot be compelled to take any step for the purpose.

from other property, the transfer of possession is not complete unless it is divided off.[1] The rules about 'musha'' have become technical, but they are based on a principle that is of universal application: the donor cannot be compelled to do anything that he has left undone,[2] and which is necessary for completing the gift.[3] E.g. where a donor D purports to give to the donee R half of a field, D ought to give possession of the half of the field to R, and this cannot properly be done unless the half which forms the subject of gift is first divided off, and separated from that of which neither is gift made nor possession given. The donor cannot be compelled to do this (if he has not done it voluntarily) any more than he can be compelled to take any other step in furtherance of an agreement without consideration. This is a principle which would seem to be applicable in most cases to all Muslim systems, and would not have been confined to the Hanafi law,[4] but that system has refined it in a manner which carries it beyond the limits of the original principle. For, though the donor cannot be compelled to take any step which he has not taken, yet there is no reason why the steps that he has already taken should be considered nugatory. In other words, where such possession as can be given of undivided property has already been given, why should the donor be permitted to resile, any more than the donee be permitted to compel the donor to do what he has not done?

1. Where donor purports to make a gift of a portion of his own property, he must separate the portion given from the portion retained.

2. Where donor gives possession to several donees, but gives away the whole property —difference of view between Hanifa and disciples.

Nor have the technicalities of the Hanafi lawyers stopped here: Where a donor makes a gift to two or more persons jointly, it may well be considered that there is nothing more left for the donor to do, than to give joint possession of the subject of gift, and to leave the donees to divide it amongst themselves, if they so desire. Thus if instead of making a gift of half of the field, and keeping the ownership of the other half with himself, D makes a gift to two separate donees, R and RA,—according to Abu Hanifa[5] the transaction consists of two parts and the gift to R and RA must, each in its turn, be completed by D, and if he has not done so, each gift has remained incomplete, and cannot be completed, except by the donor himself. Abu Yusuf and Imam Muhammad, on the other hand, have taken a less technical view, and hold the gift to be valid.

3. Gift of entire interest by joint owners (i) to stranger (ii) to co-owner.

But where there are two or more persons jointly entitled to the subject of the gift, and "they combine in making a gift of it entire to one person," none of the reasons given above apply, and there is no doubt amongst the three Hanafi exponents of law that the gift is valid.[6]

[1] So that in the eyes of the Hanafi lawyers it is a *sine qua non* of valid transfer of possession that the *musha'* should be divided off. This seems to be lost sight of when the rule that "the gift of a *musha'* may be validated by subsequent possession" is considered. See, e.g., *Mahomed* v. *Bai Cooverbai* (1904) 6 Bom. L. R. 1043, 1050. (Russell J.)

[2] Hed. 483 (col. ii. *ll.* 2-10) and cf. s. 883 (about donor doing everything to transfer possession). Cf. *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) 15 Cal. 689, 702; 15 I. A. 81. *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, 9 (para. 1).

[3] *Gulam Jaffar* v. *Masludin* (1880) 5 Bom. 238, 240.

[4] The Hanafi exponents are agreed amongst themselves on this point, Bail. I. 516, (*ll.* 8-9), 517*n*. Thus we find that when the fruit on a tree is the subject of a gift the Hanafis say it cannot be valid because it is an "undefined portion," Hed. 484. (col. i. para. 1). Under other systems the invalidity of the gift would be established under some circumstances because possession of the fruit would be held not to have been given. Of course, if the fruit were unripe the case might be different; in which case under Hanafi law the property would not be considered to be divisible.

[5] Bail. I. 615, (*l.* 1).

[6] Bail. I. 517.

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4. Gift to joint part.

It was a corollary from this last rule that if two persons are joint owners of property, and one of them makes a gift of his share to the other, thus making the donee owner of the entire subject of gift, the gift must be valid. The Privy Council have extended this rule, and permitted a gift amongst joint owners, even where the donee does not become by the gift the sole owner of the property part of which is the subject of the gift.[1]

5. Gift to joint donees of whom one is minor.

Exactly the reverse of the proposition contained in the proviso to this section is stated in a case from the North-West Provinces: "It appears from a passage in the 'Durr-ul-Mukhtar' and a passage in the 'Fatawa 'Alamgiri' that in a special case like the present, in which one of two donees is an adult and the other an infant son, a gift of undivided property is absolutely invalid, not merely 'fasid' but 'batil.'"[2]

Subject of gift alone must be transferred.

375. Where the subject of gift is joined to other property which does not form part of the subject of gift, there according to Hanafi law, the subject of gift must be separated, or removed so as not to be so joined to what is not given;[3] and possession given of the subject of gift joined to something that is not intended to be transferred to the donee, is not a valid transfer of possession.[4]

Gift of contents without that which holds them is not vice

376. Where the subject of gift is delivered to the donee contained in a thing belonging to the donor and not forming part of the subject of gift, there the delivery of possession is valid, but where something, which does not form part of the subject of a gift, is contained in that which does form part thereof, and the two are delivered together, there is no valid delivery of possession.[5]

Illustrations.

(1) D makes a gift to R of his mansion and gives possession of it leaving in it effects belonging to himself. The gift is not valid,[5] unless R is the minor son, or the husband, or wife[6] of D[7] [or D is otherwise the legal guardian of R.[8]]

(2) The gift of land without the crop then standing on it, or of a palm tree in bearing without its fruit, or *vice versa*, or of a house or vessel in which there is something belonging to the donor, without the contents of the house or vessel, is stated to be invalid, in each

[1] See s. 377.

[2] *Nizamuddin* v. *Zabeda Bibi* (1871) 6 N. W. 338. The judges were however strongly impelled to decide against the validity of the gift on the grounds of justice, equity, and good conscience.

[3] Bail. I. 508 (*ll.* 18-20); Macn. 213 (case 22); Hed. 483 (col. i. last lines), cf. the rules about *musha'*, ss. 374, 380-383.

[4] Bail. I. 520. But see comment and Bail. I. 530 (*ll.* 2-4). The distinction between the gift of "a palm tree in bearing without its fruit" which is invalid. Bail. I. 508 (*l.* 21), and of the fruit without the tree which is valid, if the donee is asked to take possession. Bail. I. 520 (*ll.* 7-18) is based on the same ground.

[5] Bail. I. 519.

[6] *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157.

[7] Bail. I. 520 (*ll.* 2-4), 530 (*ll.* 2-4). Macnaghten, 231, Precedents, Gifts, xxii.

[8] See below s. 400 (whether transfer of possession by legal guardian other than father or grandfather not necessary).

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case.[1] But if the donee is directed to reap or gather the fruit, and he does so, the gift of the fruit is valid.[2] The law contained in the ancient texts relating to the strictness of possession has, however, undergone considerable change; and the present illustration is given merely to show how the law would operate if it were applied rigidly.

Other instances.

The gift of a leathern bag in which there is food of the donor's is not valid, while a gift of the food in the bag is lawful. So also the gift of a pitcher without the water in it is not lawful but the gift of the water without the pitcher is valid.[3]

Reason of rule.

The rule is refined and technical, and would hardly find acceptance in British India. It seems to be based on the idea that it may be necessary for the donor to deliver the subject of gift in some object which should contain it; but in the opposite case the jurists suspect that if the donor wishes to make a gift, he would not leave his own property within that which he transfers to the donee.

(2) Gifts where Parties are Co-owners.

Gift from co-owner to another valid.

377. An undivided part of a property that is capable of division may validly form the subject of a gift where the donor and donee are co-sharers in the said property, or joint owners thereof.[4]

Two or more joint owners may validly give to one donee.

378. Two or more persons who are entitled to the whole of a property in undivided shares, may validly make a joint gift of the whole of it to a single donee.[5]

"When the donor purports to make a gift the subject of which is capable of division, and consists of an undivided part of property, the whole of which belong to the donor, the gift is invalid."[6]

Gift of whole property to two or more joint donees in undivided shares valid.

379. A gift to two or more persons jointly is valid, notwithstanding that the donor has not divided the shares of the donees, nor given separate possession to each of his respective share; provided that the interest of each donee is defined in the declaration of gift.[7]

This is the opinion held by Imam Muhammad. According to Abu Hanifa such a gift is invalid, unless it is a 'sadaqa.' Abu Yusuf held the gift to be valid only if (i) it is either a 'sadaqa,' or (ii) the donor either expressly states that

[1] Bail. I. 508 (*ll.* 20-24), 519 (*ll.* 18-24). But when the crop or fruit is not yet ripe and it cannot be gathered, the gift should be valid. See s. 374, and *expl. I.* (Bail. I. 530, *ll.* 2-4).

[2] Bail. 520 (*ll.* 16-21), "on a favourable construction."

[3] See p. 289, *n.* 4.

[4] *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) 15 Cal. 684, 701 (P.C.). But see Hed. 483 (col. ii. para. 5); Macnaghten, 212 R. 1, 214 R. 4 (restricting the validity to the case where there is no other person possessing a proprietary right in the property, except the donor and donee). This must be considered to be overruled by the P. C. decision *Ameena* v. *Zeifa* (1860) 3 W. R. (CIV. RUL.) 37.

[5] Bail. I. 517 (para. 1, *ll.* 7-8); Macnaghten, 215.

[6] Bail. I. 516 (*ll.* 8-10, 517 *n*). Abu Hanifa and the two disciples agree as to this.

[7] Bail. I. 516-517.

the donees are to take in equal shares, or (iii) if their shares are not specified ; so that according to him the gift is invalid if the donor purports to give the subject of gift in unequal shares to the donees.[1] The opinion of the disciples has been stated "to be generally adopted," and after the often quoted remark of the Privy Council[2] there cannot be much doubt that the Courts in British India would follow Imam Muhammad's opinion, which is the most liberal. SECTION 379

Mr. Ameer Ali[3] cites a passage from the 'Radd-ul-Mukhtar' to the effect that a gift to a minor and adult jointly is not valid, though it is said that the difficulty may be avoided by a device mentioned in the same place. These technicalities will no doubt be disregarded in British India. See next page.

(3) Some Incidents of the Doctrine of 'Musha'.'

380. A gift is not invalidated by the fact that subsequently to its being completed, its subject becomes 'musha',' and that it is not then divided off and possession given in accordance with section 381 below.[4] Supervenient invalidate gift.

Illustration.

D makes a complete and valid gift of a property to R, and then revokes it as to half of the subject of the gift. The gift remains valid to the extent that it is unrevoked.[5] Similarly, if the right of a third person is established in the subject of gift after the gift is completed.[6]

The rule contained in this section may be stated in the following terms ; "Supervenient confusion does not invalidate a gift"—"confusion" being the term used to denote the objection to gifts of 'musha" viz., the confusion arising from what has been given away as gift, being undetermined.

381. A gift which is invalid in its inception because its subject is a 'musha',' can be validated by the subject of the gift being subsequently divided off from the rest of the property of which it forms part, and by possession being given of the said divided part to the donee.[7] Subsequent musha'.'

This rule is not of much practical importance, for the subsequent partition and possession would amount to a new gift. The first gift being invalid,[8] possession under it would in Muhammadan law be no doubt "with responsibility," but where the donor is willing to make a fresh gift, he would presumably not be desirous of making the donee responsible for any deterioration in the subject of the gift.

[1] *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O.C.) 27.

[2] See s. 383 below ; and cf. pp. 26-27 above, with footnotes. p. 140 *n.* 4.

[3] I. 55 ; citing *Radd-ul-Mukhtar*, IV, 783.

[4] Bail I. 517 ; *Gulam Jafar* v. *Masludin* (1880) 5 Bom. 238, 240. Ameer Ali, I. 56, citing *Radd-ul-Mukhtar*, IV. 783

[5] Bail. I. 517 (para. 2) ; see, however, Bail. I. 520.

[6] Macnaghten, 208 & *n.*

[7] Hed. 483 (col. ii. para. 6); Bail. I. 512 (*ll.*11-12) 516, 517 (para. 3); *Muhammed Mumtaz Ahmed* v. *Zubaida Jan* (1889) 11 All. 460 ; 6 I.A. 205 ; *Mahomed* v *Coverbai* (1904) 6 Bom. L. R. 1043 ; *Mohib Ullah* v. *Abdul Khalik* (1908), 30 All, 250 (where it is not clear whether the possession was given by dividing the property or not).

[8] And thus possession of the subject of gift would be with responsibility under s. 350 (referring to possession of invalid gift).

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Doctrine of 'musha' to be strictly confined.

382. It has been stated by the Privy Council that the doctrine relating to the invalidity of gifts of 'musha'' is wholly unadapted to a progressive state of society, and ought to be confined within the strictest limits.[1]

When not applied.

Hence a gift having been purported to be made of a four anna share in a 'kaimi rayati' without demarcating it, or giving separate possession, it was held that it would be extremely inequitable to let the donor question the validity of the gift after the lapse of about fourteen years, during which he had ratified and acknowledged the gift, and permitted the donee to be in joint possession with himself; and the gift was held valid and operative.[2]

Is the doctrine opposed to equity?

Benson J. went so far as to say that the doctrine of 'musha'' was opposed to equity, justice, and good conscience, and so could not apply at all in Madras,[3] where the Muhammadan law of gifts is not made expressly applicable: but this ruling was not followed in a later case[4] in which it was pointed out that Benson J.'s opinion was 'obiter,' and not concurred in by his colleague, Shephard J.

Device to avoid it.

The Hanafi lawyers were themselves astute to avoid the doctrine—see above comment to s. 379 and cf. "A gift of a moiety of a house (which otherwise would be bad for 'mushâa' may validly be effected in this way (according to the 'Bazâzia') that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt that is the price."[5]

§ 6.—Possession of Subject of Gift.

(1) Gift Completed by Transfer of Possession.

(a) Acts on the Part of the Donor.

Transfer of possession necessary to complete gift.

383. (1) The declaration and acceptance of a gift have no legal effect unless and until the gift is completed by the transfer to the donee of such seisin or possession[6] as the subject of the gift permits; and where possession of the subject of a gift is given to the donee at a time subsequent to the declaration and acceptance of the gift, the property forming the subject of the gift is transferred to the donee as from the date when possession was given, and not before.[7]

Transfer of subject of gift effected from time when possession given.

[1] (*Sheikh*) *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1889) 11 All. 460, 475, 16, I. A. 195, 205, applied by P. C.; *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1; 34 I. A. 167; *Ebrahimbhai* v. *Fulbai* (1902) 26 Bom. 577.

[2] *Abdul Aziz* v. *Fateh Mahomed Haji.* (1911) 38 Cal. 518.

[3] *Alabi Koya* v *Mussa Koya* (1901) 24 Mad. 513. cf. *Bava* v. *Mahomed* (1896) 19 Mad. 343.

[4] *Vahazullah Sahib* v. *Boyapati Nagayya* (1907) 30 Mad. 519. (Wallis and Miller JJ.)

[5] Ameer Ali, I. 55.

[6] Bail. II. 203 (*ll.* 5-7), 204 (*ll.* 3-4, 9-11), I. 508 (*l.* 17), 512-513; (Hed. 482, *Obedur Reza* v. *Muneer* (1871) 16 W. R. 88. *Shah Jan Bibee* v. *Shib Chunder Shaha* (1874) 22 W. R. 314; *Jeswunt Singhjee Ubby Singji* v. *Jet Singhee Ubby Singjee* (1844) 3 Moo. I. A. 245; 6 W. R. (P.C.) 43 *Meherali* v. *Tajudin* (1888) 13 Bom. 156.

[7] Bail. II. 207 (*second*) e.g. in *Anwari Begum* v. *Nizamuddin Shah* (1896) 21 All. 165, 171-172. In Macnaghten, 201, (case 5) it is stated that possession subsequent to the declaration of gift does not validate the gift, though it is taken (or rather completed—as the property had to be divided off) with the consent of the donor. *Sed quaere.* Cf. *Khader Hussain Sahib* v. *Hussain Begum Sahiba* (1869) 5 Mad. H. C. R. 114, 119.

(2) Imam Malik holds that the right to the gift property relates back to the time of the declaration.[1]

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Explanation I—The donor must do everything which, according to the nature of the property that forms the subject of the gift, is necessary to be done in order to transfer the property, and to render the gift complete, and binding upon himself.[2]

necessary.

Explanation II—Where the donor puts it within the power of the donee to take possession of the subject of gift, if he chooses, there the donor has done everything which is necessary to be done in order to transfer possession.[3]

Power to take possession.

Illustrations.

(1) On 21st Oct., 1891, D made a gift to his daughter *R* of the whole of his property consisting of shares in two villages which were then and subsequently held under attachment by the Collector for arrears of revenue. The deed of gift provided that *R* should give D Rs. 120 annually for his maintenance. *Held*, that D having transferred to *R*, and having divested himself of, the rights which he had and which he purported to give to *R*, and having got *R*'s name entered in the Government papers, there was a valid gift, notwithstanding that suits were filed by D after the date of the gift for rent due—such suits having been filed before the mutation of names took place. (11 All. 460 relied upon).[4]

(2) On 12th Feb., 1879, *D* made a deed of gift transferring her right in half of certain properties to *R* her daughter and co-sharer.[5] On 22nd Feb., 1879, the deed was registered.[6] The evidence of transfer of possession as stated by the P. C. was as follows: (*a*) A declaration in the deed that possession was transferred, and that *D* had abandoned all connection with the properties, and that *R* was to have complete control of every kind in respect thereof (*R*'s husband was the general manager of both *D* and *R*). (*b*) On the 22nd Feb., 1879, the deed was registered. On the 24th April *D* gave a power of attorney to C to present and verify a petition for mutation of names, and (*d*) a petition was presented on 28th April. (*e*) On 5th June a 'parwana' was issued by the Assistant Collector for proclamation of the deed of gift, and for enquiry as to possession, (*f*) which was done; and on the 27th July the village 'patwari' reported that the deed was made, and possession transferred: and (*g*) on 28th July he reported that the notification had been proclaimed. (*h*) H, who became

[1] Hed. 482 (col. ii.).

[2] *Milroy* v. *Lord* (1852) 4 De. G. F. & J. 274; cf. *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) 15 Cal. 689, 702; 15 I. A. 81 referring to *Kalidas Mullick* v. *Kanhya Lal Pandit* (1884) 121, 133; 11 I. A. 218.

[3] Bail. I. 514 (para. 2), II. 204; Ameer Ali, I. 65, citing *Fatawa Qazi Khan*, 282, and *Mama-ul-Anhar*.

[4] *Anwari Begum* v. *Nizamuddin* (1898) 21 All. 165.

[5] A point was taken in this case that the gift was invalid as a *musha'*. It does not seem to have been pointed out in reply that the gift was from one co-sharer to another.

[6] The P. C. said that the declaration in the deed that she had given possession was an admission, and her heirs and all persons claiming under her were bound by that admission, 11 All. at p. 475

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heir of *D* on her death, did not raise any objection to the mutation of names. *R* died on 3rd December, 1879, The mutation of names took place on 4th February 1880 (after the death of the donee). As against this it was proved that *(i)* there were 5 decrees in suits by *D* for rent accrued after the date of the deed of gift; (*j*) that *D* paid revenue on 26th Nov., 1879, that *(k)* in January, 1880, there was an order of the Assistant Collector speaking of *D* as being in possession. [The suits were, however, commenced, the payment of revenue was made, and the order issued before the mutation of names in the Collector's books.] (*l*) That *D* continued to reside in one of the houses forming part of the gift; (*m*) *R's* husband made an attempt to acquire the whole of the property, and it was argued that if the gift had been valid there would be a question as to only one-sixth of it.[1] *Held*, that it was proved that possession was taken, and that there was a complete and valid gift.[2]

(3) In 1848 D [3] transferred and indorsed to R, his son,[4] Government promissory notes of the value of Rs. 6,74,000 In 1853 Government notified that certain Government notes, of which the notes so transferred formed part, were about to be paid off, and option was given to the then holders. *Held*, that the legal title was undoubtedly in R (p. 544),[5] the probability being that it was intended as a transfer of property in the lifetime of D, with a reservation of the use or proceeds of the money transferred, during the lifetime of D only: "The design to alter, and so in one sense to defeat, the disposition of property is simply a design to conform to the law whilst working out an unforbidden design" (See pp. 547—8).[5] Their lordships added: "The gift relates to the substance of the article and not to the use of it; there is no such participation in the thing given as would invalidate the gift. Again, the Mahomedan law defeats not the grant but the condition; but the arrangement between D and R was based on valid consideration, the son's undertaking is valid, and could be enforced in India as a trust constituting a valid obligation to make a return of the proceeds during the time stipulated. The Mahomedan law authority whom Mr. Campbell consulted supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority; but it is to be observed that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties. . . . The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value" (p. 550).[5] *Held*, there was a valid gift 'inter vivos' as to the Company's paper. Costs of both parties out of residuary estate of deceased.[5]

(4) D executed, in favour of R, a deed of gift of all his rights of inheritance in the estate of the deceased C. The deed recited that the

[1] This (*m*) and the preceding (*l*) point the P. C. characterise as "futile" and the first three (*i*, *j*, & *k*,) as "weak and unavailing."

[2] *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1889) 11. All. 460. The P. C. reversed a finding of facts by the Subordinate Judge though the High Court had not expressed any opinion on it; see at p. 470.

[3] Nawab Moonawarood Dawlah.

[4] Nawab Umjad Ali Khan.

[5] (*Nawab*) *Umjad Ally Khan* v. (*Mussummat*) *Mohumdee Begum* (1867) 11. Moo. I. A. 516, 544-548; 10 W. R. (P.C.) 25. The figures in ( ) refer to pp. of 11 M. I. A.

gift was made in consideration of natural love and affection, and of past services. *Held*, this was not a 'hiba bil 'iwaz,' which consists of two transactions : both the 'hiba' and the "iwaz ' being gifts—and that the subject of " iwaz ' can be only such properties as can be the subject of gift, and that natural love and affection and past services cannot be the subject of a gift. *Held*, therefore, that possession was neccessary to be transferred, and the gift property (i.e., share in the estate) being immovable, and not of a nature which renders it impossible to deliver actual possession to the donee. actual possession was necessary. No such actual possession having been given, the gift was ineffectual.[1]

1. NECESSITY FOR TRANSFER OF POSSESSION.

Necessity of transfer of possession to complete gift.

The necessity for possession in order to complete a gift, is based on the same ground on which a contract without consideration cannot be enforced. Where the donor has not done everything to divest himself of the property in order to complete the gift, some third party must make him do what he has left undone, and this infringes the principal notion connected with a gift—its voluntary nature. The ' Hidaya ' thus explains the requirements of a gift : " gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts ; and seisin is necessary in order to establish a right of property in the gift, because a right of property according to our doctors is not established in the thing given merely by means of the contract, without seisin. . . . The arguments of our doctors are twofold.—First the Prophet has said a gift is not valid without seisin (meaning that a right of property is not established in a gift until after seisin).—Secondly. gifts are voluntary deeds ; and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent, before he had voluntarily engaged for it." [2] In other words, if a gift were valid without possession being given to the donee, the law would be decreeing specific performance of an agreement without consideration, in many cases not even an agreement, but a mere wish on the part of the donor, or a surmise that he must have wished it. The same reasoning is the basis of the rule of Hanafi law that when the subject of gift is capable of division, the gift should not be considered complete unless the division is made. " If the gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver, which he has not engaged for, namely a division." [3]

Reason as explained in ' Hidaya.'

Viz. donor cannot be obliged to do that which he has not done: the transaction being voluntary.

Bequest.

In the case of a bequest, on the other hand, under Muhammadan law the "transfer is to be decreed as having effect from the death of the testator, and not from the time of taking possession, though there should have been some delay in taking it."

Suit to cancel a gift where possession not given.

Conversely, Blair and Burkitt JJ. have held that the donor cannot sue the donee for cancellation of the gift, on the ground that he did not

[1] *Rahim Bukhsh* v. *Muhammad Hasan* (1888) 11. All. 1; Macnaghten, 201 (case 6.)

[2] Hed. 482 (col. i.).

[3] Hed. 482 (coll. i-ii.) ; cf. the case where a transfer is made for a valid consideration and operates as a contract : *Mahammadunissu Begam* v. *J. C. Bachelor* (1905) 29 Bom. 428.

[4] Bail. II. 207-208 ; but see Probate and Administration Act, s 116, and below on wills.

SECTION 383 give possession: because either the deed of gift is a nullity, from which the plaintiff would not apprehend any injury, or "if possession was non-essential to its validity, then it would be a good deed of gift."[1] On both these points the learned judges cautiously declined to express an opinion.

2. POSSESSION DEFINED.

Complete seisin.

The meaning of 'qabz-ul-kamil' (complete seisin) has been thus explained: "With reference to movables, it depends on their nature; and with reference to immovable property, as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin."[2] Cf. "By possession is meant possession of that character of which the thing is capable."[3]

As to the kinds of possession, compare—

Kinds of possession.

(a) Removing movables.

1. "Possession in the case of movable things, like an animal, or pieces of cloth, or a thing that can be measured or weighed or numbered, is by removing it, and with reference to other things it is to leave it alone between the thing and him (the transferee) after raising the hand from it."[4]

(b) Customary control.

2. "Possession and its kinds[5]—What is meant by it ('qabz' or possession) in all places where the 'share' (jurist) has considered it regarding its validity, its binding force, or other effects, is as follows: The transfer of the customary ('urfiya) control ('sultanat') from the transferor to the transferee, equally whether the legal (shar'ia) control has accrued to him permanently, by a contract, (as in the case of sale and the like), or not, (as in the case of 'waqf' and 'hiba' and the like). There is no doubt regarding its accruing by vacation, 'takhliat,' in the case of immovable property: in the sense that all obstructions are removed from the way of the transferee, and also that the hand of the transferor is raised, and his permission is given to the transferee; for this is necessary in order that he (the transferee) may become thereby like the transferor, as regards his taking possession of landed property, and it is not then necessary for the transferee to get at the property by himself, or through his agent, or by his dealing with it, indeed there is no necessity even for the lapse of time, although it (the property) may be remote from the transferee, because of its absolute validity without it (i.e., the lapse of time), like the validity of the property coming under his possession ('qabz') control (''wilayat') and power ('istilat') thereby in the same manner as it was with the transferor."[6]

(c) Vacating immovables. Lapse of time not necessary.

Possession defined and exemplified by Domat.

Possession has been thus defined and exemplified: "Possession, taken in a proper sense, is the detention of a thing, which he who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses. . . , Thus one may possess movables by keeping them under lock and key, or having them otherwise at one's disposal: thus one possesses cattle by shutting them up, or giving them to be kept: thus one possesses a house by dwelling in it, or having the keys thereof, or trusting it to a tenant, or by building in it: thus one possesses lands by

Key, control, dwelling, use.

[1] *Umrao Bibi* v. *Jan Ali Shah* (1898) 20 All. 465. But see below.

[2] *Majma-ul-Anhar*, 342, cited and translated in Ameer Ali, I. 42.

[3] *Lord Advocate* v. *Young* (1887) 12 App. Ca. 544, 556.

[4] *Sharh-Lum'a*, 295.

[5] This heading is in the original.

[6] *Jawahir-ul-Kalam, Kitab-ul-Tijarat*, IV. 136, (*ll.* 18 *et*

cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure." [1] SECTION 383

"We must not confound," he continues, "the ways of acquiring the right to possess . . . with the ways of entering and getting into possession, and of having a thing in one's power to use it, to enjoy it, and to dispose of it. The ways of acquiring the property of things, and by means of the property, the right to possess them, are infinite. For one acquires them by a sale, by exchange, by donation, and by different titles which the laws have regulated. . . We are now to consider how one becomes possessor, and the ways of entering upon a real and actual possession. Seeing the use of possession is to exercise the right of property, it implies three things: (i) a just cause of possessing as master, (ii) the intention to possess in this quality, and (iii) detention. . . Without intention there is no possession. . . Without the detention, the intention is useless. . . . And without a just cause the detention is only usurpation." [2]

Right to possess.

Actual possession implies. (i) just cause, (ii) intention, (iii) detention.

Possession is defined in the French Civil Code as "the retention or enjoyment of a thing or of a right which we have, and which we make use of, either ourselves, or by another person, who holds it or makes use of it in our name."—Art. 2228.

Explanation II is adapted from the following words of Lord Justice Turner: "The settlor must have done everything which according to the nature of the property was necesary to be done in order to transfer the property and render the settlement binding." [3] With this statement may be compared the decisions cited in the footnote, and Syed Ameer Ali says that the 'Majmaaul Anhar' uses similar language, viz., "possession so far as its nature admits." [4]

It may require dividing of the property.

384. The registration of a document constituting the declaration and acceptance of a gift does not, without delivery of possession by the donor, complete the gift.[5]

Registration.

See the Indian Registration Act, s. 17.

(b) Acts on the Part of the Donee.

385. Where the subject of a gift is in the possession [6] of the donee at the time when the declaration of gift is made, the gift is completed by the donee signifying his acceptance of the

Donee already in possession.

[1] Domat, "Civil Law," (1861) translated by Wm. Strahan, I. 845, 846, ss. 2127. 2130.

[2] "Civil Law," I. 853-858, ss. 2147, 2161.

[3] *Milory* v. *Lord* (1852) 4 De G. F. and G. 274; cf. *Mahomed Buksh Khan* v. *Husseini Bibi* (1888) 15 Cal. 689, 702. 15 I. A. 81 referring to *Kalidas Mullick* v. *Kanhya Lal Pundit* (1884) 121, 133; 11 T. A. 218.

[4] "Mahommedan Law," I. 86.

[5] *Vahazullah* v. *Boyapati* (1907) 30 Mad. 519; *Ismal* v. *Ramji Sambhaji* (1899) 23 Bom. 682; *Mogulsha* v. *Mahamad Sahib* (1887) 11 Bom. 517, referring to *Vasudeo Bhat* v. *Narayn Daji Damle* (1882) 7 Bom. 131; *Dagai Dabee* v. *Mothura Nath Chattopadhya* (1883) 5 Cal. 854, and adding that these rulings between Hindus "would appear to be equally, if not especially, applicable to gifts under the Mahomedan law." In Roman law the gift could be complete without delivery and it required registration if the subject of gift was 200 (later 500) solidi or over.—Justin. II.vii. 2. Cf. [1898]Bom.P.J.,.147

[6] I.e. actual possession—mere collection of rents from the tenants by an agent does not constitute such possession, *Valayat Hossain* v *Maniran* (1879) 5 Cal. L. R. 91. Cf. however. "The doctrine of possession has been extended under the name of 'quasi possession' or of 'possessio juris' to the control which may be exercised over advantages, short of ownership, which may be derived from objects." Holland, "Jurisprudence," 179.

SECTION 385 gift; and no formal transference of the possession of the subject of the gift is necessary.[1]

Illustration.

A piece of cloth belonging to D is deposited with R. R says "give it to me," and D answers "I have given it to thee." This is a gift. But if the cloth had been in the hands of D himself and the same words had passed between them, it would have been a deposit.[2]

"Nor is it necessary that any time should elapse to enable the donee to repeat his seizin as some of our doctors have said."[3] Similarly, possession in the hands of the legal guardian of a minor is possession in himself (see below ss. 400 *et seq.*) and no transfer is necessary.

Donor must consent to donee taking possession.

386. (1) Where possession is taken by the donee by himself, he must do so with the express or implied consent of the donor.[4]

Mere declaration of gift does not amount to such consent.

(2) The mere declaration of a gift does not amount to the donor's consent that the donee should take possession; but where possession is taken by the donee at the same meeting as the declaration of gift, and the donor does not raise any objection to it, there the donor will be presumed[5] to have consented to possession being taken by the donee.[6]

When subject of gift present.

(3) Where the declaration of gift is made in the vicinity of the subject of gift,[7] and the donee takes possession of the subject of the gift not at the same meeting, but subsequently, it is not valid, unless the consent of the donor has been expressly obtained.

When not present.

(4) Where the declaration of gift is not made in the vicinity of the property,[7] possession may be taken after the separation of the meeting, without the express consent of the donor.[8]

Illustration.

D gives his slave to R, (all three being present together) without saying "take possession of him," and R goes away, leaving the slave; he cannot afterwards take possession of him.[9]

[1] Bail. I. 514, II. 204, (*ll.* 14-19); Ameer Ali, I. 71, citing *Radd-ul-Mukhtar*, IV. 783, and Hed. 484 (col. i. para. 4).

[2] Bail. I. 510.

[3] Bail. II. 204 (*ll.* 17-19), (para. 4)

[4] Hed. 482 (col. ii.); Bail. I. 513, II. 204 (para. 4).

[5] Hed. 483 (col. i. *ll.* 13-15); and see above pp. 47-48.

[6] Bail. II. 204 *n.* 6: according to the author of the *Tahrir-ul-Ahkam* (Shiah), permission is necessary even though the donor is present at the time of the gift. Cf. Macnaghten, 215.

[7] The distinction about the gift being made in the vicinity of its subject is not expressly made in Bail. II. 204, but where the subject of gift is not present at the time of the gift, a reasonable time must, it is clear, be given to the donee to take possession. But see Bail. II. 204 *n.* 6.

[8] Bail. I. 513; Hed. 482 (col. ii.).

[9] Bail. I. 514 (*ll* 7-11).

(c) *Intervention of Third Parties.*

(i) *Gift through a Trust.*

Gift through a trust.

387. Where a gift is purported to be made through the declaration of a trust, possession must be given of its subject to the trustee in order to complete it, unless the trust is declared by will [1] or the donee declares himself to be the trustee.[2]

Illustration.

D executed a deed of trust relating to certain properties, on the 9th of October, 1876, appointing two trustees. D did not transfer possession to the trustees during his lifetime. Subsequently D made a will confirming the trust deed. D died on the 6th of May 1883. *Held*, that the interest of the beneficiaries did not arise in the lifetime of D, as the gift was not completed, but that it operated as a part of the will, and was given effect to as such.[1]

Trusts in law.

When a Muslim voluntarily declares himself a trustee of any property (whether for the benefit of others, or of himself and others), it may be a question of some nicety whether the disposition is governed entirely by the Indian Trusts Act, or to any extent by Muhammadan law, and whether, in either case, it is necessary for the completion of the (gift or) trust, that it should have been acted upon. Such action on the trust, being in this form of gift either the equivalent of that transfer of possession which Muhammadan law requires, or being necessary for "indicating with reasonable certainty . . . an intention . . . to create . . a trust," under the Trusts Act, s. 6.

Beaman J. expresses a "doubt whether private trusts are known to Muhammadan law."[3] The word trust is ambiguous, and is used sometimes to refer to the obligation which is annexed to the ownership of property, (as in the Trusts Act, s. 3) and sometimes to the deed containing the trusts, and in particular to deeds containing family arrangements in English law. It may be at once admitted that the family trusts of Sunni Muhammadan law took the shape of 'waqf,' which Beaman J. no doubt excludes from the term private trusts. But it seems equally beyond dispute that in the sense of annexing obligation to the ownership[4] of property, trusts are not only known to Muhammadan law, but they abound in it. Thus we have not only the 'mutawalli' of a 'waqf,' the guardians of the property of lunatics and minors, and executors, but we have a special recognition of ownership "with responsibility" to another person.[5] It is difficult, of course, for a technical term in one system of

[1] *Moosabhai* v. *Yacoobhai* (1904) 29 Bom. 267 ; 7 Bom. L. R. 45.

[2] The Trusts Act, s. 6, requires the trust property to be transferred to the trustees "unless the trust is declared by will, or the author of the trust is himself to be the trustee."

[3] In doing so he seems to overlook (*a*) that in any view, even according to the Privy Council decisions, a *waqf* may consist of a private trust, provided that it is followed by a trust for charity; (*b*) that there is probably no person now in existence who contends that there is any foundation in Muhammadan law for the theory that a *waqf* for a person with life interests to his descendants in perpetuity is invalid.

[4] The *ownership* of the trustee is not necessarily insisted upon, e.g., guardians and agents are said to be trustees.

[5] Bail. I. 514, 518 (paras. 2, 3,) 591, 527, 665, II. 250 ; Hed. 149, 214, 347, 414, 421, 471, 478 (col. ii. para. 4), 484 (col. i.) 644, 632 636 (col. ii. para. 2).

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law, to have an exactly equivalent term, connoting identical incidents in another system of law. But such a great authority both on law and on the meaning of Arabic terms as Sir William Jones, and the careful translator of the 'Fatawa 'Alamgiri' and 'Shara'ya-ul-Islam,' who had a good deal of experience in the administration of law (with whom may be coupled the translators of the 'Hidaya') have all concurred in using the terms trust and trustee in order to render into English the meaning of Muslim writers on law. The question, however, can hardly be of any but academical interest in India, inasmuch as the Trusts Act applies to Muslims.

(ii) *Gift through Agent.*

Possession to of donee

388. The donee may authorise an agent to take possession of the subject the gift on his behalf, [1] and a gift may be validly completed by transferring possession of the subject of gift to any person authorized to receive possession on behalf of the donee.[2]

(d) Continuance of Possession.

Continuance of possession unnecessary.

389. After a gift has been completed, its validity is not affected by the fact that the donee does not continue to be in possession of the subject of the gift.[3]

Illustration.

A gift is made by a mother to her daughter and exclusive possession given of it, the fact that the donor afterwards continues to reside in the house which is the subject of the gift, does not necessarily detract from the value of the evidence that there was a complete gift and transfer of possession nor is inconsistent with it: it is explained by the relationship of the parties.[3]

Cf. comment to s. 383 above

Donor coming back.

This section is based on the following words of Sausse, C. J.: "The circumstance of possession, once given, being subsequently continued, does not appear

Revocation of gift.

to be a necessary condition of a 'complete seisin,' or its non-continuance to invalidate the 'hiba.'" [3] Cf. "After possession has once been acquired, it is preserved without an actual detention." [5]

Instances of the donor coming back into a house which forms the subject of gift will be found amongst the cases noted under ss. 396, 401, *q. v.*

"Non-continuance of possession" may, however, in some cases, be proof of a revocation of the gift, where the gift is revocable. For the idea underlying the phrase of the Muslim jurists that a gift is not obligatory is twofold (1) that it need not be made at all, (2) that even after it has been made the subject of gift need not ('exceptis excipiendis') be allowed to continue in the

[1] *Fatawa 'Alamgiri, Hiba*, ch. xi., giving various details, which are unnecessary, or inapplicable in British India. See Contract Act, s. 90.

[2] Cf. Contract Act, s. 90.

[3] *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157, referring to *Jafier Khan* v. *Hubshee Beebee*, I. S. D. A. Rep. of Bengal, Morley's Dig. "Gifts," pl. 55, p. 268.

[4] *Kandath Vettil Bava* v. *Musaliam Vettil Pukrukutti* (1907) 30 Mad. 305.

[5] Domat, I. 847, s. 2132. Code, vii. 32.

possession of the donee, as his property, i.e., the gift may be revoked. See below ss. 420 *et seq.* SECTION 389

(2) Different Kinds of Possession Transferred to Donee.

(a) As Affected by Character of Property.

(i) *Possession of Movable Property.*

390. Where the subject of the gift is movable property, the gift is not complete unless its subject has been actually delivered.[1] of property.

The gift of movable property is styled 'hadia' as distinguished from 'hiba'; see below, s. 437. Compare comment to s. 383 above.

The Transfer of Property Act, s. 123, gives, as an alternative for delivery of movable property, the execution of a registered instrument of transfer, but the section does not apply to Muslims.[2]

391. Where the subject of the gift consists of money, an entry in books of account to the effect that the money has been paid over to the donee, does not in itself operate as a completion of the gift.[3] Book of.

But see 'Emnabai v. Hajirabai'[4] noted under s. 404 below referring to acts of ownership as evidence of possession.

(ii) *Possession of Immovable Property.*

392. Where the subject of gift consists of immovable property, in order to complete the gift, the donor must vacate the property[5] if he is in occupation of it, and cease, after the gift, to exercise any rights over it,[6] and then must place the donor in such a position that he can take possession if he chooses.[5] F immovable property

Semble, the donor may also complete the gift by taking a lease of the property from the donee, which will operate as a constructive possession.[7] Lease from donee.

[1] *Majma-ul-Anhar*, 342, cited and translated in Ameer Ali, I. 42. See above p. 296.

[2] Transfer of Property Act, s. 129, and cf. Contract Act, ss. 90-94, as to delivery of articles sold.

[3] *Sir Jamsetji Jijibhai* v. *Sonabai* (1865) 2 Bom. H. C. R. 133. See also *Ebrahimbhai* v. *Fulbai* (1902) 26 Bom. 577, and *Mancher-shaw Narielwala* v. *Ardeshir Narielwala* (1908) 10 Bom. L. R. 1209, 1217, reversed on appeal (1912) 12 Bom. L. R. 53.

[4] (1888) 13 Bom. 352.

[5] Cf. *Zohooroodeen Sirdar* v. *Baharoollah Sircar* (1864) W. R. 185; *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157; *Gulam Jafar* v. *Masludin* (1880) 5 Bom. 238, 243 (para. 4).

[6] Keeping any article whatsoever, "even a straw," belonging to the donor in the subject of gift, technically infringes the rule of completely vacating the property, but this rule is not enforced rigidly, especially where the donee is a near relation of the donor: (*Bibi*) *Khaver* v. (*Bibi*) *Rukhia* (1905) 25 Bom. 468.

[7] *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O.C.J.) 27, 31-33, per Sargent J. No lease was proved; but it was assumed that possession could be given in this manner. In (*Bibi*) *Sultan Khaver Begum* v. (*Bibi*) *Rukhia Sultan* (1905) 25 Bom. 468, 6 Bom. L. R. 983, 7 Bom. L. R. 443, the donor paid to the donee after the gift, Rs. 30 for her board and lodging. *Humera Bibi* v. *Najimunnissa* (1905) 28 All. 147; *Kandath* v. *Musaliam* (1907) 30 Mad. 305.

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Illustration.

D is living in a mansion, and purports to make a gift of it to R, saying "take possession," or "I have delivered." The gift is not valid. It would be the same if instead of D, his people, or his goods, were in the mansion.[1]

See comment to s. 383 above.

Customary control.

Cf. "It (possession) is the transfer of the customary ('urfiya')[2] control over the thing from the transferor to the transferee equally whether he obtains the legal control permanently (by a contract like sale or the like) or not (as in the case of 'waqf' and gift[3] and the like). There is no doubt as to its (i.e., possession) being transferred by vacating, with reference to immovables, in the sense of removing all obstacles in the way of the transferee and by the transferor raising his hand[4] and giving him permission—this is necessary in order to place him (the transferee) in the same position as the transferor.

Vacating.

Taking possession.

"Hence it is not necessary for the transferee to get to the subject of the transfer either by himself or through an agent, or that he should use it. Even the lapse of time is not necessary although the object may be at a distance from the transferee.[5]

'Takhliat' or vacating explained.

"'Takhliat' or vacating (a property) means giving up all dealing with it, and leaving it entirely at the disposal of the purchaser or the donor, without (leaving) any obstacle in the way of his using it . . . . Know that the Shahid Sani said that 'takhliat' (vacating) is the removal of an obstacle, if there is any, in the way of the purchaser entering into possession; coupled with permission to take possession of it; and the author of the 'Kifaya' criticises this, stating that in the case of 'hiba' and 'waqf' and the like, this (necessity for permission) may hold, but in the case of a sale it is not practicable, inasmuch as the object may go out of possession without his intending it; but in my opinion Shahid Sani means by permission, intimation that no obstacle exists in the way of his occupying it."[6]

Attornment by tenants transfers possession.

393. Where the subject of gift consists of immovable property which is occupied by tenants, if the donor requests them to attorn to the donee, the possession of the property is thereby transferred to the donee.[7]

[1] Bail. I. 520 (*ll.* 1-4). But see the illustration citing Bail. I. 530, *ll.* 2-4, showing that this does not apply to minors. See also Macnaghten, 231, Precedent xxii. on Gifts. *Contra* (*Shaikh*) *Ibhram* v. (*Shaikh*) *Suleman* (1884) 9 Bom. 146, 150. (*Bibi*) *Khaver Sultan* v. (*Bibi*) *Rukhia* (1905) 29 Bom. 468, 7 Bom. L. R. 443; upholding Chandavarkar J. (1904) 6 Bom. L. R. 983.

[2] From *'urf* custom, see above p 18 cf. "It never was imagined. . . . that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute: yet notwithstanding delivery of the key of bulky goods . . . has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing: and therefore the key is not a symbol and would not do," per Lord Hardwicke, *Ward* v. *Turner* (1751) 2 Ves. Sen. 431, 442.

[3] Gift being revocable.

[4] "Raising the hand" is apparently the equivalent of the English "hands off."

[5] *Jawahir-ul-Kalam*: *Kitabul-Tijarat*, 136.

[6] *Jami'-ush-Shittat* 128, 129.

[7] *Sajjad Ahmad Khan* v. *Kadri Begum* (1895) 18 All 1; (*Shaik*) *Ibhram* v (*Shaik*) *Suleman* (1884) 9 Bom 146; *Sharifa Bibi* v. *Gulam Mahomed Dastagir Khan* (1892) 16 Mad. 43: *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157, 162 (para. 2).

(iii) *Possession of Incorporeal Property.*

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394. Where the subject of gift is incorporeal (other than an actionable claim[1]) it is validly transferred to the donee if the donor transfers to the donee all the possession which the nature of the property forming the subject of gift permits, and divests himself of all his rights in the said property.[2]

Where subject of gift is incorporeal.

So where a gift is made of Government promissory notes, it can be perfected by a gift transferring and endorsing the notes to the donee ;[3] a gift of zamindari rights held directly under Government which are in the occupation of tenants may be perfected by requesting the tenants to pay the rents to the donee, accompanied with the mutation of names in the books of the Collector.[4] Similarly, if the donor dismisses her servants employed on the property forming the subject of gift, and after the date of the gift the 'tahsildars' are employed and paid for by the donees, and they collect rent for the donees, the gift is perfected.[5] On the other hand, when money is deposited in a bank, and the deposit receipt is marked "not transferable," mere delivery of the receipt does not operate as a gift;[6] nor does a book entry. See s. 390 above.

Government Promissory notes, Zamindari.

(b) Substitutes for Physical Possession.

(i) *Symbolical or Constructive Possession.*

395. The donor may complete the gift by transferring the symbolical or constructive possession of the subject of gift to the donee.[7]

Symbolical or constructive possession.

"The Muhammadan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession of this property to the donee."[8] This was an 'obiter dictum,' as it was held that even constructive possession was not given, and that the gift was revoked.

Similarly it was said by Sausse C.J. that "handing over symbolical possession of a house or property by keys, etc."[9] is a sufficient transfer of possession, though this was also 'obiter,' as the donor was the husband, and he actually went out of the house before witnesses. See also 'Moosabhai *v.* Yacoobhai.'[10]

[1] As to which see the Transfer of Property Act, ss. 130 *et seq.*

[2] See comment. Cf. *Nizamuddin* v. (*Mussumat*) *Zabeda Bibi* (1874) 6 N. W. 338, 341; *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, 9 (para. 2), 10 (para. 2); *Shahzadee Hazara* v. *Khaja Hossein Ali Khan* (1869) 12 W. R. 498.

[3] (*Nawab*) *Umjad Ally Khan* v. (*Mussummat*) *Mohumdee Begum* (1867) 11 Moo. I. A. 16; 10 W. R. (P.C.) 25; *Sahibunissa* v. *Hafiza Bibi* (1887) 9 All. 213, pension under Act XXIII. of 1871.

[4] *Sajjad Ahmad Khan* v. *Kadri Begam* (1895) 18 All., 1; cf. *Anwari Begum* v. *Nizamuddin* (1896) 21 All. 165.

Mullick Abdool Gaffoor v. *Muleka* (1884) 10 Cal. 1112. The subject of gift consisted of zamindaris and shares of zamindaris, let out to tenants and ryots; a good many lakheraj properties, also let out to tenants; several malikana rights of some value; and a variety of house property in Patna and elsewhere consisting of houses, sheds, roads, gardens, etc.

[6] *Aga Mahomed Jaffer Bindanim* v. *Koolsom Bibee* (1897) 25 Cal. 9, 24 I. A. 196.

[7] *Ismal* v. *Ramji Sambhaji* (1899) 23 Bom. 682.

[8] *Ib.* citing *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650 (F.B.) (*Shaik*) *Ibrahim* v. (*Shaik*) *Suleman* (1884) 9 Bom. 146; *Meherali* v. *Tajudin* (1888) 13 Bom. 159.

[9] *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157, 160, 161 (paras. 3, 4). Cf. below comment to s. 35 and Ameer Ali, I. 60: "according to the Shaikh and the authors of *Sarair*, *Ghunia* etc. seisin may be either actual or constructive."

[10] (1904) 29 Bom. 267; 7 Bom. L. R. 45.

SECTION 395 And cf. "mere surrender or delivery of symbolical possession is sufficient in all cases of gift when the subject is immovable; when it is movable, manual or physical possession seems to be required so far as the nature of the article permits. Authority to take possession is equivalent to delivery of possession."[1]

(ii) *Manifestation by Donor of Intention to Transfer.*

When donor and donee both on the premises. appropriate intention unequivocally manifested, transfers possession.

396. Where the donor and donee are present on the same premises[2] (which form the subject of a gift), an appropriate intention may put the donor out of possession and the donee into it without any actual physical departure, or formal entry; and effect will be given as far as possible to the purpose of the donor whose intention to transfer has been unequivocally manifested.[3]

The present section is based on a judgment of West J.,[4] which is quoted by Mr. Ameer Ali with the remark, "This is in accordance with the principle stated in the 'Majmaa ul Anhar,'" and Jenkins C. J. said in a recent case:[3] "This decision has now stood in the authorized reports for over 20 years, and it has never, as far as I can find, been questioned. On the contrary, it has since been referred to as containing true exposition of the law in 'Ismal *v.* Ramji Sambhaji,'[5] to which Tyabji J. was a party, while in 'Rahim Bakhsh *v.* Muhammad Hasan'[6] Mahmood J. in delivering the judgment of the Court expressly distinguishes the case then before him from so much of the decision in 'Shaikh Ibhram *v.* Shaikh Suleman' as related to the house, without in any way suggesting that the law as laid down on this point was erroneous. The decision is also cited by Muttusami Ayyar J. in 'Sharifa Bibi *v.* Gulam Mahomed Dastagir Khan.'[7] Here then, if anywhere, it is best 'stare decisis.'"

According to the texts of Muhammadan law acknowledgment by the donor that he has transferred possession (though it has not really been transferred) may take the place of actual transfer of possession; this section practically represents the same rule of law.[8]

(3) Position of Parties as Affecting Transfer of Possession.

(a) Special Rules where Donee not 'sui juris.'

(i) *Persons who must take possession on behalf of Minor or Lunatic.*

Guardian must take possession for minor or lunatic.

397. Except as provided in sections 398-400 below where a gift is made to a minor or lunatic, by a donor other than the father or grandfather or the person entitled to be the guardian of the property of the said minor or lunatic, possession of the subject of

[1] Ameer Ali, I. 59; cf. Bail. II. 204, *n.* 8.

[2] Cf. s. 401; and s. 389 *ill.*

[3] *(Shaik) Ibhram* v. *(Shaik) Suleman* (1884) 9 Bom. 461, 150, 151; followed in *(Bibi) Khaver Sultan* v. *Bibi Rukhia Sultan* (1905) 29 Bom. 468; *Humera Bibi* v. *Najimunissa Bibi* (1905) 28 All. 147; cf. *Rahim Bakksh* v. *Muhammad Hasan* (1888) 11 All. 1 12. *Kandath Vettil Bava* v. *Musaliam Vettil Pakrukutti* (1907) 30 Mad. 305 (mere residence of mother will not disprove completion of gift).

[4] *Shaik Ibhram* v. *Shaik Suleman* (1884) 6 Bom. 146.

[5] (1899) 23 Bom. 682.

[6] (1888) 11 All. I. 12.

[7] (1892) 16 Mad. 48.

[8] Bail. II. 204 (para. 2); p. 310, *n.* 7.

gift must be taken on behalf of the said minor or lunatic by the guardian of his property.[1] SECTION 397

Illustrations.

(1) *W* is the minor wife of H. A gift is made to *W*. Possession may be taken of the gift either by *W* or H,[2] provided that *W* is old enough to permit consummation of marriage; but if *W* is not old enough, possession can only be validly taken for her by her husband, if she is in his custody; otherwise her guardian can alone do so.[2]

(2) D makes a gift to R, an infant, and gives possession to GB, the brother of R's grandfather. The seisin of GB "will not be legally sufficient, unless R was living under the protection of GB." [3]

(3) *D* makes a gift to R, a boy whom she had in her custody, and treated as her adopted son. *D* continued to be in possession of the subject of gift; *held*, that the gift was valid without possession, and notwithstanding that the father of R was living, the possession of *D* was the possession of R.[4]

(Sunni law.) Possession to be taken by—
1. Guardian (of property) —whether minor in his custody or not.
2. Guardian of person (not being guardian of property) having custody of minor.
3. Stranger having custodywhen there is no relation.

Baillie, I. 530, referring to this point, is not quite clear, unless the law as to the persons who are entitled to be guardians of the property of a minor or lunatic, is borne in mind. The following is a translation of the same passage, but the examples and illustrations are given in footnotes: "Where the donee is a minor, or of unsound mind, the authority to take possession on his behalf is in his guardian ('wali').[5] The rule is the same whether the minor [or lunatic] be living in the family of these persons or not. When the [guardian [6]] is absent at a distance without any communication, possession may be taken for a minor by any person who follows him next in guardianship. And with regard to persons other than the [guardian [7]], such as the brother,[8] paternal uncle,[8] mother,[8] and other relatives,[8] they have all [9] the authority to take possession of a gift for a minor, if he is in their family [10] Similarly, when the minor is in the family of the executors of the said persons, the executors may take possession.[9] And so when a stranger maintains an orphan,[11] who has no other (relation) the stranger also may effectually take possession of the gift.[9] In each of these cases it makes no difference whether or not the minor has sufficient intelligence to understand what taking possession implies. But in all cases

[1] Hed. 484. (col. ii. para. 2); Bail. I. 530 (*ll.* 6-7); II. 204; Macn. 213; and see below (referring to possession of *de facto* guardian). Cf. *Mohinuddin* v. *Manchershah* (1882) 6 Bom. 650, (662, para. 2, last 2 sentences).

[2] Bail. I. 530-531. The reason being that H is entitled to have custody of his wife after she is old enough to permit consummation. See s. 24 (1) above; Hed. 484 (col. ii. para. 6).

[3] Macn. 213.

[4] (*Mussummaut*) *Banoo Beebee* v. *Fukheroodeen Hosein* (1816) 2 S. D. A. Cal. 180. Ameer Ali, I. 75, says that though the Sudder Court "proceeded further" (than the strict law) the decision is correct in principle.

[5] I.e. "the guardian of the property," as is shown by the words immediately following, "who is first the father, then the father's executor, then his grandfather, then the executor of the executor, and then the Qazi, and then the person appointed by the Qazi." See above, s. 257.

[6] In the original "the father or his executor, and the grandfather or his executor."

[7] In the original "the father or grandfather"—see last note.

[8] I.e. who are guardians of the person but not of property.

[9] Each of these is said to be a rule of *ihtih*- "liberal construction." See above, p. 20.
'Iyal—family; *iyalat* means custody.

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Semble if father present no one else can take possession

it is assumed that the father[1] is either dead, or, if alive, is absent at such a distance that he cannot be communicated with. When, however, the father is living and present, and the minor is in the custody of the persons referred to,[2] the question arises whether it would be valid. No express mention has been made of this in the books, except that it is said that in the case where a stranger maintains an orphan who has no one else to maintain him, it would be valid for him to take possession of the gift on his behalf; and this provision implies that the taking possession by these persons would not be valid when the father is present—it being said in the case of the paternal grandfather also that he cannot take possession on behalf of the minor, in case the father is alive. There is no express provision dealing with the case where the minor is in his custody, and [i.e., as distinguished from the case] where he is not. But from what is expressly stated it is implied that it would not be valid [even where he is in the custody of the grandfather] ; so it is in the 'Zakhïra.' In the case where the minor is in the custody of his paternal uncle and in his family,[3] and a gift has been made to the minor, and the executor of the father is present. and the uncle has taken possession of the gift, it is said that his possession is not valid, and if the brother or the paternal uncle or the mother takes possession of it, while the minor is in the custody of a stranger, it would not be valid. But if the stranger in whose custody the minor is, takes possession of it, it would be valid. So it is in the 'Fatawa Qazi Khan.'"[4]

apparently not even grandfather.

Father's executor prevents any one else taking possesion except grandfather, unless that person has custody.

(Shiah law.) Guardians of property must take possession.

Turning to the Shiah law, it will be found, that in accordance with it, possession on behalf of a person who is not 'sui juris' must be taken by the father or grandfather or "the legal guardian or the judge." It will be noticed that only those persons are referred to who have the right to be guardians of property.

Transfer of possession to person who has custody, though not legally guardian of property.

398. Where the person legally entitled to act as the guardian[5] of the donee's property is absent,[6] possession may be taken on behalf of the said donee under Hanafi law[7] by any person who has custody of the donee. Under Shiah law possession must, according to the 'Shara'ya-ul-Islam,' be "taken by the legal guardian, or the judge."[7] It is submitted that where a Mussulman minor or lunatic is in the custody of some person who is not his legal guardian, the said person would be presumed to be the agent of the legal guardian impliedly authorised to take possession of gifts on behalf of the minor under section 388, whether the said guardian is present or absent.[8]

[1] This must refer not only to the father but also to the grandfather, and the other persons referred to in footnote (3) above.

[2] I.e. not the father.

[3] See p. 305, *n.* 10, above.

[4] *Fatawa 'Alamgiri*, III. 733 (Naval Kishore Ed.)

[5] The absence of the father is insisted upon quite definitely. Bail. I. 530 (*ll.* 26-32); and the same would apply in the case of all legal guardians, as appears from the illustration.

[6] Absence "at a distance of 3 stages" is said to be meant. Macnaghten, 206-207 (case 9).

[7] Bail. I. 530-351 : II. 204. See comment.

[8] See *ill.* (3) to last section It is submitted that the fact that the legal guardian permits another person to have the custody of the ward would justify the presumption. See Macnaghten, 206-207 (case 9) where mother held entitled to take possession in absence of father—the gift being by herself.

There is express mention in the 'Fatawa 'Alamgiri'[1] and 'Hidaya' about a person taking possession of a gift on behalf of a minor who is the guardian not of his property but of his person; and, as an extension of this rule, anyone who has the actual care and custody of the person of a minor, is authorised to take possession of the subject of gift on behalf of his 'de facto' ward. The transfer of possession to such a person (who may be termed the 'de facto' guardian) is, however, said to be valid only in case the father is absent. But it is submitted that where the father (or other legal guardian) of a minor or lunatic is present, and allows the ward to be in the custody of another, then such person must be taken to be impliedly authorised as the agent of the legal guardian to take possession of gifts. Such an implied authority is expressly referred to in the 'Hidaya': "It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she have been sent from her father's house to his; because she is held by implication to have resigned the management of her concerns to the husband." The next two sentences, it is true, restrict the case to the husband alone, and do not place even the mother in the same category. Cf. also the rule about absence at a distance.

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Implied authority of guardian to take possession.

(or includes) such authority

So, again, in Shiah law only the father and grandfather and their executors can be guardians whether for property or for custody, and the law is stated in much stricter terms by the Shiah lawyers. Syed Ameer Ali says, however: "When a gift is made to a minor, according to Hanafi law the possession of any person in whose protection the infant is living is sufficient. Among the Shiahs there are two divergent views. According to the Mohakkik possession should be taken on behalf of a minor by a person legally authorised to do so, or by the judge. According to the Shaikh and the 'Usûli' jurists the possession of any person who is a guardian 'de facto' is sufficient. But even according to the 'Sharâya,' when possession has been obtained, and held on behalf of a minor, by a person other then the father or grandfather, (or their executors) who are the guardians 'de jure,' the Court will not allow the gifts to a minor to be invalidated.'[2]

In the converse case when the minor's property is dealt with, the law is no doubt much more stringent, and none but the authorized guardian can act on his behalf.[3] So that the guardian has no power even to make an ''iwaz' out of the minor's property, though that has the result of making the gift irrevocable.[4]

399. Where a minor or person of unsound mind has sufficient intelligence to take possession of the subject of gift, transference of possession to him will complete the gift.[5]

Possession to minor donee.

(ii) *Transfer of Possession when Unnecessary.*

400. Where the father or grandfather [or any other person entitled to be the guardian of the property [6]] of a minor or

When from his father or grandfather dian[1] no transfer of possession necessary.

[1] See comment to last section.

[2] Ameer Ali, I. 114. No authority is cited, but it is said in a footnote that "the point was decided in accordance with this rule by the Calcutta High Court," no particulars of the decision are given. See also *Musst. Banoo Bibi* v. *Fakhrooddin Hasan*, 4 S. D. A. 180.

[3] See above ss. 269, 270.

[4] Bail. 585 (*ll.* 4-90 para. 3). Ameer Ali, I. 101 (para. 4).

[5] Hed. 484 (col. ii. para. 5); Bail. I. 531 (*ll.* 7-11); Macn. 218.

[6] See comment.

SECTION 400 person of unsound mind, makes a declaration of gift in favour of the said minor or person of unsound mind, and the subject of the said gift is in the possession of the said father or grandfather [or other guardian] or of some person on his behalf, there the gift is complete without any transfer of the possession of the subject of the gift : the declaration of gift having in law the effect of transforming the possession of the donor on his own behalf into possession on behalf of the donee, as the guardian of the property of the donee.[1]

Possession of guardian is possession of ward.

This section is the same in principle as s. 388 above, "because seizin by the guardian is seizin on his (the minor's) part ; hence at the time of the declaration the minor may be taken to be already in possession by the subject of the gift, which consequently need not be retransferred to him formally." The reasoning, of course, does not apply when the son is not a minor.[2]

the rule applies to all guardians, and not restricted to father or grandfather.

The books generally mention the rule in such a form as if it were restricted to the case where the father or grandfather were the donor, but on principle[3] it must extend to all persons who are the guardians of the ward's property. Then, again, "gifts by a mother, when (the thing given is in her own hands, and) the father is dead, without appointing an executor" are said to be valid "in like manner." Now, the only inference from the restriction is that where the father has appointed an executor, the executor being the guardian of the property,[4] the mother has no authority to take possession of the subject of gift. And this supports what the rule might be expected to be on general principles.

Shiah law.

As to Shiah law it is stated as follows : "If any other than the father or grandfather of the child should make him a gift, the donor's possession would not be sufficient, whether he have power over [i.e., custody of] the child or not, and the legal guardian must obtain power over the gift in order to complete the right of the child."[5] But the general rule that possession may be taken by an agent on behalf of the donee must apply equally to the guardian ;[6] and where the person legally entitled to be the guardian of a minor allows his rights to be exercised by another, would he not be considered to have authorised that other to take possession of gifts made to the ward ? See s. 396 above.

It is stated in the 'Fatawa 'Alamgiri' that "If the father makes a gift of a house to his minor child, and has not defined the boundaries and rights

[1] Hed. 484 (col. i. para. 4); Bail. I. 145 (para.2), 529, 530-531; II. 204 ; Macn. 212, R. 2 ; *Ameeroonnissa* v. *Abadoonnissa* (1875) 2 I. A. 87 ; 15 Ben. L. R. 67, 78; 23 W. R. 208 ; *Moulvi Wajeed Ali* v. *Moulvi Abdool Ali* [1864] W. R. 127; *Hussain* v. (*Shaik*) *Kaira* (1889) 13 Mad. 46 ; *Giyasooddeen Hyder* v. *Fatima Begum* (1868) 1 Agra 238 ; *Fatima Bibee* v. *Ahmad Baksh* (1903), 31 Cal. 319 ; affirmed (1907) 35 Cal. 271. (P. C.) (*Nawab Amerud-dy Kakya*) *Husain Bahadur* v. *Nateri Srinavasa Charlu* (1871) 6 Mad. H C. R. 356, 359.

[2] As seems to have been the case in *Munnoo Bibee* v. *Jehandar Khan* (1906) 1 Agra 250. Cf. p. 312 *n.* 2.

[3] See ss. 385, 388, 397 above.

[4] See ss. 257-259 above.

[5] Bail. II. 204 (para. 5 *ll.* 23-28), cf. the possession on behalf of *waqf* property. Bail. II. 218 ("*fourth*" last 6 lines.)

[6] See s. 388 above.

appertaining to it, and if the house is at the time of the gift entrusted[1] to some one, and the person to whom it is entrusted is living in the house, then the minor will become the owner of the house by the contract of gift, and in this regard 'sadaqa' is also similar to 'hiba.'"[2] SECTION 400

In an earlier chapter[3] of the same work it is said that the gift of a father to his infant child is completed by the contract, and it makes no difference whether the subject of the gift be in his own hands or in deposit with another. But if it be in the hands of a usurper (i.e. when the father cannot exercise any control over it at all), or of a pledgee (see s. 370) or of a tenant (see s. 393) the gift is not lawful (viz. by the mere declaration) for want of possession."[3]

(ii) *Where parties are Husband and Wife [or others] living together in the property.*

401. Where a husband or wife makes a gift of a house to the other[4] in which they have been living together, it is not necessary for completing the gift that the donor should vacate it, by either departing from it, or by removing his or her property from it.[4] *Quaere*, whether the same rule applies in the case of relations other than husband and wife, who are living together. **Husband need not vacate in favour of wife and 'vice versa.'**

Macnaghten also mentions the case of the father and minor children as on the same footing. But that is hardly a new instance, as the father is the legal guardian of his minor child, and the father's possession is not only the possession of the child, but the father alone can take possession on behalf of the minor. It is submitted that this rule cannot on principle be extended[5] to the case of any other except the wife and husband; except of course in cases where the donee is not 'sui juris' and then the rules stated in ss. 397-400 apply.

(4) Proof of Possession: Presumptions.

402. The onus lies on the person claiming to be the donee, to prove that possession has been given to him.[6] **Onus on donee.**

[1] In the original *wadi'at*, "a deposit, trust, whatever is committed to another's charge" (Richardson's Dictionary).

[2] *Fatawa 'Alamgiri*, *Hiba*, ch. XI., last sentence, citing the *Jawahir Akhlati*; cf. Hed. 481 (col. i. para. 4).

[3] Bail. 1. 520 (para. 2), ch. VI. of original. Cf. *Rahim Baksh* v. *Muhammad Hasan* [1888] 11 All. 1, following Macn. 201 (case 6); *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All 430, 33 I. A. 68, 75.

[4] Macn. 214. *Amina Bibi* v. *Khatija Bibi* 1864) 1 B. H. C. R. 157; "It is remarkable that the . . . books . . . do not contain any express . . . reference to this point, viz., to a gift from husband to wife. The converse . . case, viz., that of a gift from wife to husband of the house in which they were residing and in which they continued to reside is mentioned as one of the exceptions," per Sausse C. J. *ib.* 162. "It is distinctly laid down in *Kazi Khan* and the *Radd ul-Mukhtar* that the husband may make such a gift" Ameer Ali, I. 67 *n.* *Azimun Nissa Begum* v. *Dale* (1868) 6 M. H. C. R. 455; *Emnabai* v. *Hajirabai* (1888), 13 Bom. 352; *Ibrahimbhai* v. *Fulbai* (1902) 26 Bom. 577, 596.

[5] *Bava Saib* v. *Mahomed* (1896) 19 Mad. 343. Mr. Mulla in his useful book appears to do so to every case where the donor and donee are living together. "Mahomedan Law," s. 115 (3), p. 81. The rule was held not to apply between aunt and nephew: *Bava Saib v. Mahomed* (1896) 19 Mad. 343; nor between a lady and one described as her foster son, but "who was no real relation to her." *Vahazullah Sahib* v. *Boyapati Nagayya* (1907) 30 Mad. 519, L. 523. See above, s. 396 and notes thereto.

[6] See *ill.* and comment

SECTION 402
Onus of proof where gift from father to minor child.

Exception—Where the intention of a father to make a gift to his minor child is proved, the onus lies on the father to show subsequent possession of the property by him was not on behalf of the minor.

Illustration.

D admits that he made a declaration of gift in favour of R, saying, "I gave but did not put him in possession," the "word is with the donor" (but the donee may demand his oath, if he insists that possession was given).[2]

In 'Ismail Mahomed *v.* Hurbai,'[3] Farran C.J. and Candy J. held that the onus of proving the transference of possession was on the donee. They did so on the authority of a passage in a Privy Council decision[1] dealing with the onus of proof, where the gift is such as has the effect of defeating the policy of the Sunni law, which disfavours interference by will with the course of the devolution of property amongst the heirs. Similarly, though gifts to relatives and especially to children are considered "highly proper and becoming,"[5] it is considered abominable to make unequal gifts to them[6] under Shiah law.

Acknowledgment.

403. Where the donor has acknowledged that he has made a gift, and that he has delivered possession of the subject of gift to the donee, it will be presumed that the gift was completed as acknowledged.[7]

Illustrations.

(1) If D makes a declaration of gift to R, and R accepts it, but before possession is given, or acknowledged to be given, D dies; the gift is inoperative.[8]

[1] *Moulvie Wajeed Ali* v. *Moulvie Abdool Ali* [1864] W. R. 121, 123, 124. *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1875) 21 A. 87; 15 Ben. L. R. 67; 23 W. R. 208; *Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal. 319, 330.

[2] Bail. II. 208 (*third*). The illustration may be paraphrased as follows: the presumption is in favour of the donor. If the donee, however, produces evidence the presumption may shift. Cf. *ante*, p. 48 *n.* 2.

[3] Printed Judgments (Bombay) [1898] p. 106.

[4] *Khajooroonnissa* v. *Roushan Jehan* (1876) 2 Cal. 184, 197; 3 I. A. 291, 307.

[5] Bail. II. 205 (para. 4).

[6] See s. 361 above and *ill.* to this section. But under Shiah *Ithna 'ashari* law bequests to heirs are valid without the consent of the other heirs.

[7] See *ill.* and comment for Hanafi law; and Bail. II. 204 (*ll.* 4-8,) from which it would appear as if the presumption were conclusive. But that passage no doubt refers to acknowledgments in Court; and possibly has reference to a proceeding similar to the fines and recoveries of English feudal law. The distinction between conclusive and other presumptions appears from the last sentence of the passage translated from the *Fatawa 'Alamgiri* (see p. 311). Cf. also Transfer of Property Act s. 122; and see *ill.* (2) and cf. (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman* (1884) 9 Bom. 146: 150 (para. 3, *l.* 8:) "a declaration of the person previously possessed, puts him into possession"; *Humera Bibi* v. *Najmunnissa Bibi* (1905) 28 All. 147, 150, 151, (donor in reply to interrogatories administered to her 6 or 7 months after gift, admitted that she had given possession; she was not believed when she gave evidence, 14 years after, that possession was not given). See also *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. R. 157, 161, 162.

[8] Bail. II. 204, *ll.* 4-8; cf. *Humera Bibi*, *ubi supra* at p 152; acknowledgment that possession was given may of course operate as an admission; Evidence Act ss. 17 *et*

(2) "The subject of gift is in the possession of D, and R claims it, saying 'a gift of it was made to me by D, who gave me possession,' which D denies. R proves that D had acknowledged that he had made the gift, and that he had given, and that R had taken, possession. Abu Hanifa had at first held that this evidence would not be accepted, but later he altered his view and the two disciples agree with the latter view."[1]

Acknowledgment of possession. Withdrawal of it.

The extract which is given as *ill.* (2) above continues as follows: "And the same rule prevails when a similar dispute arises in 'rahn' and 'sadaq.' And if the testimony of the two witnesses conflicts in this regard, that one witness bears testimony to actual possession, and another to the donor merely acknowledging that possession was given, then without any difference of opinion the testimony cannot be accepted. And if the slave (the subject of gift) be in the possession of the donee, and the witnesses depose to the donor having acknowledged to have given possession to the donee, then the testimony is valid according to both the earlier and the latter views expressed by the great Imam. This is in the 'Zakhira.' And if the donor acknowledges before the Qazi, then though the slave is at the time in the possession of the donor he will be taken from the donor, and given over to the donee. . . . This is from the 'Muhit.'"

However it was held[2] that no gift was proved where a Mussulman did not execute any formal transfer of a property to his wife, but caused mutation of names in her favour, and presented a petition to the revenue court, stating that he had transferred his rights and interests to his wife, and made her his 'locum tenens,' but that she had no power to transfer the property in any way, but that she would continue to hold and possess the share for her life.

Acts of ownership evidence of possession.

404. Acts of ownership exercised by the donee over the subject of gift, may be adduced as evidence that possession was transferred to him.[3]

Illustration.

D declares orally in the presence of seven witnesses that he gives to *R* his wife all his revenue-paying lands. The gift is stated to be in lieu of dower. *R* subsequently pays the Government dues and obtains a decree of ejectment against a tenant. *Held*, that whether the dower was due or not, the acts referred to showed that there was a transfer of possession, and the gift was valid and complete.[4]

Nature of acts of ownership.

The acts of ownership exercised by the donee must, it is plain, be of a nature which he could not, or at least did not, exercise before the gift ;[5] on

[1] *Fatawa 'Alamgiri, Hiba* ch. IX., *ad init.*

[2] *Mumtazunissa* v. *Tufail Ahmad* (1905) 28 All. 264.

[3] *Jones* v. *Williams* (1837) 2 M. & W. 326, 327; *Barnes* v *Mawson* (1813) M. & S. 77; *University College* v. *Oxford Corporation* (1904) 20 T. L. R. 637; *Ferrand* v. *Milligan* (1845) 7 Q. B. 730; See also *Bhagwansing* v. *Secretary of State* (1906) 10 Bom. L. R. 671, and the authorities therein referred to by Batty J. *Sharifu Bibi* v. *Ghulam Mahomed Dastagir Khan* (1892) 16 Mad. 43 *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O.C.J.) 27, 31-33 (donee giving lease to donor); *Gulam Jafar* v. *Masludin* (1880) 5 Bom. 238, 242, 243.

[4] *Karmarunnissa* v. *Husaini* (1880) 3 All. 266 (P.C.)

[5] Cf. *Valayet Hossein* v. *Maniran*, (1879) 5 Cal. L. R. 91.

SECTION 404 the other hand, where the husband made the gift of a house to his wife, and continued recovering the rent and spending the rents on the family expenses, but had accounts prepared 10 or 11 years after the date of the gift in the name of the wife, the circumstances were held to afford sufficient evidence of of possession having been given.[1] But when the father purports to make a gift to his son and there is no real change in the nature of the enjoyment, the gift cannot be held to be completed.[2] See also section 405 below.

Analogy of 'waqf'

Thus it is necessary to transfer possession for the completion of a 'waqf' as much as for the completion of a gift, and we find that when the public are allowed to pray in a building which is erected for serving as a 'masjid' this is equivalent to transfer of possession and the 'waqf' is completed;[3] similarly the 'waqf' is completed when an aqueduct is built and people have used it, or occupied a caravanserai, or inn, or buried in a cemetery,[4] or a road is dedicated to Mussulmans, and one Mussulman has passed over it, or a bridge made and people have crossed it.[5]

Purchase by father in name of son.

405. From the fact that a Mussulman father purchases property in the name of his son, no presumption arises in India, that a gift of the property was intended to be made to the son.[6]

Cf. Trusts Act II. of 1882, s. 82.

'Benami' or 'farzi' purchase.

"The presumption of a 'benami' or 'farzi' purchase may of course be removed by circumstances[7] showing that the property was intended to be transferred to the son, but evidence of acts of ostensible ownership prove (*sic*) nothing"[8] See s. 404 above. The English law is just the reverse. Under it, when a purchase or transfer is made in the name of the wife, child or adopted child of the man paying the purchase money or making the transfer, there is a presumption that the gift was intended,[8] but the presumption may be rebutted by an unmistakable act of possession, or by formal possession taken by the donor.[9]

When Government securities were endorsed and delivered by a father to his son in the presence of the local Treasury Officer, the question arose[10] whether this was intended as a transfer of ownership (as held by the first court) or was a 'benami' transaction (as held by the High Court in Appeal), the Privy Council pointed out that the father was old, and that the son had been appointed his attorney (p. 271): "'old age may be a good cause for transferring such dominion as enables the transferee to deal with others; but whether it would induce the General (i.e. the donor) to strip himself bare, and to leave himself and the rest of his family at the mercy of his eldest son is another consideration."[10] Then they point out that immediately after the endorsement, the General set about making a will (the endorsement was on 5th March, the will was signed on the 15th July). Though the will was quite

[1] *Emnabai* v. *Hajirabai* (1888) 13 Bom. 352.

[2] *Munnoo Bibee* v. *Jchandar Khan* (1866) 1 Agra 250; *Khader Hussain Sahib* v. *Hussain Begum Sahiba* (1869) 5 Mad. H.C.R. 114, 119.

[3] Bail. I. 604, below s. 514.

[4] Bail. I. 609, below s. 462 *ill* (3).

[5] Bail. I. 610, (para. 2).

[6] (*Moulvie*) *Sayyud Uzhur Ali* v. (*Mussumat*) *Bibee Altaf Fatima* (1869) 13 Moo. I.A 232, 247; 4 Ben. L.R. 1.

[7] *Gulam Jafar* v. *Musludin* (1880) 5 Bom. 238: cf. also s. 400 above.

[8] Halsbury, "Laws of England," XV. 415, s. 824.

[9] *Stock* v. *McAvoy* (1872) L. R. 15 Eq. 55. Cf. Halsbury, *Ibid.* 417, s. 827.

[10] (*Nawab*) *Ibrahim Khan* v. *Ummat-ul-Zohra* (1896) 19 All. 267, 271, 274, 24 I. A. 1.

invalid, the legacies and annuities contained in it were referred to as showing that the father could not have looked on the son as the owner of the notes. This was strengthened by the fact that the father continued to pay out sums from their income as before. The Subordinate Judge had held that the father gave the corpus, reserving the income to himself. The High Court and Privy Council held that this was a mere theory of the Subordinate Judge, the son's case being quite different. SECTION 405.

§ 6.—'Iwaz' or Return for Gift.

(1). 'Iwaz' of Two Kinds.

(a) Where 'Iwaz' not Stipulated for: 'Hiba bil 'Iwaz.'

'Hiba bil 'iwaz' defined.

406. Where the donee of a gift (which is referred to in this context as "the original gift," cognate expressions having cognate meanings) makes a reciprocal gift to the original donor, and signifies [1] that the said reciprocal gift is in return for the original gift received by himself,[2] the said reciprocal gift is called an 'iwaz' or "return" for the original gift. After a return has been so made, the original gift, is called a 'hiba bil 'iwaz' (or a gift with a return).

Illustrations.

(1) D makes a gift to R of a horse. R then makes a gift of a camel to D, and states that the gift of the camel is a return for the original gift, (viz., of the horse) made to R by D. The gift of the camel is the "return" or 'iwaz' for the original gift, and after the camel has been given to D and accepted by him, the gift of the horse by D to R is called a 'hiba bil 'iwaz.'

(2) M H died, leaving as his heirs his widow *W*, and his brother F A. The estate of M H was kept joint and managed by F A, who made an annual allowance of money and grain to *W* for maintenance. On the 1st of January 1867, F A passed (an instrument which was construed as) a deed of gift of certain property in favour of *W*. On 3rd January 1867, *W* passed a writing in favour of F A by which she relinquished to F A her rights in the estate of her husband M H. *Held*, that the two deeds amounted to a 'hiba bil 'iwaz.' [3]

[1] Bail. 1. 532 (*ll.* 11-13), where the following forms are given: "this is the *'iwaz* or the *badal*," or "in place of thy gift," or "I have made a donation of this for thy gift." If the reciprocal gift is made without saying "in *'iwaz* of thy gift, or using some other of the forms of expression abovementioned, the second gift would not be an exchange for the first but a new gift and each of the parties would have the right to revoke," *ib.* (*ll.* 15-21).

[2] Cf. *Ussud Ali Khan* v. (*Mussamat*) *Olfut Beebee* (1868) 3 Agra, 237. "the deed of gift must distinctly and specifically bestow the property in lieu of something received."

[3] *Muhammad Faiz Ahmad Khan* v. *Ghulam Ahmad Khan* (1881) 3 All. 490; 8 I.A. 25. In the illustration, *W* stands for Walimunissa, M H for Muhammad Husain Khan: F A for Faiz Ahmad Khan.

[4] *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 181, 197, 198; 2 I.A. 291. It is stated in the headnote to this case that when consideration for a gift is actually paid, transfer of possession is not necessary to validate the gift. This proposition seems to be stated by their lordships of the P. C. merely as a part of the appellants' contention and not as an exposition of the law by themselves; see below, s. 411 p.324.

SECTION 406.

(3) D purported to make on 18th November 1839 a deed of gift in which it was set forth that in consideration of a payment of Rs. 10,000, D gave to his son R a one-third share of D's moiety of a certain zamindari. On the same date D executed a will referring to the said deed of gift. In May 1841, R applied for mutation of names in respect of the said one-third share; D resisted this claim, saying he had not received the consideration. On 19th November 1841, a petition was presented to the Collector, dated 14th November 1841, purporting to proceed from D, in which D admitted the gift, and consented to mutation of names. D had died on 15th November 1841. The Collector declined to act on this petition. *Held*, that no real consideration was passed, that there was no intention on the part of D to part with the property at once to R; but that both D and R were endeavouring to evade the Muhammadan law by representing that to be a present transfer of property which was intended only to operate after D's death, and consequently that there was no valid gift.[1]

Wrong user of the term 'hiba bil 'iwaz.'

Baillie pointed out in 1865 that the expression 'hiba bil 'iwaz' is, or was at the time he wrote, frequently used inaccurately in India, and applied to transactions which would really be denominated sales, alike by Muslim and English lawyers.[2] It need hardly be said that the popular misapplication of technical terms of law cannot affect the law as it is laid down in texts of authority, which are expressed in precise language, and which were written long before the inaccurate use of the terms in question came into vogue, and which besides were written as a rule in countries sufficiently distant from India to be free from the taint of Indian malappropriation (if the expression may be allowed) of Arabic words.[3] No doubt popular misuse of such terms may have to be borne in mind when documents inartificially expressed have to be construed, and it must be remembered that many of the decisions[4] given by the Sadr Diwani 'Adalat Courts, on which the earlier English books on Muhammadan law are mostly based, consisted of the interpretations of documents of this nature. To this must be added that prior to the passing of the Contract Act, the Muhammadan law of sale was applicable in India.

It cannot affect the Muhammadan law.

Under these circumstances we must in the first instance define with precision the real nature of the different classes of transactions, and state precisely what the Muslim writers of authority mean when they speak of 'hiba bil 'iwaz' and 'hiba ba shart ul 'iwaz.' After this is done it will be possible and necessary[5] to consider which of the transactions contemplated by the said writers are

1. 'Hiba bil 'iwaz' and 'hiba ba shart ul 'iwaz' must be understood in the sense laid down in texts.

2. Then the applicability of their rules to be considered.

[1] See above p. 313, *n.* 4.

[2] Bail. I. 122, 532 *n.*

[3] Sir R. Wilson points out that what Macnaghten and Ameer Ali "mean by *hiba bil 'iwaz*, simply is Baillie's 'Indian form' which 'resembles sale in all its legal incidents.'" Except through some such explanation, certain statements in Macnaghten seem to be incapable of being supported. With reference to Syed Ameer Ali's book, however, there seems to be a misapprehension in Sir R. Wilson's mind. Ameer Ali no doubt says a *hiba bil 'iwaz* is a sale in all its legal incidents ("Mahommedan Law," I 101), but this must be read with what precedes and follows: "When the exchange takes place subsequently to the gift the *'iwaz* is regarded as a gift *ab initio*." *Ibid.* I. 98; and cf. *ibid.* I. 102 (para 1) which clearly shows that the right hon. author is referring to the case where are *'iwaz* has been given for a gift already made, in which case all the stages of the *hiba bil 'iwaz* are completed.

[4] E.g. Macnaghten, APPX. Dig. of Cases. Deed, 2, Gift, 11.

[5] *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C. J.) 27.

of such a nature that they would, in accordance with the language of the Indian legislature, fall on the one hand within the category of gifts (and be therefore governed by the Muhammadan law), and on the other hand of contracts (and be governed by the Contract Act).[1] SECTION 406.

The chief characteristic of a gift, as it is understood in modern systems, is that it is a transfer without consideration.[2] At the time when the rules about 'hiba bil 'iwaz' (literally a gift with a return) and 'hiba ba shart ul 'iwaz' (gift with a stipulation for return) arose in Muhammadan law, it seems to have been more common than it is nowadays for persons to enter into transactions which can be best described as lying midway between gifts strictly so called, and barter.[3] A 'hiba bil 'iwaz' consists of two separate acts of donation, i.e., of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee.[4] The notion underlying a 'hiba bil 'iwaz' was something of the following nature: D makes a gift to R, and R spontaneously (but out of the feelings of regard stimulated by the gift that he has just received) makes a gift in his turn to D, saying that his gift is a return for the gift that D had made him. In modern society R would probably desist from making such a statement, and would defer his gift till some suitable occasion arose, supplying a pretext for the gift. But it will be observed that the mutual gifts of modern times are in essence the same as the 'hiba bil 'iwaz' of the Muslim lawyers. A person who receives a present, in most instances feels himself under a social obligation to give a present in return. When, however, the reciprocal gifts have been completed, under Muhammadan law, a new legal incident arises, viz. that each of the said gifts becomes irrevocable, gifts being in the theory of Muhammadan law normally revocable; though the exceptions to this rule are so numerous that few gifts retain their revocability, even where no ''iwaz' is given. They lie midway between gift and barter or sale.

Considered from this point of view, the law may be stated in the following terms: "the donee of any gift may make the said gift irrevocable by giving a gift in his turn to the donor, stating that it is in return for the said gift. The return for a gift so made is called the ''iwaz' and the original gift is then called 'hiba bil 'iwaz.'" The distinction between a reciprocal gift made with this intention and an article given in a contract of exchange or barter is obvious.

This seems to be the proper place to refer to 'Jainabai *v.* R. D. Sethna,'[5] which contains a suggestive judgment, but apparently on many of the points discussed by the learned judge he was supplied with only fragmentary materials, and his 'obiter dicta' (for such they are) must therefore be considered with those limitations. Thus it appears as if he were led to believe that "a private gift 'inter vivos' to be legal and valid, must be free from all pious or religious purposes" (pp. 609-610), which is not correct if it is meant that a religious motive annexed to a private gift affects its validity in any way; he however recognises that by one and the same act part of the property may be given with a religious 'Jainabai *v.* R. D. Sethna.

[1] See p. 314, *n.* 5, above.

[2] Bail. I. 507, (*ll.* 1-3); II. 203, (*l.* 3); Hed. 482 are to the same effect.

[3] *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C. J.) 27. *Solah Bibee* v. *Keerun* (1871) 16 W. R. 175; cf. also *Mahammadunissa Begum* v. *J. C. Batchelor*, (1905) 29 Bom. 428.

[4] *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1 (Mahmood J.).

[5] (1910) 34 Bom. 604.

SECTION 406. motive, and part without it, though he seems to consider this as enunciating a new principle. Again, (p. 611) it seems to be overlooked that the order of the Court is necessary merely for the completion of the revocation; the remarks on pp. 612-613 proceed on the basis that the creation of limited interests are governed by the rules of 'hiba'; on p. 614 Muhammadan law is described "as the extremely crude and simple notions of primitive people."[1] On the same page when it is said that "the addition of descendants would protract the first gift and postpone its reversion to the donor," the learned judge did not have the authorities before him showing that the descendants do not inherit from their ancestors, but take it under the grant from the donor. The question of trusts in Muhammadan law to which he refers (p. 616) is dealt with elsewhere.

(*b*) *Where 'Iwaz' Stipulated for: 'Hiba ba shart ul'iwaz.'*

'Hiba ba shart ul 'iwaz' defined.

407. Where a gift is made with a stipulation for a return, it is termed a 'hiba ba shart ul 'iwaz.'[2] The return stipulated for may be specified or unspecified.

"Iwaz" compared with consideration in a contract.

It must be noted that the fact that a "return" is stipulated for does not take away the original nature of the transaction: 'ex hypothesi,' there is originally a gift, i.e., there was no consideration for the transfer of the subject of the gift, and the stipulation for return cannot be taken to be consideration, otherwise there would not be a gift. Consequently the original gift and the stipulation are not reciprocal promises forming the consideration for each other under the Contract Act s. 2. (f), but each is an independent gift.[3] It may be admitted at once that such transactions are very peculiar, and that in India we should expect either a gift to be made without any stipulation, or otherwise a contract in clear terms. But inasmuch as the law had its origin not in our times, nor in the country where it has to be applied, there should be nothing surprising in it if transactions are referred to, and provided for, which are unfamiliar to us.[4]

1. "Iwaz" if not stipulated for, like gift.

The nature of the original gift and the return is clearly explained in the 'Fatawa 'Alamgiri.' The relevant passages may be translated as follows: "Where the 'iwaz' follows the gift, it is a gift 'ab initio'—there is no difference of view on this point amongst our doctors . . . . All the conditions which apply to a gift, apply equally to the return following a gift, as possession,[5] and joining together, or dividing. This is stated in the 'Khazanat-ul-Muftiin.' . . .

2. If "iwaz" stipulated for

(*a*) in its inception it is a gift.

As to the second kind of "iwaz," viz., such an "iwaz" as is stipulated for in the declaration and acceptance[6] of the gift, if the gift is with a stipulation for a return, then in its inception the same conditions apply to it which apply to a gift,

[1] In *Hoosa Adam* v. *Ismail* (1909) 12 Bom. L. R. 169, 183. the same learned judge says that "at the time the Mahomedan law was codified, or reduced, at any rate to learned treatises, the society for the regulation of whose rights and conduct it was enacted was still very largely in the nomadic state."

[2] Bail I. 534, ll. 208; cf. *Mogulsha* v. *Mahamad* (1887) 11 Bom. 517.

[3] *Cf. Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1.

[4] A gratuity given to an attendant is a gift; when it is made, however, there is frequently a tacit, or sometimes an express, understanding for a "return" to be made by the donee in the shape of some service to be rendered, but if the attendant does not render the service, the donor does not consider himself in the same position as he would if he had handed to a shopkeeper the price of an article, and the shopkeeper had refused to hand over the article to the purchaser.

[5] These words are omitted in Bail. I. 534 (*ll.* 16-17).

[6] *Aqd-ul-hiba*, i.e., agreement for the gift.

so that if it is an undivided thing but capable of division, then it will not be valid, and property will not be established in it prior to transference of possession ; and neither will have the option to refuse to take delivery.[1] But after possession has been taken by each [viz. of the gift, and the return respectively] it will be governed by the law of sale ; so that neither will have the liberty to take back what belonged to him, but rights of pre-emption will arise, and each will have the option to give back the thing of which he has taken possession, on the ground of there being a defect in it. And a 'sadaqa' with a stipulation for return, is reckoned as a 'hiba ba shart ul 'iwaz.' These rules are laid down on the principle of 'ihtihsan,'[2] for analogy would require that a 'hiba ba shart ul 'iwaz' should be considered a sale both in its inception and after completion : so it is stated in the 'Fatawa Qazi Khan.' If a gift is made of a house to two men for the ''iwaz' of 1,000 'dirhams' after possession has been taken mutually, this gift will be considered a lawful sale, i.e., the gift will be converted into a lawful sale : this is stated in the 'Qunia.' "[3] From these passages it is clear that however the words may be applied in India, neither a 'hiba bil 'iwaz' nor a 'hiba ba shart ul 'iwaz' is complete without each side taking possession of it. It would be difficult in India to prove a 'hiba ba shart ul 'iwaz' which would not be a contract :[4] for it would mean proving that though the donor stipulated for a return at the time he was making a declaration of gift, the stipulation did not form consideration for the gift. But when a transaction once comes within the category of a 'hiba bil 'iwaz' or a 'hiba ba shart ul 'iwaz,' it is submitted that there is no warrant for stating that transfer of possession can be dispensed with in regard to its completion.

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(*b*) After competition i.e. when possession taken on each side, has incidents of sale.

So that 'hiba bil 'iwaz 'may after completion almost be said to be merely a form of barter.

(2) Subject of ''Iwaz' or Return.

408. Whatever may be the subject of gift may be the subject of an ''iwaz' or return ; and doing or abstaining from doing something may operate as an ''iwaz,' whether such act or abstention has been antecedently stipulated for, or accepted as a return subsequently to the original gift ; provided that according to Sunni law in a 'hiba bil 'iwaz' the ''iwaz' cannot consist of a part of the subject of the original gift[5] (unless such a change has taken place in the latter, that the original gift has become irrevocable).[6]

What may be the subject 'iwaz.'

[1] I.e. on the ground that there is some defect in the subject of the gift or of the return. Bail. I. 534 (para. 3, *l.* 7) seems to be a mistranslation.

[2] See above, p. 20.

[3] *Fatawa 'Alamgiri, Hiba*, ch. VII. corresponding to Bail. I. 534, 535. Cf. table, p. 257.

[4] Cf. *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (o. c.) 27 ; *Mirza* v. *Toola Beebee* (1829) 4 S. D. A. 425.

[5] E.g. *mahr* : *Mahomed Faiz Ahmed* v. *Ghulam Ahmed Khan* (1881) 3 All. 490 ; 8 I. A. 25. *Muhammad Esuph Ravutan* v. *Pattamsa Ammal* (1899) 23 Mad. 70. But not past services, nor natural love and affection : *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1, 5 (para. 2), 6 (paras. 2, 3). Syed Ameer Ali says : "A gift made on condition that the donee should make some present, or offer some gratuity, or service, to the donor is valid," I. 116.

[6] Bail, I. 532-533,

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Quaere, whether according to Hanafi law in a 'hiba ba shart ul 'iwaz' a return may be stipulated for which consists of a part of the subject of the original gift.[1]

Explanation I—According to Shiah law part of the subject of the original gift may validly form the subject of return or 'iwaz.'[1]

Part of subject of gift.

Explanation II—The produce of the subject of gift does not form part of the subject of gift.[2]

Illustrations.

(1) A gift is made with a stipulation that the donee shall give over to the donor the income or proceeds of the subject of gift; the possession of the subject of gift being transferred to the donee, the gift is valid,[3] and the donee's undertaking to give over the income or proceeds to the donor is also valid and enforceable in the Courts of British India as a trust.[3]

(2) Government promissory notes were purported to be transferred, coupled with the condition that the donee was to receive only the interest during her life, and that after her death the notes were to be held in trust for all her heirs. The Privy Council did not decide whether the gift was not absolute, and the condition void, as it was unnecessary in the case before them.[4]

(3) D makes a gift to R on condition that R should return a part of the subject of gift as an 'iwaz.' Under Sunni law the condition is void,[5] and the gift absolute. Under Shiah law both the gift and the condition are valid.[1]

(4) "If the donee convert a portion of the gift to another substance, and give it in exchange, it would be a good 'iwaz.' If a person make a gift of one thousand 'dirhams' to A, who gives in exchange out of the same one 'dirham,' this is not a good 'iwaz' according to 'us' (i.e. the Hanafis) though Zafar differs."[6]

(5) "The Jurist Muhammed Baqar Majlisi in reply to a question gave the following response: Being asked, 'If a man makes the gift of a property or a garden to his wife in lieu of her dower, does it come under the category of a gift with a return, so that unless one of them retracts, the other cannot retract?' he answered, 'Yes, it is a gift with a return.'"[7]

[1] See comment.

[2] *Nawab Umjad Ally* v. (*Mussumat*) *Mohumdee Begum* (1867) 11 Moo. I. A. 517. See above s. 352 etc. pp. 267 *et seq*. So that according to either system of Muhammadan law a stipulation may be lawfully made (in a *hiba ba shart ul 'iwaz*) for the return of the produce of the subject of gift. See above s. 352. *Semble* the produce of the subject may also form the subject of *'iwaz* in a *hiba bil iwaz*. See comment to this section.

[3] (*Nawab*) *Umjad Ally Khan* v. *Mussumat Mohumdee Begum* (1867) 11 Moo. I. A. 517; 10 W. R. (P.C.) 25. *Kasim Hussein* v. *Sharfunnissa* (1883) 5 All. 285

[4] *Suleman Kadr* v. *Dorab Ali Khan* (1881) 8 Cal. 1, 7; [8] I A. 117. Cf. (*Nawab*) *Ibrahim Ali Khan* v. *Ummat-ul-Zohra* (1896) 19 All. 267; 24 I.A. 1.

[5] Bail. I. 538; see however s. 352.

[6] Ameer Ali, I. 101, citing *Fatawai Qazi Khan*.

[7] *Jami'-ush-Shittat*, 392. See p. 317 *n*. 5, for other cases relating to *mahr*.

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A contract may be the subject of 'iwaz'

"Anything that is capable of being given as a return, is sufficient. It may be in the form of a contract, such as a letting and hiring, and the like, which requires a declaration and acceptance, and forms a separate transaction by itself; or it may consist of (a promise to do) some work, such as sewing a certain piece of cloth, which does not require a separate contract; and by such sewing it becomes a gift with return ('hiba mu'awwaza'); or it may be the release of a claim against the donor, or some other person. Although in the treatises of the jurists there is no express provision dealing with this matter, yet the generality of their statements includes all, and with reference to 'sadaqa' it has been cited in evidence of its being irrevocable, that as a return from God is also an ''iwaz,' so it falls under the head of 'hiba mu'awwaza'—gift with a return . . . and the learned doctor Aga Muhammad Baqar Behbahani in a Persian treatise has expressly asserted the principle in such general terms" [1]

(Shiah law.) part of the subject of gift as ''iwaz'

"In the case of a gift with a stipulation for a return, there is no distinction whether the return that is made consists of a part of the subject of gift, or of anything else; for when it (the return) is not specified, the fact that it has come into the donee's possession in consequence of the gift makes no difference; hence a part of the subject of gift may be given in return for the whole." [1]

The last two paragraphs are taken from a Shiah authority.

The words of the section enclosed in parentheses may seem to be of little effect, inasmuch as in Muhammadan law, as contemplated by its original exponents, the main, if not the sole, effect of an ''iwaz' is to make the gift irrevocable; and where the gift has become irrevocable without any ''iwaz,' it may import little whether the ''iwaz' is valid or not, as such. But if the ''iwaz' is valid as such, it is irrevocable, whereas if it takes effect as an independent gift, it is revocable; besides, the provision may have an important bearing on conditional gifts, and limited estates through trusts.

Effect of the rule on life-interests.

Just as a part of the subject of gift cannot be a valid ''iwaz' in Sunni law, so the reversionary interest in the subject of gift cannot be the subject of return, i.e. the donor cannot give merely a life-interest in the subject of 'hiba.' [2] On the other hand, in Shiah law part of the subject of gift may be the ''iwaz'; and similarly a life-interest may be created under Shiah law, even if the theory be accepted that a life-interest consists of a gift of the dominium, with a stipulation that the reversionary interest in the subject of gift will be returned to the donor,[3] the reversionary interest being considered as a part of the subject of gift.

The decision referred to in *explanation II* must now be considered.[4]

Effect of ruling that produce distinct from, and no part of 'corpus.'

The adoption by the Privy Council of the argument that the 'corpus' and the produce are distinct from each other, though made when considering whether the gift in question was either incomplete, or vitiated by having annexed to it a condition which had reference to its subject, must have its bearing on other parts of the law, for (as it has already been observed) the principle underlying the rule (i) that the donor must divide up property, part of which is the subject of his gift, is the same as the reason for the rule (ii) that no conditions imposed on the donee can

[1] *Jami'-ush-Shittat*, 392.
[2] Bail. I. 509, but see s. 444 below.
[3] See p. 318, *n.* 7, above.
[4] See above.

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be enforced by the donor. What, therefore, is sufficient to give rise to an exception to the first rule, cannot be said to have no bearing on the operation of the second rule, where both of them have their origin in the same general principle; such a consideration ought, 'prima facie,' to be equally sufficient for requiring an exception to be made to the second rule. If, therefore, in regard to the first rule, the 'corpus' of the gift is to be considered as distinct from its produce, it must follow that the same can be done in the case of the second rule, unless there is some distinctive feature in the one rule which is absent from the other, and which prevents analogy of reasoning with reference to the two.

'Prima facie,' if the distinction between 'corpus' and produce may support an exception to the theory of 'musha',' it may also support an exception to the rule against conditional gifts.

In other words if it is established that 'corpus' and produce are distinguishable when the question is whether a gift has been completed or not, and if it is possible for a gift to be completed as regards the 'corpus' of its subject, notwithstanding that it may not be completed with regard to its produce, namely if possession of the subject of the gift may be complete, notwithstanding that possession of its produce is not transferred to the donee—or rather that the donee is given no right to take or retain possession of the produce—then the law ought by parity of reasoning to permit the donor of the 'corpus' to impose conditions relating to the produce, and such conditions ought not to be considered as affecting the voluntary nature of the gift of the 'corpus.'

'Hiba ba shart ul 'iwaz' with stipulation relating to produce.

It is improbable that there should be no authority, in the vast stores of Muslim jurisprudence, referring to the point whether conditions may be imposed by the donor relating to the produce of the subject of gift.[1] Failing anything to throw direct light on the point, it may be said that the conclusion at which the Privy Council have arrived seems to be opposed to the gist of the Sunni law, though (subject to the considerations mentioned below) it does not seem opposed to the trend of Shiah law. For we find that in Shiah law the stipulation for an ''iwaz' or return consisting of a part of the subject of gift is valid, whereas in Sunni law it is not valid; and (as pointed out by Sir R. Wilson) produce would ordinarily be considered as part of the 'corpus.' However that may be, the conclusion of the Privy Council is based on a Sunni authority, and it must therefore, presumably, be taken that a stipulation for an ''iwaz' or return, when its subject consists of the produce of that property which is the subject of the gift, would not be an infringement of the rule of Sunni law, which does not permit a stipulation to be made for the return of what consists of a part of the subject of gift, or in any way having reference to it; and that, therefore, under Sunni law, as well as under Shiah law, the produce of the subject of gift may, in accordance with the decision of the Privy Council, be the subject of ''iwaz.'

Conditions raising a trust.

Coming now to that part of the Privy Council judgment in which they say that the arrangement is enforceable as an agreement raising a trust, it appears to contravene the Muhammadan law of gifts, which strives to keep even a 'hiba ba shart ul 'iwaz'[2] (under that head alone can a gift with an arrangement between the donor and donee come) a voluntary transaction, until the last moment

[1] Cf. "A gift by A to B of a certain property without any restriction on the power of disposition, but subject to the condition that B should pay periodically to A, or A and his heirs, a *part* of the usufruct of the property. In such a case both the gift and the condition would be valid" (citing *Nawadir* without giving reference). "And if B should alienate the property, the assignee would take it subject to the condition." Ameer Ali, I. 76.

[2] Not a *hiba-bil-'iwaz*, for in that there is no arrangement *ab initio*. See the table.

—and until it is completed by both the donor and the donee performing their respective parts neither side can be required to perform it: the donor may resile by revoking his gift, or the donee refuse to do what he stipulated to do. It is only after both parties have done what was arranged that the transaction is considered as a sale. SECTION 408

Finally an agreement to return the produce of that which forms the subject of gift can hardly be considered in the same light as a 'shart' or stipulation in a 'hiba ba shart ul 'iwaz,' for the reason that according to Muhammadan law that alone can be the subject of ''iwaz' which can be the subject of gift. Now future produce has no existence, and cannot form the subject of gift, and consequently under strict Muhammadan law it cannot form the subject of ''iwaz.' While if it be argued that since the produce of the subject of gift has been held not to form part of the subject of a gift of the 'corpus,' therefore the donor in a gift of the kind referred to parts with the whole of one thing (the 'corpus') reserving to himself quite another thing (the produce), and that such a reservation cannot be governed by the rules relating to stipulations for ''iwaz,' on the ground that those rules refer to the donee giving something from himself to the donor, whereas this is the case of the donor reserving or retaining something with the possession of which he never parts—such an argument does not meet the difficulty: for the produce being something which will arise in future, and which in the nature of things will in the first instance be in the possession of the donee, the donor cannot come by it by purporting merely to "reserve" the right to the produce; he can only obtain it if the donee gives it to him, or allows him to take it. So that whether the produce is technically part of the 'corpus' or not, and whether we consider that the gift is a conditional one, or that the donor merely reserves his rights over one object while he gives away another, still the difficulty remains.

Future produce cannot be subject of 'iwaz' as it cannot be subject of gift.

Under Shiah Muhammadan law (apart from the Privy Council decision) the effect of D making a gift to R, on condition that R should give to D the income, would, it seems, strictly be as-follows: (1) D is not bound to transfer the subject of the intended gift to R, even after the arrangement, nor (2) is R bound to accept possession of it; and in the case, (i) either of D not offering to transfer it, or (ii) R not accepting it, the whole transaction will fall through, without any legal results arising, (3) if D transfers the subject to R, R may, even after accepting the gift on the 'shart' or stipulation of giving to D the produce, refuse to perform the 'shart,' and he cannot be obliged to do so, but (4) if he does not perform it, D may revoke his gift (unless, *semble*, the gift is or has become irrevocable: and apparently the same rules apply to the revocability of such a gift as to ordinary gifts). See table on p. 257 above.

Strict Shiah law.

But in spite of all these difficulties of applying and giving effect to the ruling of the Privy Council, the Courts must take the law to be as laid down in the decision; and as that decision has a liberalising effect and brings the law into nearer conformity with the needs of modern times, it cannot, it is submitted, be objected to. It may also be remarked that where (as in British India) the parties are familiar with stipulations in the nature of trusts annexed to gifts, and the donor transfers property to the donee on a mutual understanding that such stipulations will be given effect to, those Courts which enforce the Muhammadan law of gifts as equity, justice and good conscience,[2] would hardly

Conclusion.

Disregard of stipulation

[1] See s. 366 above. [2] See table preceding p. 29 above.

SECTION 408 enforce it in such a manner as to allow a fraud to be committed by permitting the donee to contend that he is not bound by the stipulations. The Shiah lawyers give wide extension to the rules of ''iwaz' and to grants of limited estates on the authority of the Quran, where it is laid down that—

> "It is of no avail that ye turn your faces [in prayer] towards the East and the West, but righteousness is in . . . . those who perform their engagements[1] in which they have engaged. . . . these are the true and these are the pious." [2] —Quran, II. 172.

Distinction between incidents of ''iwaz' when it has been stipulated for and when not.

In considering what may form the subject of the ''iwaz' in the two transactions, above referred to it must be borne in mind (*a*) that in a 'hiba bil 'iwaz' though the ''iwaz' proceeds from the donee of the original gift, the original donor has the option of refusing to accept the proffered ''iwaz' whatever it be, so that it may appear reasonable that if the original donor chooses to accept part of the subject of gift as ''iwaz,' he should be permitted to do so. On the other hand (*b*) while in a 'hiba ba shart ul 'iwaz' the original donor is bound to accept the stipulated ''iwaz,' [3] (*c*) yet he has taken the initiative in proposing what should be the ''iwaz' for the 'shart,' and he of his own accord, at the very time of making the gift, stipulates that a part of the subject of gift should be returned to him. These conflicting reasons seem to be equally balanced, in regard to both kinds of gifts with return.

Natural love and affection or services cannot be the subject of ''iwaz,' any more than they can of gift.[4] See s. 373 and compare s. 351 above.

Marriage as ''iwaz

409. It has been held that a gift made to a bride by the mother of the bridegroom in contemplation of the intended marriage is a 'hiba bil 'iwaz,' the intended marriage being apparently considered as a valid subject of 'iwaz.' [5]

The judgment referred to does not seem to carry much weight, but is noted as of interest. Though it is difficult to agree with the learned judge that the transaction was a 'Hebabil Ewaz,' there is reason to believe that the transaction might have been supported on similar grounds to those recently taken by the Privy Council who held that a bride may sue on an agreement by which her intended father-in-law promised her father that she would be paid Rs. 500 as soon as she was received in her husband's house.[6]

(3) Legal Incidents of ''Iwaz' or Return.

''Iwaz' subsequent to gift i.e. in 'hiba bil 'iwaz.'

410. The law applicable to a return which is made subsequently to the completion of the original gift, is in all respects (except as provided in sections 417 to 420 below) the same as the law applicable to gifts generally.[7]

[1] *'Ahad* in the original.

[2] This verse is cited above, p. 6; cf. also p. 329 *n.* 1.

[3] Though this is not quite clear.

[4] *Ussud Ali Khan* v. (*Mussamat*) *Olfut Beebee* (1868), 3 Agra, 237.

[5] (*Bibee*) *Kulsoon* v. (*Bibee*) *Ameerunnessa* (1863) 1 Hyde. 150 (Wells J.).

[6] (*Nawab*) *Khwaja Muhammad* v. *Nawab Hussaini Begum* (1910) 32 All. 410 (P.C.) and cf. ss. 104, 105, pp. 117-118 above.

[7] Bail. I. 534 (para. 2). See *Rahim Bakhsh* v. *Muhammad Hasan* (1888), 11 All. 1, 5 (para. 3), 6 (para. 1), 7 (para. 2), (Mahmood J., Straight J. concurring).

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Cf. "In order that the 'iwaz' which has been stipulated for should be binding (i.e. transferred irrevocably to the original donor) there must be a declaration, acceptance, and possession on both sides (i.e. of the subject of the gift and return respectively) so that the mere declaration, acceptance, and possession of the original gift does not make it irrevocable, so long as the second gift (i.e. return) is not completed by possession being given of it [1] . . . Just as acceptance of the declaration of a gift is necessary in order that it may be completed, so also offering and giving (of the return is necessary). . . . Yet if the donor says, 'I give you this with the stipulation that you should sew this piece of cloth which I place before you;' or 'that you should make a ring out of this silver that is before you,' and if the donee without the knowledge of the donor sews, or makes a ring, then in this case it is true that a return has been completed, and the donor cannot change his mind (i.e. revoke his gift) nor is there any need for acceptance (on the part of the donor). Hence, what is meant is, that the offer of a return on the part of the donee is not sufficient (to make the original gift irrevocable) unless the donor accepts it, where the return needs the usual declaration and acceptance (as in the case of a return consisting of a fresh gift, or another transaction), but where it does not need a declaration and acceptance (such as a release, and doing some work like sewing a piece of cloth, or forging silver) if the donor should change his mind, and become aware before that is done, then he is at liberty not to accept it, and may reject the sewing or the forging. It is the prevalent and well-known opinion of the learned, that a release requires no acceptance in cases other than this, viz., where it serves as a return for a thing, as is evident."[1]

Declaration, acceptance and possession necessary to transfer subject of 'iwaz'

Acceptance may be implied.

or it may be unnecessary as

1. Where the proposal comes from the donor;

2. in the case of a release,— which requires no acceptance.

A learned author whose book is a very handy and useful compendium has made the following statement: "A 'hiba bil 'iwaz' is a sale in all respects and delivery of possession is not necessary to validate the transaction."[2]

'Hiba bil 'iwaz, not a sale.—

This is based on a misapprehension of the law,[3] which can no doubt be traced to Macnaghten,[4] who refers to the statement in the texts in the following terms: "They say that a 'hiba bil 'iwaz' is a sale in every sense of the word." But it must be remembered that a transaction is called a 'hiba bil 'iwaz' only after it has been completed by possession being taken both of the 'hiba' and the 'iwaz.' For in the first instance in a 'hiba bil 'iwaz we start with a gift; and at the time of the gift there is no mention of a return (or consideration); for if there is, it is a 'hiba ba shart ul 'iwaz.' Therefore as regards the first gift it is a gift pure and simple, and there is no question that that should be completed by possession. Again the 'iwaz' is purely voluntary on the part of the donee, and it must be completed like any other gift. When this has been mutually done, then the first gift becomes a 'hiba bil 'iwaz.' The question is still doubtful whether the 'iwaz' may be given and complete as an 'iwaz' though the original donor has not completed the original gift by transfer of possession. On principle it would seem that if the

Though after it is completed the result is that the property of one person is exchanged

is a barter.

[1] *Jami'-ush-Shittat*, 392.

[2] Mulla. "Mahomedan Law" (3rd Ed.) p. 88. Of course, what appears a *hiba bil 'iwaz* may be a contract with a valid consideration: cf. *Mahammadunissa Begum* v. *J.C. Batchelor* (1905), 29 Bom. 428. The *mahr* may be the consideration: *Muhammad Esuph* v. *Pattamsa Ammal* (1889) 23 Mad. 70.

[3] Cf. *n.* 4 above, *Mogulsha* v. *Mahamad Sahib* (1887) 11 Bom. 517. This misapprehension is alluded to *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R. (O.C.J.) 27, 32.

[4] "Moohummudan Law," 209 *n.* (case 15). Cf. also table on p. 257.

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original donor does not give possession the only remedy to the original donee is to revoke the gift of the ''iwaz.'

'Hiba bil 'iwaz' not complete without transfer of possession.

The Madras High Court has, however, held[1] that the 'hiba bil 'iwaz' may be completed without transfer of the possession of the subject of the original gift—provided that the "consideration agreed to be given" is proved to have actually passed.[1] As to this decision it may be said with all deference that though the result could not have been otherwise, the judgment confuses notions which are absolutely distinct. Thus for instance, how can there be a "consideration agreed to be given" in a 'hiba bil 'iwaz'? That can only be in a 'hiba ba shart ul 'iwaz.' As to the case itself, it seems perfectly clear that there was a contract—the consideration consisting on the one hand of the release of the 'mahr' by the wife, and the deed of settlement on the other. Alternatively it may be termed either a compounding or a release of the 'mahr.'[2]

'Khujoorooniss-sa *v.* Roushun Jehan.

The confusion of ideas and the statement based on it that in a 'hiba bil 'iwaz' possession is not required is further sought to be supported by a passage in a judgment of the Privy Council,[3] where they merely refer to the contention of the appellant, a contention which in the first place was not upheld by the Privy Council, and which in the second place could have had reference only to a 'hiba ba shart ul 'iwaz.' Though their lordships mention neither a 'hiba bil 'iwaz' nor a 'hiba ba shart ul 'iwaz' in express terms, they do state that, even according to the appellants' contention, in any event the donor must have intended to divest himself of the property—and as it was proved that the donor did not intend doing that, they could not decide that such intention, not carried completely into effect, nor followed by the actual payment of the consideration, could make the two transactions irrevocable as a 'hiba bil 'iwaz,' or 'hiba ba shart ul 'iwaz' (as the case may be), and ''iwaz' respectively.[3]

Return before completion of gift.

411. *Quaere*, whether a return may be validly made before the original gift has been completed; and whether, if a return is so made and accepted the original gift is complete without possession being given of its subject.

Whether possession of subject of return enough without that of subject gift.

In the case of 'Moosa Adam Patel *v.* Ismail Moosa'[4] it is said that possession of the consideration, i.e., return, in a 'hiba bil 'iwaz' is necessary, but not of the subject of the gift itself. It is submitted that the latter proposition is quite opposed to the theory of a 'hiba bil 'iwaz.' The ''iwaz' or return, or what has been called consideration in the judgment, arises as an afterthought on the part of the donee, after the primary gift is completed, and both

[1] *Muhammad Esuph Ravutan* v. *Pattamsa Ammal* (1899) 23 Mad. 70, 73, citing (*Ranee*) *Khujooroonissa* v. (*Mussamut*) *Roushan Jehan* (1876) 3 I. A. 291, 2 Cal. 184.

[2] See above, ss. 99, 100, pp. 114, 115.

[3] (*Ranee*) *Khujooroonissa* v. (*Mussamut*) *Roushun Jehan* (1876) 2 I.A. 291, 307, 308; 2 Cal. 184, 197 (para. 2): "But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a bona-fide intention on the part of the donor to divest himself in *praesenti* of the property, and to confer it upon the donee."

[4] (1909) 12 Bom. L. R. 169; on p. 186, it is said that "this is the law by the common consent of all authorities"—which are, however, not referred to, but on p. 189 reference is made to *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 33 I. A. 68; 8 Bom. L. R. 387, and it is said that in the judgment of the P. C. there is some confusion between the two forms of gifts. It is submitted that there is no such confusion on the part of the P. C.

the primary gifts and the return are governed by the same rules as to completion as in s. 346 above: but besides that, the 'return' cannot operate as a return (for the purpose of making the primary gift irrevocable) unless it "be distinctly opposed to the prior gift by words clearly expressive of such opposition as, for instance, by saying 'this is the ''iwaz' or the 'budul,' or in place of the gift.'"[1] SECTION 411

412. An ''iwaz' or return may be made by a person other than the donee of the original gift; and it may be made by such other person without being directed to do so by the said donee.[2] ''Iwaz' by

413. The return must be given to the donor of the original gift; where it is purported to be given to a person other than the donor, it does not operate as a return, and does not make the original gift irrevocable, unless it has been stipulated that the return should be made to such other person.[3] ''Iwaz' cannot be to other than donee.

This section is based on a text[4] which may be translated as follows: "The return should go to the donor, and not to any other; so also it appears from the response of 'Abdullah ibn Suran, where he (Al Sadiq) is reported to have said, 'when the donor gets a return, it is not permissible for him to revoke it,' from which it is inferred that when the return is made to any person other than the donor, he may revoke it (the original gift). In the second case it is so (i.e., the gift becomes irrevocable) because a stipulation is equivalent[5] to a price. Hence such a stipulation of a gift to another person (by way of return) which has been mentioned in the agreement of the original gift, acts as a return for the subject of the original gift, which then becomes a gift with a return, and is rendered obligatory, except that the original donor may revoke the first gift (i.e., may not complete it, or may retract it before it becomes irrevocable by the acceptance of the return) and the donor may (similarly) revoke the second gift."[4]

Where there was an agreement between the fathers of the parties to the marriage that the bridegroom would pay to the bride (who was a minor) Rs. 500 as soon as she was received into her husband's house, the Privy Council held[6] that the bride could sue on the agreement and that the principle of 'Tweddle *v.* Atkinson'[7] had no application to the suit.

414. An ''iwaz' or return may be made only as to part of the subject of the original gift.[8] ''Iwaz' as to part of gift.

(4) *Legal Effects of ''Iwaz' and 'Hiba' on each other.*

415. The donee is under no obligation to make any return, except as provided in sections 351 and 352 above, notwithstanding Donee not bound to make a

[1] Bail. I. 532.
[2] Bail. I. 535, *ll.* 9-13; 534, *ll.* 13-16; Hed. 486.
[3] See comment.
[4] *Jami'-ush-Shittat*, 392 (Shiah).
[5] To be quite accurate, the author should have said "potentially equivalent."
[6] (*Nawab*) *Khwaja Muhammad* v. *wab*) *Husaini Begum* (1910) 23 All. 410 (P.C.).
[7] (1861) 1 B. & S. 393; plaintiff not being a party to an agreement could not sue on it.
[8] Bail. I. 535 (*ll.* 5-8); Hed. 487 (col i.).

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Donor not to it.

that the gift is made with a stipulation for a return (and even though the return is specified).[1]

The donor is under no obligation to accept any return that the donee may offer to make; [notwithstanding that he has stipulated for a specified return, and the donee offers to make that return].[2]

"'When a person has made a gift in general terms, there is no condition or obligation on the part of the donee to give any gratuity in return,' equally whether it be from an equal, an inferior, or a superior. There is no difference of opinion about it. It appears from the writings of jurists that its being binding [3] depends on the return being made. But if it is a gift to a relation, for instance, it is binding without a return. True, it is said in the 'Kafi' that a present from an inferior to a superior requires a return of an equal value, and he is not allowed to deal with it before making any return or expressing an intention to do so. 'Still, if he should do so the donor would thereby be barred from retracting the gift,' if the return is accepted by the donor. He (the donor) is not bound to accept it, for it is like a new gift, which he is not bound to accept, the more so as it cancels his (the donor's) right to revoke (the original gift)." [4] See also comment to next section.

"Ishaq bin Ammar says: 'I asked, "A man makes a present to me with a view to get something that I have, in return; I take it, but I do not give anything in return. Is this valid?" He (Abi 'Abdulla Imam Ja'far-us-Sadiq) said, "Yes, you may do so, but you ought not to neglect making the return."'" [5]

"The result of an examination of the authorities brings us to the view adopted by Muhaqqiq [6] and other learned jurists: the words of Muhaqqiq are as follows: 'The donee cannot be compelled to make the stipulated return, but he has the option,'--he means to say that the donee can elect either to make the stipulated return, or to give back the subject of the gift itself . . . . at any rate it is the approved and prevalent opinion that so long as he (the donee) has not fulfilled the stipulation, and acceptance and possession by the donor have not taken place, the donee has the option of either fulfilling the stipulation, or returning the gift."[7]

['iwaz' shart ul 'iwaz' both irrevocable.

416. After a 'hiba' and its ''iwaz' have both been completed by possession of the subject of each being given respectively to the original donee and the original donor, neither the 'hiba' nor the ''iwaz' can be revoked, provided that they are both valid. Where the ''iwaz' or return is made as to part of the subject of the gift only the said part of the subject of the gift is irrevocable.[8]

[1] Bail. I. 535, II. 208.

[2] So it seems from the passages translated from the *Jawahir-ul-Kalam* and *Jami'-ush-Shittat* in the comment to ss. 416 and 417 but the point is very doubtful. It is of little but academical interest; see table p. 257. I have assumed that the donor would be bound to accept the stipulated return.

[3] I.e. irrevocable, see p. 262 *n*.

[4] *Jawahir-ul-Kalam*, IV. 635. the words in single inverted commas are from the *Shara'ya-ul-Islam*, on which the *Jawahir* is a commentary. See Bail. II. 208.

[5] *Jawahir-ul-Kalam*, IV. 636.

[6] I.e. the author of the *Shara'ya-ul-Islam*.

[7] *Jami'-ush-Shittat*, 382.

[8] Hed. 487 (col. i.); Bail. I. 538 (*ll.* 5-8); II. 205 (*ll.* 16-19), 207 (*ll.* 4-5). Cf. below s. 48.

Illustrations. SECTION 416

(1) D makes a gift of a house to R, a stranger, and puts R in possession—and R gives a horse as a return or ''iwaz' for D's gift, which D accepts. Then D purports to sell the house referred to. The sale is invalid.[1]

(2) In *ill.* (1), if R had not given to D the ''iwaz,' the sale would have been valid, provided that D had previously revoked his gift, but not otherwise.[2]

The rule is the same whether the ''iwaz' has been stipulated for or not; in other words, whether it is a 'hiba bil 'iwaz' or 'hiba ba shart ul 'iwaz.'

The following translation from a Shiah text shows how difficult it is to adhere to the theory that a 'hiba ba shart ul 'iwaz' is a gift and not a sale, and continues to be a gift and a voluntary transaction, until the subject of gift and of the return are respectively transferred: and that then it "turns into" a sale. Many of the rules, it is clear, are of merely moral obligation:—

"The details relating to revocation may be stated thus: (1) with a stipulation that a return will not be made, there is no question that the gift is not obligatory;[3] (2) with a stipulation for a return, what is stipulated for is absolutely obligatory.[4] (3) again, where the stipulation specifies the return, the specific return is obligatory, that is to say the donee must make the stipulated return, otherwise the donor has the option of breaking off the transaction;[5] (4) where the stipulation does not specify the return, the fulfilment of the stipulation is not the less obligatory, but if the parties agree upon the subject (lit. amount) of the return that is sufficient; (5) where they do not (so agree) it is necessary to make a return of the same value, whether it consists of another article or of the value (in money) of the subject of the original gift); it is not obligatory on the donee to make a return of greater value than the subject of gift. Yet the donor may demand it,[6] just as the donor cannot be compelled to accept the first.[6] The value of the gift must be taken to be what it is at the time of the transfer of possession—if it is transferred subsequently to the declaration; or it may be fixed at the time of making the return."[7]

417. Where a return is stipulated for, and it is in fact made and accepted,[8] there (after possession of its subject is

'Hiba ba shart ul 'iwaz' when completed, operates as sale.

[1] Bail. II. 207.

[2] Cf. repugnant legacies. The first act is valid, and the second one, unless expressly stated, is assumed to be done inadvertently.

[3] I.e., it is (*a*) not necessary that it should be completed, (*b*) it may be revoked. See comment to s. 389 above.

[4] I.e. if no return is made, the donor may revoke the original gift. See clause (3) of this passage. The donor has no power to enforce specific performance. See s. 415

[5] *Aqd* or agreement; cf. p. 54 *n.* 7 above.

[6] I.e., he may threaten to revoke the gift unless a return of higher value is made. An instance is given in the *Jawahir-ul-Kalam* on the same page (IV. 636) of a person who made a gift to the Prophet of a camel (apparently of extraordinary value) and was not satisfied though he was offered three camels in return, nor with six: at last nine were offered, and he was satisfied. This was nothing but a sale; but according to the social ideas of the time, it was a method of forcing the hand of persons from whom a favour or dealings were sought. The present writer had an experience with a Turkish gentleman who made a gift of a Quran to him, and expected in return to be paid his passage to Constantinople.

[7] *Jawahir-ul-Kalam*, IV. 636.

[8] But not until it is made. See comment.

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transferred) the original gift and the return mutually operate in Muhammadan law as reciprocal considerations, and the two together constitute a sale.[1] *Quaere*, whether they are governed in British India by the Indian Contract Act, or the Muhammadan law of sale.[2]

Illustration.

H purports to transfer the whole of his property to his wife *W*, in lieu of dower, but does not put her into possession, and thereafter H executes a deed purporting to convey the same property to another person. If the transfer to *W* was made as her dower, it is a contract with a valid consideration, and enforceable without possession being given to the donee. But if it was a mere gift, then possession would be required to perfect it.[3]

Where return stipulated for

Cf. " The donor may either (1) stipulate that no return should be made; [4] or (2) that a return should be made; or (3) he may make an absolute gift without reference to any return. (1) As regards the first case, no difficulty arises in concluding that the donee is not required to make any return; and if the gift is not made to a relative, nor with the intention of approach (to God) etc., the donor may revoke it so long as its subject continues to exist. (2) Where the donor stipulates for a return, it is evident that no question can arise as to its validity; in such a case he may either (*a*) specify the return that has to be made, or (*b*) leave it unspecified. If it is specified, the stipulated return must be made; with the result that if the donee gives the stipulated return, and the donor receives it, the gift becomes irrevocable; but if the donee does not make the stipulated return, the donor has the option of revoking his gift. Thus, what is meant by saying that 'the stipulated return must be made,' is this, that if the donee desires that the gift should take effect (irrevocably), he must make the stipulated return; and not that there is any absolute obligation on the donee to make the return; in other words, the donee is not bound to make the return, namely, if he chooses, he has the option of giving back the subject of gift itself, and making no return. It is evident from this that when the donee gives a return, it is not binding so long as the donor does not accept it. For the return is like a fresh gift. Traditions are in general terms, to the effect that revocation is valid until a return is made, and that the donor is under no obligation to accept it; nay, even if he accepts or agrees to the return, so long as he has not taken possession of its subject, he has the option of revoking it (his original gift); and inasmuch as there is no authority to the effect that this is one of those transactions which can become obligatory (irrevocable)[5] before acceptance and possession, no such inference (in favour of its being

It need not be made but if made, it will cause the original gift to be irrevocable.

Return like a fresh gift.

[1] Cf. *Ghulam Mustafa* v. *Hurmat* (1880) 2 All. 854; *Rajabai* v. *Ismail Ahmed* (1870) 7 Bom. H. C. R., (O. C.) 27.

[2] That law is not superseded for all purposes in British India, e. g. not for pre-emption; cf. *Fida* v. *Muzaffar* (1882) 5 All 65: *Amjad* v. *Mushtaq* (1895) 17 All. 454.

[3] Macn. 216-219 (case 15); *Ghulam Mustafa* v. *Hurmat* (1880) 2 All. 854

[4] This seems supererogatory: but the donor may wish to preserve his right of revocation.

[5] See above, p. 262, *n*. 1

irrevocable) can be drawn from (the ordinance) 'fulfil covenants,' [1] being in general terms, as some have supposed; so also no such inference can be drawn from traditions (authentic though they be) as the one in which 'Abdullah ibn Sinan reports: 'he (Imam Ja'afar-us-Sadiq) said: "The gift is valid (i.e., irrevocable) for relatives, and for one who has given a return for his gift, and in others revocation is allowed."'"[2] SECTION 417

418. Where a 'hiba ba shart ul 'iwaz' or a gift with a stipulation for a return is made, and the stipulation is unlawful, both the gift and the stipulation are void.[3] Stipulation avoids gift.

This section is based on the following: "Now as to the stipulations which are unlawful: (these are) such as may be 'Muqtaza-i-aql' (unreasonable), for instance the donor says, I give you, and make a condition that you should not sell it, and you should not make a gift of it to others, then in such a case the stipulation is invalid: regarding the invalidity of the original contract (gift) there are two ways (of considering it), or rather two opinions, and the better opinion is that it is invalid."[4]

With this should be compared the rule of Sunni law, that the condition is always void, and the gift valid. Just as the Sunni jurists consider the use of the word 'hiba' conclusive to show that the whole 'dominium' has been transferred, and neglect all other words in the declarations of gift, and the Shiahs look at the whole of the declaration and see whether the meaning gathered from the whole of it can be given effect to, so, similarly, if the condition is illegal, the Shiah lawyers do not merely reject it, and give effect to an absolute gift, but avoid both the gift and the stipulation if the two are inseparably connected with each other. The rule obviously cannot apply where the ''iwaz' is not stipulated for— i.e., in a 'hiba bil-'iwaz.'

419. Where the original gift or the return is or becomes void wholly or in part, the return [5] or original [6] gift may respectively be revoked, wholly or in part, as the case may be[7]; provided first that the original gift cannot be revoked under circumstances in which it would have become irrevocable without a return having been made; [8] and secondly that the return may be revoked even though it has increased or diminished in value.[9] When either the gift or the return is void

Illustrations.

(1) If the father purports to make a gift out of the property belonging to his minor child, and receives a return or ''iwaz' for such a gift from the donee, the original gift is void, and both the original gift and the ''iwaz' may be revoked.[10]

[1] Referring to Quran, II. 172, cited above, p. 6. See also p. 822, *n.* 2, 852, *n.* 1.
[2] *Jami'-ush-Shittat*, 382.
[3] See comment.
[4] *Jami'-ush-Shittat*, 381.
[5] Bail. I. 533 (*ll.* 27-32).
Bail. I. 533 (3rd); Hed. 487.
Bail. I. 534 (*ll.* 1-2,)
Bail. I. 533 (*ll.* 14-17. See below ss. 244 *et seq.*)
Bail. I. 533 (*ll.* 32-34. See below ss. 424 *et seq.*)
Bail. I. 535 (para. 3).

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(2) A person makes a gift to a minor, and the father of the minor purports to make a return for the gift out of the minor's property, "the exchanging is not lawful, though the gift were made on condition of an 'iwaz.'" Both the original gift and the 'iwaz' may therefore be revoked.[1]

(3) D is in his deathbed illness and purports to make a gift to R of the whole of his property valued at Rs. 600, for which R makes a return. If the value of the return is Rs. 400 or more (i.e. two-thirds of D's estate) the original gift and 'iwaz' are both valid.[1]

(4) In *ill.* (3) if the value of the return is Rs. 300, then the gift is invalid as to Rs. 100, i.e. one-sixth of it The donee may in such a case either pay Rs. 100 to the heirs, in which event the gift and return both become irrevocable, or he may return the gift and demand back the return which he had made.[2]

§ 8.—Revocation of Gift.

(1) Normal Revocability of Gift.

Gifts are revocable

420. Subject to sections 422-429 below, the donor may revoke his gift,[3] even where he has purported to waive his right of revocation at the time of or after the declaration of gift ; provided that where he has accepted something in return for the waiver, he cannot revoke the gift.[4]

Illustrations.

(1) The following are valid forms of revocation : "I have revoked the gift," or, "I have restored it to my own property," or, "I have annulled or dissolved the gift," or, "I have retracted, or taken back my gift," or, "I demand the restitution of my gift."[5]

(2) But a mere resumption of the gift property is not a valid revocation, nor does a sale purported to be made of the gift property, operate as such.[6]

Partial revocation valid.

421. A gift may be revoked as to only part of the subject thereof ; and where the cause making a gift irrevocable applies

[1] See p. 329, *n.* 10, above.

[2] Bail. I. 536, 542 (*ll.* 20-25).

[3] *Cassamally* v. *Currimbhai* (1911) Bom. 214.

[4] Bail. I. 508 (*l.* 30); 529, 528 (para. 2), II. 205), (*ll.* 13-15). Hed. 486 (col. i.). The gift was held to be revoked in *Ismal* v. *Ramji Sambhaji* (1899) 23 Bom. 622. Cf. Transfer of Property Act, s. 126, which does not allow gifts to be revoked unless made revocable by agreement, and a gift revocable at the mere will of the donor is declared to be void. On the other hand, a thing lent gratuitously, even if for a specified period, may be demanded back within the period under the Contract Act, s. 159. For Roman law see Justin, II. 7, 2 : "If those that receive the boon prove ungrateful, we have by our constitution given leave to revoke the gifts on certain fixed grounds." Whereas gifts between husband and wife and from child to parent were restricted by some complicated provisions (see Digest XXIV, Tit. 1).

[5] Bail. I. 524, II. 205 *n.* 10. See *ante* 49-50.

[6] Bail. I. 524, II. 207.

to part only of the subject of gift, the gift may be revoked as to the other part of the subject.[1] SECTION 421

422. A conditional revocation of gift is not valid; nor if it is referred to a future time.[2] Conditional

If the donor says "when the beginning of this month comes, I have revoked," the revocation would not be valid, because it can neither be suspended on a condition nor referred to a future time.[2]

(2) Revocation how Completed.

423. (1) According to Hanafi law, the revocation of a gift is completed either by an order of the Court cancelling the gift,[1] or by the donee consenting to the revocation of the gift; and[3] in either event the subject of the gift re-vests in the donor without his taking possession.[4] Where there is neither a decree of the Court, nor the mutual consent of the donor and the donee to revoke the gift, the revocation is not complete unless and until the donor takes possession of the subject of the gift.[5]

1. Hanafi law: Revocation not complete unless—
(a) Order of court or Consent of parties.

(2) According to Shiah [6] [and Shafi'i][7] law the revocation of a gift is complete without any decree of the Court.[6]

2. Shiah and Shafi'i law: Order of Court not necessary.

Explanation—Neither mere re-assumption of the subject of the gift by the donor,[6] nor his purporting to alienate it,[8] constitutes a revocation of the gift.

"Should the donor die without affording any other proof of his intention to retract the gift"—than mere re-assumption of the gift from the donee—"it is still, although found in the donor's possession, the lawful property of the donee."[6]

Can the donor come to the Court for revocation of his declaration of gift when it has not been completed by transfer of possession? It has been held that he cannot.[9] In the case referred to, the donee was a niece of the donor's, so the gift could not have been revoked.

[1] Bail. I. 526 (*ll.* 17-18); Hed. 486 (col. ii.): 487 (col. i.).

[2] Bail. I. 524.

[3] Hed. 486 (col. i.), 487; Bail. I. 527, (para. 3), 524 (*ll.* 10-12); *Enaet Hossein* v. *Khoobunnissa* (1889) 11 W. R. 320; *Sheik Jeetoo* v. *Mt. Budun* (1837) 63 S. D. A. Rep. 189.

[4] Bail. I. 527 (*ll.* 22-25). In *ll.* 14-16 it is stated that there is some doubt whether a revocation by mutual consent amounts to a "cancellation"; "the tendency of precedents" is (*l.* 17) stated to be in favour of its being considered a cancellation; and the effects of cancellation are stated (*ll.* 22-25) as represented by the section above

[5] Bail. I 527 (*ll.* 28-35); Hed. 487. Where the donee gives back possession of the gift he must consent impliedly. Would possession obtained without his permission be enough?

[6] Bail. II. 205 *n.* 10, citing the *Tahrir-ul-Ahkam* from MSS. of the translator of the *Imamcea Digest*, vol. I.

[7] The *Minhaj-ut-Talibin* and its comment do not seem to mention any decree of the Court; it would therefore seem that the Shafi'i law agrees with the Shiah law on this point as on so many others; though see s. 424 below.

[8] Bail. II. 207, (*ll.* 5-10.) "Others maintain that it (viz. the alienation) would be valid, because he has power of retraction; but the first opinion (which is given above) is best supported"

[9] *Umrao Bibi* v. *Jan Ali Shah* (1898) 20 All. 465; see above s. 383.

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(3) *Gifts which Cannot be Revoked.*

Irrevocability from—(a) relationship between—consanguinity.

424. According to Hanafi law gifts in favour of relations[1] within the prohibited degrees cannot be revoked.[2] According to Shiah law a gift to any relation by consanguinity is irrevocable.[3] According to Shafi'i law such a gift cannot be revoked except when it is from a father or other paternal ancestor, to a child or other descendant.[3]

The following is from the 'Jawahir-ul-Kalam' (a Shiah text): "'Rahm' or consanguinity in this connection means any relationship whatsoever by blood, known as 'nasab,' however distant the kinship be, and even though it be such as does not establish prohibition to marry. But as regards what is related from some jurists as to the term being limited to those who are prohibited from intermarriage, it is a rare opinion, and open to be refuted from what you have already learnt."[3] Cf. the passage from the 'Sharh-i-Lum'a' following s. 425, which refers to "near" relatives.

Under the systems other than that of Shafi'i, the gift to a descendant cannot be revoked in any case, being to a person within the prohibited degrees. The explanation of this strange contradiction between the schools of Shafi'i and others is interesting: Shafi'i bases his rule on a tradition that the Prophet said "retract not gifts." This is taken by the other exponents of the law to be merely recommendatory, and not a positive injunction with legal force. On the other hand, Shafi'i bases the exception to his general rule that gifts are not revocable, and permits revocation of gifts to descendants, on the ground that the father and other ascendants have "power" over the property of their descendants. See above, s. 290. All the schools are agreed that the father has a right to apply the child's property to the maintenance of himself and of the child; but Shafi'i alone draws from this the conclusion that the father has such a 'patria postestas' as to entitle him to deal with the property of his children—even though they be adults. See above, p. 262, on causes of irrevocability.

(ii) Affinity between parties.

425. (1) According to Hanafi law a gift cannot be revoked where the donor and donee are husband and wife, or 'vice versa.'[5]

[1] Hed. 486 (col. ii.); Bail I. 524, 525 (8th); Macn 215; Bail. II. 205 (*ll.* 9-13), 207 (*l.* 4). Some Shiah authorities hold that when the gift is to others than parents, it may be revoked. Macnaghten, 202-203 (case 6) mentions the revocation of a gift to a son's daughter; and says "there is a special exemption in the case of a donation from a father to a son or grandson, the resumption of which is declared allowable." This is clearly erroneous, unless the parties were governed by Shafi'i law, see comment.

[2] "According to the *Khazanat-ul-Muftiin* relationship arising from fosterage or affinity does not bar revocation." Ameer Ali, I. 94.

[3] *Jawahir-ul-Kalam*, IV. 630.

[4] Hed. 485 (col. ii.). The Maliki law is said to be the same: Ameer Ali, I. 89. Sir R. Wilson cites Van Den Berg's translation of the *Minhaj-ul-Talibin*, II. 195-197, which mentions that the father and other ascendants are entitled to revoke, and points out that Hed. 485 refers only to the father. Sir R. Wilson's surmise that paternal ancestors must be intended to be referred to, is borne out by the fact on the one hand that the Hed. merely mentions the point incidentally, and the word father is often used in Arabic for ancestors generally. On the other hand Shafi'i reckons kinship only in the agnatic line, and according to his school distant kindred (i.e., cognates) are absolutely excluded from inheritance. The same rule no doubts prevails here, and an ancestor in the Shafi'i system must mean an agnatic ancestor.

[5] Bail. I. 525 (7th); Hed. 486; *Shah Makdum Bakhsh* v. *Lutf Ali* (1834) 5 S. D. A. Rep. 355; Morley, I. 269, s. 60.

(2) The Shiah authorities are not unanimous on the point whether it is permissible to revoke a gift in favour of a husband or wife. All authorities are agreed that to revoke such a gift is abominable, but the better opinion is that it is not unlawful.[1]

SECTION 425 (Shiah law.) Revocation of gifts in favour of husband or wife permissible but abominable.

Explanation—The rule above referred to applies in cases when the relationship exists at the time of the gift; and a marriage contracted subsequently to the gift does not make the prior gift irrevocable, nor does a gift made during marriage become revocable on a dissolution of the marriage.[2]

The following is from a Shiah book of authority:[3] "Revocability may arise from the fact of his (the donor's) being a near relative, even one with whom marriage is not prohibited; or (according to the better opinion) from the fact of their being husband and wife."[1] Syed Ameer Ali states that the author of the 'Mabsut' referred to as the 'Shaikh' takes the same view; and points out that the law as laid down in the 'Shara'ya-ul-Islam' is not very different, "considering how much the moral is mixed up in the 'Shara'ya' with the legal."[4]

426. A gift cannot be revoked after the death of the donor or of the donee.[5]

death.

427. (1) According to Hanafi law a gift cannot be revoked after the subject of the gift has—

(c) change in subject of gift, or its transfer.

(*a*) perished;[6] or

(*b*) been so changed as to lose its identity;[7] or

(*c*) been alienated, or transferred[8] by the donee;[9] or

(*d*) increased in value,[9] owing to some accession thereto which is inseparable from it,[10] or owing to its being moved from one place to another.[11]

(2) According to Shiah[12] and Shafi'i law a gift becomes irrevocable under clauses (*a*) (*b*) and (*c*) mentioned above. The

(Shiah and Shafi'i law.)

[1] Bail. II. 205, 206. The *Lum'a* considers the better opinion to be the other way: see comment

[2] See p. 332, *n.* 5, above.

[3] *Sharh-i-Lum'a*, I. 233.

[4] Ameer Ali, I. 89-90.

[5] Bail. I. 525 (2nd and 3rd); Hed. 486 (col. i.); Macn. 212 (*ll.* 1-2); Macn. 215.

[6] Bail. I. 524 (para. 3), "for there is no means of having recourse for its value, since the contract was not for value." Bail. II. 25, *ll.* 14-16.

[7] This expression is borrowed from Sir R. Wilson, "Anglo-Muhammadan Law." 336; See Bail. I. 525 (6th); as grinding wheat, baking flour, and churning milk into butter. Hed. 486 (col. i.) makes the gift of the wheat, flour or milk irrevocable. Turning a bath into a dwelling house, without making any addition to the building, does not make it irrevocable nor *vice versa*. Bail. I. 526 (*ll.* 5-7).

[8] Bail. I. 525 (2nd).

[9] *Shah Makdum Bakhsh* v. *Lutf Ali* (1834) 5 S. D. A. Rep. 355.

[10] Hed. 486 (col. i.); Bail. I. 525 (4th), e.g., plastering a house with mortar or clay; or shutting up a door in buildings, or repairing them.

[11] "According to Aboo Huneefa and Moohummud." Bail. I. 525 (*l.* 15). Some Shiah authorities go so far as to hold that mere use by the donee makes the gift irrevocable. But the opposite opinion is said to be more reasonable and approved by the *Shara'ya-ul-Islam*.

[12] Shiah law: absence of increase as a cause preventing revocation from Bail. II. 205 (para. 3), 208 (case 4), 209 (case 6); the difference of view is mentioned in Bail. II, 209.

SECTION 427 Shiah authorities are divided as to whether the gift can be revoked after the donee has caused any increase or profit to accrue to the subject of the gift.[1]

"Where one person makes a gift of a horse, and the donee has it trained, there is no power of revocation on the part of the donor."[2]

Revocable and irrevocable gifts.

"It is said in 'Al Murasim,' that a gift to a stranger is of two kinds, what can be consumed and what cannot be. If it be such as can be consumed, like measurable articles, and it is consumed, then there is no revocation. What is not such is of two kinds: one for which there is a return, and one for which there is no return. In the former case there is no revocation, and in the latter revocation is allowed. In 'Al Ghunia,' the author places under the kind in which revocation is not allowed, such in which return is stipulated for, and made; or in favour of a relation; or the person to whom the gift is made is such that by the gift having been made to him, approach to God is the result. Under the latter class he places all others."[3]

'iwaz.' **428.** A gift cannot be revoked for which an 'iwaz' or return[4] has been given to the donor. The return may be given either by the donee or by a third party.[5]

(c) transfer of subject. **429.** The donor cannot revoke a gift, the subject of which has been transferred in any manner whatever from the donee to another person.[6]

(4) *Gifts of which the Revocability Revives.*

Revocation of second gift. **430.** When a gift has become irrevocable (under the last section) by reason of the donee having made a second gift of its subject, to a second donee, and subsequently the said second gift is revoked, then the first gift again becomes revocable.

Save as provided above, a gift having become irrevocable under the said section does not again become revocable.[7]

Illustration.

In 1900 D makes a gift (referred to as the first gift) of a horse to R, a stranger, without return. In 1901 R makes a gift (referred to as the second gift) of the horse to RA. In 1903 R revokes the second gift and takes back the horse from RA. Between 1901 and 1903 the first gift cannot be revoked (by D); but it may be revoked after 1903 (or

[1] See p. 333, *n.* 12, above.
[2] Ameer Ali, I. 94.
[3] *Jawahir-ul-Kalam*, IV. 631.
[4] Bail. I. 525 (5th); II. 205, (*ll.* 16-19), 207 (*ll.* 5-7); Hed. 486 (col. i.).
[5] Hed. 486 (col. ii. para. 6).
[6] Bail. I. 525 (1st), whether by sale, gift or death. *Shah Makdum Bakhsh* v. *Lutf Ali* (1834) 5 S. D. A. 355; Morley I. 269 s. 60; *Wajeed Ali* v. *Abdul Ali* [1864] W. R. 121 (alienation by donee; though the gift was to a son and would have been irrevocable on that ground too).
[7] Bail. I. 526 (para. 4); 527 (*ll.* 1-3, 18-21).

before 1901). The first gift would have remained irrevocable in 1903, if R had got back the horse by purchase or had inherited it. [1]

Addition perishing.

431. When the right of revoking a gift has been lost owing to an addition being made to the subject of the gift, and then the addition perishes, or is destroyed, the right revives.[2]

Diminution in value after not revive revocability.

432 When the right of revoking a gift has been lost owing to the value of its subject having increased, the right does not revive on a subsequent diminution in its value.[3]

(5) *Effect of Revocation.*

Not retrospective.

433. When a gift is revoked, the donor becomes entitled only to the future rights in the subject of the gift, and not to rights referring to transactions which have already taken place.

Illustration.

D makes a gift to R of a house. Another house adjacent to the subject of gift is sold, and then D revokes the gift : he has no right of pre-emption over the adjacent house.[4]

On revocation donor not to be compensated of gift.

434. When a gift is revoked, the donor cannot claim any compensation from the donee for such deterioration in or damage to the subject of the gift as may have taken place, or been caused during the period when it was in the possession of the donee.[5]

cannot be separated,— donor's.

435. (1) According to Shiah and Shafi'i law, when a gift is revoked [10] the donor is entitled to any such increase or profit accrued from the subject of the gift as cannot be separated from it, or as was formed, or in existence, at the time that the gift was made.[6]

Donee to get

(2) When any increase or profit has accrued from the subject of the gift, as the result of the donee's act, and then the donor purports to revoke the gift, then according to those Shiah authorities who consider the revocation valid, the donor is obliged to give to the donee by way of compensation half of the cost to the donee of bringing about the said increase or profit.[7]

Explanation—The donee is entitled to such increase or profit as can be separated from the subject of gift, whether it was formed at the time of the gift or not.

[1] Bail. I. 526 (para. 4), 527 (*ll.* 1-3, 18-21).
[2] Bail. I. 526 (*ll.* 11-13).
[3] Bail. I. 526 (*ll.* 18-26).
[4] Bail. I. 526 (*ll.* 30-36).
[5] Bail. II. 208 (*fourth*)
[6] Bail. II. 208 (*fourth*), as to Shafi'i law see Wilson, "Anglo-Muhammadan Law," 417-418 Cf. Contract Act, s. 163 and Roman law of Specifications, Justin, II, i. 25-28 ; Gaius. II. 79.
[7] Bail. II. 209.

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Illustration.

D makes a gift of an orchard to R. D then revokes the gift. The fruit belongs to D, if it was on the trees when the gift was made; otherwise it belongs to R.

Thus it will be seen that on a gift being retracted—

1. When there has been any defect or deficiency in the subject of the gift, it must be borne by the original donor.
2. When there has been an accretion or increase in the property, or profit accrued from the gift, and it has not been caused by the donee,
   (*a*) if the increase or profit is united to the original gift and cannot be separated from it, it belongs to the donor;
   (*b*) if the increase or profit is not so united and can be separated,
   (i) it belongs to the donee, if it came into being entirely after the gift.
   (ii) it belongs to the donor if it was formed at the time of the gift.[1]
3. When there has been an accretion or increase in the subject of the gift which is the result of the donee's act, the donor must bear half the cost of the addition.[2] According to some authors, such a "use" of the subject would debar the donor from revoking.

Donee may use subject of gift until revocation complete —not after.

436. Until the revocation of a gift is completed in accordance with section 423 above[3] the donee may use and dispose of the subject of the gift, but not after it is so completed; provided that the donee is not responsible for any loss to the subject of the gift if it lawfully remains in his possession after the revocation of the gift is complete.

On demand by donor revoked gift to be returned.

Explanation—Possession by the donee of the subject of the gift is not lawful after the revocation is complete if the donor has demanded restoration of its possession, and the donee has refused to restore it.[3]

§ 9—Voluntary Transfers other than 'Hiba.'

(1) 'Sadaqa,' or Gift with a Religious Motive.

'Sadaqa' is gift

437. 'Sadaqa' is a transfer of property or rights in all respects like a gift[4] save that (1) a 'sadaqa' is made out of a desire to obtain religious merit;[5] (2) a 'sadaqa' cannot be revoked;[6] (3) a 'sadaqa,' unlike a gift, need not be expressly accepted.[7]

Irrevocable acceptance not necessary.

[1] Bail. II. 208.
[2] Bail. II. 209.
[3] Bail. I. 527-528, refers directly only to cancellation by the Court; but it is presumed that the same rule would apply to revocation by mutual consent. Cf Contract Act. s. 161.
[4] Hed. 489; Bail. I. 545-574, 516 (*ll.* 13-16), II. 224.
[5] See *ante*, p. 50.
[6] Bail. I. 545 (*ll.* 4-5); cf. *Ghulam Hussain Saib* v. *Agi Ajam Tadallah Saib* and *vice versa* (1868), 4 Mad. H. C. R. 44, 47, which shows how closely *sadaqa* is allied to *waqf*.
[7] Bail. I. 545 (*ll.* 17-19).

Explanation—A 'sadaqa' can be made to a rich man as well as a poor man, and cannot be revoked in either case.[1] SECTION 437

'Sadaqa,' 'hiba' and 'hadiya' distinguished.

The 'Jawahir-ul-Kalam' refers to a tradition that Imam Ja'far us Sadiq stated: "Sadaqa is an innovation; at the time of the Prophet people used to give only as 'hiba' and 'nahala.' . . . . Hence in a quotation from 'Tai' it is said that when a reward (from God) and approach to God are intended in a gift, it is termed a 'sadaqa,' and so a distinction arises between it and a 'hiba' or a 'hadia' . . . . If one adds the words 'for the sake of God,' that is to say, he joins with the gift (the intention of) approach (to God), it is not proper to revoke it . . . . 'Hiba' is thus more general than 'sadaqa,' because the latter has the condition of approach (to God), which does not accompany the former. 'Hadia' is still more limited in meaning because it requires the carriage of its subject from one place to another. So it cannot be said that one has made a 'hadia' of a house or of landed property, rather it should be said he has made a 'hiba' of it."[2]

"Reward from God is a return, and so it (viz. a 'sadaqa') falls under the class of gifts for which there is a return"[3] (and as such is irrevocable).

A donation of ten 'dirhams' to two men may either be a gift or a 'sadaqa.' Abu Hanifa is reported to have held that if the donees are poor the donation becomes a 'sadaqa' ("Hanifa has construed a gift into alms when the object is a poor man") and 'vice versa.'[4]

It will be remembered that when a 'hiba' is made to two or more donees and the subject of gift is not partitioned amongst them, Abu Hanifa holds the gift void under the doctrine of 'musha',' and the two disciples hold it valid. The two disciples would equally, therefore, hold it valid if it is a 'sadaqa.' Abu Hanifa's opinion is recorded in two ways. In the 'Jama' Saghir,' it is stated to be that if it is a 'sadaqa' he holds it valid; but in the 'Mabsut' he is stated to have held it invalid even if it is a 'sadaqa.'[4]

(2) *Gift of a Debt or other Obligation.*

Transfer of debt by of gift.

438. Subject to sections 439 and 440 below, the right to recover a debt or enforce an obligation may form the subject of a gift.[5]

This is in part covered by s. 366 above. So a pension under the Pensions Act XXIII. of 1871, s. 7 (2), may form the subject of a gift, though the decision was founded on the Act, and not the Muhammadan law[6]; and rent may be remitted, the remission operating as a gift which becomes complete at the termination of the period when it becomes due.[7] See also 'Ebrahimbhai *v.* Gulbai.'[8] Cf. s. 369 above.

[1] See p. 336, *n.* 4, above.

[2] *Jawahir-ul-Kalam*, IV. 615.

[3] *Jami'-ush-Shittat*, 392.

[4] Hed. 485 (col. i.-ii.).

[5] Bail. I. 522-523, II. 203 (para. 2), restricts it to a release of the debt or obligation. But see Ameer Ali, I. 35, 60-61, 117, 118, which shows that the authors of the *Mabsut* and the *Jami'-ush-Shittat* agree with the Hanafi view. The law is now governed, however, by the Transfer of Property Act.

[6] *Sahibunnissa* v. *Hafiza Bibi* (1887) 9 All. 213.

[7] *Enaet Hossein* v. *Koobunnissa* (1869) 11 W. R. 320.

[8] (1902) 26 Bom. 577.

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"A gift by the mother to her infant child of her dower-debt due by the father is valid, when the mother invests the child with the power to realise it; in other words authorizes him to recover the debt. As the donation of a debt implies an authority to recover it, the proviso may be regarded as a distinction without a difference." [1]

(Shiah Law.) Debt can be released but not transferred.

439 (1) According to Shiah law a debt, or "what rests on the obligation of another" cannot be the subject of a valid gift to any donee other than the debtor, or person on whom the obligation rests.[2]

Sunni law otherwise.

(2) According to Sunni law the gift of a debt to a donee other than the debtor is also valid, provided that the donee is asked to take possession of the debt.[3]

Subject of gift actionable claim.

(3) *Semble*, the Transfer of Property Act, Chapter VIII., now governs the gifts of debts and obligations made by Mussulmans in British India, and where the subject of gift consists of an actionable claim, the transfer can, in British India, be effected only by the execution of an instrument in writing, signed by the transferor or his duly authorized agent, and is complete and effectual upon the execution of such instrument.[4]

Illustration.

1. D owes a debt to C, and S is a surety on account of the debt. C purports to release D. D is released notwithstanding that he does not accept the release, but S remains bound as surety under Muhammadan law.[5]

(2) D dies, owing a debt to C, who makes a gift of it to some of the heirs of C. The debt is extinguished against all the heirs of D.

(3) C, a creditor, dies, and one of C's heirs releases his share in the debt to the debtor; it is valid without being impeached on the ground of being a 'musha'.'

(4) F contracts his son S in marriage to *W*, and pays the 'mahr,' on behalf of S. This is a gift of the 'mahr' from F to S, so that should half of the 'mahr' be repayable by *W* it will be received by S and not F. ("There is some room for doubt."[6])

Applicability of Transfer of Property Act.

The whole of the Transfer of Property Act applies to Mussulmans, except Chapter VII. on gifts; and it is not provided anywhere in the Act that the rest of the Act has reference only to transactions for consideration, while it is clear from section 5 of the Act that its scope is not confined to transfers for considera-

[1] Ameer Ali, I. 75, citing as authority for the first sentence quoted above: *Radd ul-Mukhtar*, IV. 781.

[2] Bail, II. 203. In Roman law "obligations no matter how contracted, do not admit of any form of transfer," Gaius, II. 38.

Bail I. 522. Such gifts are stated to be lawful only on a "liberal construction" (*ihtihsan*), Macn. 208-209

[4] Transfer of Property Act, Ch. VIII. s. 130 (1) as amended by Act II. of 1900 s. 4.

[5] Bail I. 522. The law is altered by the Contract Act, s. 134.

[6] Bail. II. 80-81.

tion. It would, therefore, seem that the transfer of an actionable claim can only be effected (even for the purposes of a gift by Muslims) in the manner laid down in Chapter VIII. of that Act, and that the Muhammadan law on this point is repealed to that extent by the provisions contained in the said Chapter. SECTION 439

440. Where a creditor purports to make a declaration of gift of the debt to his debtor, it operates as a release, and no acceptance is required by the debtor to complete the gift.[1] **In gift of debt to debtor no acceptance necessary.**

441. The gift of a debt to a debtor is not revocable.[2]

(3) *Gift of 'Mahr.'*

442. Where a woman purports to make a gift of her 'mahr,' the rules relating to it differ from those of ordinary gifts in the following particulars: (1) The wife may lawfully make a conditional gift of her unpaid dower to her husband, and if the condition is not fulfilled she is entitled to demand payment of the dower from her husband.[3] (2) The gift of dower purported to be made to a dead husband is valid,[4] and operates to extinguish the right f the widow to claim the dower.[5] **Gift of 'mahr** **Conditional.** **To dead husband.**

Illustration.

(1) H says to his wife *W*, "hast thou freed me from the dower that I may give thee this thing or take you to Mecca?" and *W* frees H; then H refuses to give her the thing, or to take her to Mecca; there is no release of the dower.[6]

(2) *W* tells her husband H, "'you absent yourself much from me, but if you remain with me then the wall which is in such a house is a gift to you from me,' whereupon the husband stays with the wife for a while and then divorces her. The case may present five aspects: (*a*) if *W* made a mere promise, and not a gift 'in praesenti,' then the wall is not the husband's; (*b*) if *W* made a gift, and H promised, then the wall will be the husband's, provided that possession of it was given to him, but not otherwise; (*c*) if the gift is made with this stipulation that he should stay with *W*, and possession is given, even then the 'fatwa' is that the wall is not the husband's;[7] (*d*) if *W* says 'I have made a gift of this wall to you provided that you stay with me;'[8] the wall is not the husband's; (*e*) if *W* compromised with H on the stipulation that he should stay with her, and the wall be a gift to him, then the wall is not his."[9]

[1] Bail. I. 522; II 204 (*ll.* 1-4).

[2] Bail. I. 527 (para. 2.)

[3] Bail. I. 120 (para. 1), cf. *Fatawa 'Alamgiri*, Vol. II. *Nikah*, ch. vii. *fasl* 10 (*ad fin.*): extract from the *Havi*, consisting of a *responsum* of Shaikh Rahmatulla; see *ill.*

[4] Bail I. 120 (*l.* 6), 544 (last line) *Fatawa 'Alamgiri* (*Hiba*, ch. XI.) citing *Sirajia*.

[5] *Yani Begum Fakiroddin* v. *Umrao Begum* (1908) 10 Bom. L. R. 764.

[6] Bail. I. 538, 539.

[7] It is stated in the *Fatawa 'Alamgiri* that Shaikh Abul Qasim holds the contrary, but the *fatwa* is as stated above.

[8] "Here the gift is contingent."—Bail I. 539, *n.* 2.

[9] Bail. I. 539.

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(3) *W* says to her husband H, who is ill, "if you die of this illness, you are released from my dower." This is void, being a contingent gift,[1]

(4) *W* is divorced by her husband H, and H agrees to remarry *W* on condition that *W* should make a gift to him of the 'mahr' due on their first marriage. *W*'s consenting to do so does not affect her right to the first 'mahr,' whether they remarry or not, "because *W* placed on herself as a consideration for the marriage her property ('mahr'), and no consideration is due from the wife to the husband in marriage."[2]

(5) *W* is divorced by her husband H; while *W* is in her ''iddat' A gives her maintenance, to induce her to marry him; afterwards *W* refuses to marry, then the Sadr-us-Shahid says that he can claim back the maintenance if the maintenance was given on the condition that she should marry him; 'Qazi Khan' has said that it can be claimed back whether she marries or not, because it was in the nature of a bribe.[3]

Gift to dead person.

With reference to gifts to deceased persons, the following extract may be of interest: "On the death of a person, someone sends to the son of the deceased some cloth for his burial shroud, then does the son become the owner of the shroud, so that he may retain the cloth, and bury his father in another shroud? —The law is that if the deceased was such a person that, owing to his learning and knowledge of the law or piety, people considered it auspicious to give a shroud to him, then the son will not be the owner of it; and in such a case if the son wraps up the corpse in another shroud, then he will be obliged to return that cloth to its owner; but if the case is not such, then the son may use the cloth as he likes."[4]

(4) *''Ariat' or Gratuitous Loan.*

(Hanafi Law.) 'Ariat' gratuitous loan.

443. (1) According to Hanafi law ''ariat' is a gratuitous loan of an article by its owner to another who acquires the right to the profits of the subject of the ''ariat.'[5]

Neither puberty, declaration nor acceptance necessary.

(2) An ''ariat' may be made by a donor who has not attained puberty; and its subject may be the undivided part of anything; and it is not necessary that the donor should make a declaration of ''ariat' and the donee accept it.[6]

Syed Ameer Ali cites the following from the 'Fatawai Qazi Khan': "A mere grant of a usufruct is an ''ariat' in a thing which can be used without being destroyed, but things which must be consumed in use imply gift except in the case of money."[7]

[1] Bail. I. 540.

[2] *Qazi Khan*, cited in *'Alamgiri*; Bail I. 540-541. See above pp. 111-112, s. 95.

[3] *Fatawa 'Alamgiri* (*Hiba* ch. XI.) citing *Qazi Khan*. The opinion of Sadr-ush-Shahid is that he cannot claim back the maintenance unless she had agreed to marry him.

[4] *Fatawa 'Alamgiri* (*Hiba* ch. XI. *ad fin.*)

[5] Hed. 478; *Mumtazunnissa* v. *Tufail Ahmad* (1905) 28 All. 264. *In the matter of the Petition of Khalil Ahmad* (1908) 30 All. 309, correcting an error in the first judgment.

[6] *Muhammad Faiz Ahmad Khan* v. *Gulam Ahmad Khan*, (1881) 3 All 490, 492, 502, 503; 8 I.A. 25.

[7] *Fatawai Qazi Khan*, IV, 230; Ameer Ali, I. 79 *n*. Part of *n*. 8. Hed. 478-482; Bail. I. 549.

The following instances are given as to how ' 'ariat ' may be created, viz. by a man saying— SECTION 443 Forms.

"I have made thee owner of the profits of this house for a month ;" or

"I have made thee the owner of the profits of this house ;" or

"I lend thee this robe, thou mayest wear it for a day ;" or

"I lend thee this house that thou mayest live therein for a year ;" or

"I make this house of mine thy residence for one month," or "for my life-time ;" or

"My house is for thee a gift by way of residence."[1]

D says to R "my house is for thee if thou survive me, and for me if I survive thee."[2] This may operate as an ' 'ariat.' 'Ruqba' and ' 'ariat.'

Mr. Ameer Ali says : "the distinction between 'hiba' and ' 'ariat ' may be stated in a very few words. In one case the transferee acquires a right to the property ; in the other he only obtains its use or beneficial enjoyment for a limited time ; the property does not pass to him."[3] An ' 'ariat ' is a permission to use some property or to take its profits for a definite period, which is revocable at the will of the owner of the property ; and cannot be assigned by the person who has the permission,[4] nor does it devolve on his heirs.[5] Again, in an ' 'ariat' it is not necessary that the donor should be of age, nor that the thing given should be divided if of ' musha' ' nor is acceptance after proposal a condition.[5]—Can ' 'ariat ' be considered to be a transfer of property ?—The rules of Shiah law about similar transactions are very definite, and create rights which are capable of being transferred. But according to Sunni law they do not seem to be capable of transfer. Cf. the Contract Act, ss. 148 *et seq.*, and particularly s. 159. ''Ariat' distinguished from 'hiba.'

§ 10.—*Life-Interests and other Limited Estates.*

(1) *Sunni Law and Law of Trusts in British India.*

444. According to Sunni law, where a person purports to make a 'hiba,'[6] and to restrict the donee's rights in the subject of 'hiba'[6] for his life [or for any other limited period] the donee takes an absolute interest, and the subject of 'hiba'[6] devolves upon the heirs of the donee after his death.[7] (Sunni Law.) 'Hiba' cannot be restricted to life of donee.

Quaere, whether under Sunni law, as prevailing in British India, it is not possible for a life-interest or other limited estate to be transferred to the donee without consideration, where the donor is entitled to a larger interest in the property than he *Quaere* whether life-interest may be transferred in any other way.

[1] See p. 340, *n.* 7.

[2] See below, s. 445 and *ill.* (2) (3) thereto.

[3] "Mahommedan Law," I. 7.

[4] *Mumtazunnissa* v. *Tufail Ahmad*, (1905), 28 All. 264. Certain expressions in the judgment which are liable to be misunderstood were explained when the case was brought on for review : *In re Khalil* (1906) 30 All. 309.

[5] *Mahomed Faiz Ahmed Khan* v. *Ghulam Ahmed Khan*, (1881) 3 All. 490; 8 I.A. 25. See the learned judgment of the Subordinate Judge.

[6] The word *hiba* is advisedly used in this section ; see comment.

[7] Hed. 489 ; Bail. I. 509 (para. 2) *Nizamudin Gulam* v. *Abdul Gafur* (1888) 13 Bom. 364.

SECTION 444 purports to make a gift of.[1] It is generally assumed that it is not possible, *but it is submitted that the question is not free from doubt.*

Meaning of 'hiba'

A great deal of confusion has arisen in the law of gifts by what seems to be a misapplication of terms. The word 'hiba' seems in its origin to be applicable only to cases where the donor having the absolute ownership ('tamlik') of the subject of gift, transfers it in its entirety to the donee. When the authorities say that 'hiba' cannot be made conditionally, that proposition means necessarily only that 'hiba' is a term that implies not only that no consideration is received, but that the absolute property in its subject is transferred: so that when a person uses inconsistent language, saying, "I make a 'hiba,'" and at the same time purports to impose conditions upon the grant, both parts of the proposition cannot be given effect to; it is therefore assumed that the main word 'hiba' (which is a technical term of law) is used in its proper sense and the conditions are not meant to be insisted upon, just as words of recommendation may not in English law suffice to create a trust. There is some ground for this assumption, inasmuch as, where the donor wishes to give only a limited interest, he has appropriate legal terminology at his disposal, as for instance ''ariat,' 'wida,' 'waqf,' 'hubs,' etc., in some of which the grantor reserves his ownership and in others he does not.

Rule that 'hiba' must be unconditional or absolute.

This, it is submitted, is to some extent indicated by the context, in which the rule (that a gift for the life of the donee operates as an absolute gift[2]) appears in the 'Fatawa 'Alamgiri.' For the rule is introduced where the authors of that work are dealing with "the *words* by which gifts are effected." Such words or forms of making gifts are there classified under three heads:—

1. Those that are "appropriated to the purpose" (i.e. technical words of gift).
2. Those in which "the meaning of gift is concealed or implied."
3. Those which "bear equally the construction of gift, and of ''ariat.'"

It is under the second head, and as an illustration of it, that it is said, "if a man says, this mansion is to thee 'umri,' or 'hyati,' i.e. for thy life, and when thou diest it will revert to me, it takes effect as a 'hiba' and the condition is void,"[3] which seems to signify as follows: "The meaning of these words is 'concealed'; for the grantor says (the equivalent of) 'I give' which (in Arabic) implies a giving of the 'tamlik' or absolute ownership, but he also uses words which are inconsistent with the first word—in such a case the 'concealed' or 'implied' meaning is that the grant is absolute."

Forms for declaration of gift.

As the point is very important, a full and closer translation of the passage from the 'Fatawa 'Alamgiri' than Baillie's is given below.

"The words which have the effect of giving rise to a 'hiba' are of three kinds: first, such words as effectuate a 'hiba' by force of their literal meaning.

[1] Obviously a Sunni may be a mere life-tenant of a property, e. g. a *zamindar*, or may have a life interest transferred to him for consideration or otherwise, e.g. by gift from a Parsi or Christian. In such a case a Sunni can, it has been held, make a gift of a life-interest, viz. of all the interest in the property which he possesses: see above ss. 366 *et*

[2] Bail I. 509. "Much of the voidableness of conditions," says Syed Ameer Ali, "arises from the character of the Arabic expressions." I. 86.

[3] Bail. I. 509, (*ll.* 13-17) translates: "the gift is lawful, and the condition void," which is misleading.

Secondly, such as give rise to a 'hiba' by ''urf' [1] (or customary significance) or by 'kinaya' (or allegory) [2] and thirdly such as may bear the meaning equally of 'hiba' and of ''ariat.' Instances of the first kind of words are such as if one says (i) I have made a 'hiba' of this thing to thee, or I have made thee the proprietor of this article, and (ii) 'I have rendered this thing thine (lit. for or to thee),' or (iii) this 'thing is for or to thee,' or (iv) 'I have made a present or a gift of this to thee.' All these are words of 'hiba.' Instances of the second kind of 'hiba' are as follows: if one says (i) 'I have clothed thee with this cloth,' or (ii) 'I have rendered thee a dweller of this house,' then it is a 'hiba'; and similarly if one says: 'this house is thine, during the whole of my life,' or 'while I live,' or 'while thou art living this house is thine, and when thou diest, the house will come back to me and will become mine again,' in that case also the 'hiba' takes effect, and the condition is void. And the third class of words are such as if one says, 'This house is 'ruqba' or 'hubs' for you,' and gives the house to the grantee, then the great Imam and Imam Muhammad hold this to be an ''ariat,' and Abu Yusuf construes it as a 'hiba.' [3] This is contained in the 'Muhit Surukhsi.'" [4]

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1. Literally referring to gift.
2. Customarily understood to refer to gifts.
3. Such as may refer to either gift or ''ariat.'

Instance of third form.

In the comment below the decided cases will first be considered, secondly the texts of Sunni law on which the rule depends, and the reasons why life interests are not permitted, showing how it is that Shiah law permits them; thirdly and fourthly the effect of the Trusts Act and the Contract Act, s. 25, respectively on life interests created by Sunnis; and fifthly the effect of the rules on bequests for limited periods.

The authorities of the British India Courts for holding that a Sunni Mussulman cannot create a life-interest are all but conclusive:—

I. DECIDED CASES.

1. In 1872 their lordships of the Privy Council say: [5] "Upon what grounds ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be a very clear proof of so unusual a transaction. The only grounds on which it can be inferred that the plaintiff was to take only a life-interest seems to be the expression . . . [6] [which] may be explained on the supposition that they have been used to import that the property was to remain with the widow for the full term of her life; and that Ali Kureem, as her heir, would succeed to them after her death. They are, at all events, of opinion that thes

1. Unusual to create life interests: transaction requires very clear proof.

[1] See pp. 18 *et seq.*

[2] Richardson explains *kinaya* as "calling anything by a significant name, a metaphor metonymy, nickname;" and Kazimirski: "surnom, sobriquet, métonymie."

[3] It will be observed that the three jurists do not interpret the words of a conditional gift in the same way. In such a case the *Qazi* may adopt either the one view or the other. See above pp. 26, 27 & *nn.*

[4] *Fatawa 'Alamgiri, Hiba* ch. 1. which is headed "On (1) the definition, (2) constitution, (3) conditions, and (4) kinds of *hiba* and (5) on the words which constitute a *hiba*. The passage translated is the beginning of the portion dealing with the fifth head referred to. The rest of this part contains various examples, with which the chapter closes.

[5] (*Mussamut*) *Humeeda* v. (*Mussamut*) *Budlun* (1872) 17 W. R. 525, 527 (P. C).

[6] The words omitted in the quotation above are as follows: "in the 'foutenamah' and in the plaintiff's petition, recited in the proceeding for the mutation of names in the case of Mowzah Muzdumpore Doomree. The judgment in that case finds generally that she is in possession of the entire property left by Mahomed Ali, 'in lieu of Den Mohr receivable by her,' without any qualification as to the extent of her interest. Their lordships conceive that the expressions in questions may be explained," etc. as above.

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expressions, taken in connection with the rest of the evidence, are too weak to prove a transaction, so improbable amongst Mahomedans, as an alienation by the son for the life only of his mother (a transaction consistent with the case of neither party) and that the Zillah Judge came to the right conclusion when he found that the plaintiff took an absolute interest in the properties left by her husband." This case merely lays down that it was not proved that there was an attempt to create a life-interest; and that any attempt to do so unusual a thing must be proved by very clear evidence."

2. Gift with condition that donee to have mere life-interest may operate as absolute

2. In 'Suleman Kadr *v.* Dorab Ali Khan,' [1] Sir R. Collier delivering the opinion of the Privy Council said: "At the same time their lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their lordships are by no means satisfied that the gift to this lady of these Government promissory notes, subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all his heirs to all time, is not, according to Mahomedan law, in its legal effect a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for decision of the case, they will humbly advise," etc.

Life interests "inconsistent with Mahomedan law."

3. However, in 'Nizamuddin Gulam *v.* Abdul Gafur' [2] Parsons J. said, "The creation of any life-estate at all appears quite inconsistent with the Mahomedan law. See 'Mussamut Hameeda *v.* Mussamut Budlun.' [3] It might be that by consent such an estate might be created, but as a general rule, the donee in such a case would take an absolute estate. 'All our masters are agreed that when one has made a gift, and stipulated for a condition that is 'fasid' or invalid, the gift is valid, and the condition void (Bail. I. 537). So in the 'Hedaya,' III. p. 309 (Hed. 489), it is said an 'amree' or life grant is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition.' When this decision went up in appeal to the Privy Council, their lordships there said, "It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see 'Humeeda and others *v.* Budlun and the Government' [3]), but to make the fee devolve from one generation of his descendants to another, without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life-estate but a full owner, with a prohibition against alienation, which being void in law, could not affect either herself or her creditors. . . . They have not averred . . . that Tahirabibi gave such consent, and there is no evidence to show that she did . . . Besides, there was no issue on the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal." [4] It is evident, therefore, (i) that in this case the question did not arise whether a life-interest could be created or not, (ii) that in any event the law is not carried any further than by the

"Life-rents an estate which does not appear to be known to Mahomedan law."

[1] (1881) 8 Cal. 1, 7; 8 I.A. 117, 122.

[2] (1888) 13 Bom. 264, 275, Birdwood and Parsons, JJ.

[3] (1872) 17 W. R. 525 (P.C.).

[4] *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom. 1, 5; 19 I.A. 170, 178.

case to which both judgments refer, and the relevant portions of which have been already quoted (viz 'Humeeda *v.* Budlun').

4. "Life interest unknown to Mahomedan law."

4. While 'Abdul Karim v. Abdul Qayum' [1] proceeds broadly on the ground that "life-interests and contingent interests are unknown to Muhammadan law," yet in an earlier portion of the judgment it is stated that there was "'prima facie' . . . an absolute gift. But the will goes on to provide that no son shall have the right to alienate the property given to him, and that on his death without issue the widow of the son shall take no interest, but that the property of such son shall go to the surviving brothers or other heirs." It is not easy to understand how this devise could be supported even if life-interests are recognised in Sunni Muhammadan law.[3]

5. "Life interest inconsistent with Mahomedan law."

5. The proposition was stated in the same broad terms in 'Abdoola *v.* Mahomed,' [4] "the creation of a life-estate is inconsistent with Mahomedan law; see 'Nizamudin Gulam *v.* Abdul Gafur,' the cases there collected, and the observations of Lord Watson in the same case under appeal to the Privy Council. 'The general rule,' said Mr. Justice Parsons upon reviewing the authorities,' is that when a life-estate is attempted to be created, the donee would take an absolute estate.'" But this was a case between Khojas; and it ought to have been governed by Shiah law, under which it is admitted now that life-interests can be created.[5]

6 When life interest with remainder over—the latter void.

6. Again, in 'Mahomed Shah *v.* Official Trustee of Bengal' [6] it is simply stated, "The plaintiff by this deed takes a life interest with remainder to certain other persons. It has been held that this is void under Mahomedan law. It has also been held under this deed that trusts declared after the life-interest are void as gifts to unborn persons." Three unreported cases are cited, but it is not stated what propositions are established by them respectively.

II. SUNNI TEXTS. Life interests are gifts with unenforceable conditions.

The texts of Sunni law on which the proposition is based, are as follows: "If he had said 'this mansion is to thee 'umri' or 'hyati,' i.e. for thy age or for thy life, and when thou diest it reverts to me,' in which case the gift is lawful and the condition void." [7] The 'Hidaya' is more explicit. "The meaning of 'amree' [8] is a gift of a house (for example) during the life of the donee on condition of its being returned upon his death. The conveyance of the house, therefore, is valid without any return, and the condition annexed is null . . . an 'amree,' [8] moreover, is nothing but a gift and a condition, and the condition is invalid; but a gift is not rendered null by involving an invalid condition." [9]

[1] (1908) 28 All. 342 (Banerjee and Richards JJ.)

[2] Hed. 694; Bail. I. 652 *n.*, 654 (para. 2).

[3] It may be pointed out that the rules of Sunni law relating to wills differ from those relating to gifts during life. Cf. Hed. 694; Bail. I. 652 *n.* 654 (para. 2). See below.

[4] (1905) 7 Bom. L. R. 306, Batchelor J. (singly).

[5] *Banoo Begam* v. *Mir Abid Ali* (1908) 3 Bom. 172. Beaman J., however, doubts that this decision is sound. See *Jainabai* v. *Sethna* (1910) 34 Bom. 604, 612, 613. 12 Bom. L. R. 341, *Cassamally* v. *Currimbhai* (1911), 13 Bom. L. R. 717, 767-768.

[6] (1909) 36 Cal. 431. (Stephen J. singly.)

[7] The context from which this extract is taken makes it extremely probable that it merely refers to the interpretation of the particular form of Arabic words used.

[8] *Sic* in Hed. 289 for *'umra*.

[9] Hed. 489: cf. William's "Real Property" (19th Ed., 1901) 91, an estate tail was at first "called a *conditional gift* by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs, at any future time, the land should revert to the donor. Bract. fo. 17b, 47a, 68b, 69a: Co. Lit. 290 b. n. (1) V. I.; 2 Black. Comm. 110." See also Pollock and Maitland's "History of English Law," II. 16-19.

SECTION 444 Thus an 'amree'[1] is interpreted as a conditional gift, hence it gives the absolute interest; a 'ruqba' is interpreted as a contingent gift, hence it is void.[2]

Reasoning of Sunni lawyers.

The reasoning of the Sunni authorities may be paraphrased as follows; "The voluntary grant of a life-interest must be considered to be a 'hiba' with a 'shart' or stipulation that the subject of the gift will be returned to the donor or his heirs after the death of the donee: now in no case is there any obligation on the part of the donee of a 'hiba ba shart ul 'iwaz' to fulfil the 'shart': it can never be enforced. But further, this particular stipulation is invalid in its inception, because it contravenes the rule of law that the 'shart' cannot validly refer to (part of) the subject of the gift. Thus where a life-interest is purported to be granted, the grantee takes the property without any means being available to the grantor to enforce the return of the subject of the grant."

Objections against life-interests in Sunni law.

It may be said in reply that the voluntary transfer of a life-interest is not making a conditional gift, that the property of the donor remains and the donor gives merely the life-interest, parting with that absolutely, and that consequently the donee gets only that which is parted with; that the reversion never having been parted with, the donee can have no more claim against it than he can against any other thing out of the rest of the donor's property. But this argument cannot stand when it is remembered that in the theory of Muhammadan law the voluntary nature of a gift is pushed to the extreme limit, and is also opposed to the history of English law in which too a life-interest was originally considered as a gift with a condition.[3] Again, according to the theory of the law of 'hiba,' the donor must transfer the subject of the gift to the donee if it is capable of being physically transferred, if he leaves anything undone the law will not complete the 'hiba'; similarly, though he may make stipulations with the donee (as in the case of a 'hiba ba shart ul 'iwaz') such stipulations will not be enforced; the only remedy with him is to revoke his own gift, and that remedy may be put an end to any moment by the donee himself. Again, the 'iwaz' of a gift can never under Sunni law consist of a part (much less of the whole) of the subject of the gift[4] the only means, therefore, that the donor has of getting back the subject of gift, is to revoke his gift, and the donee may destroy the revocability of the gift by an act on his own part, while in no case can the gift be revoked after the death of the donee.[5]

These objections have been referred to above in detail in order to consider whether any of them can apply where a life-interest is created under a trust, or on account of natural love and affection between parties standing in a near relation to each other (Contract Act s. 26). It is submitted that they cannot.

[1] Hed. 489 (col. 1. para. 3); Bail. I. 509 *n*. 3, overlooks the second reason given in Hed *loc. cit.*, viz. that a *ruqba* is a contingent gift.

[2] See p. 348.

[3] It is submitted that there is nothing to show that a life-interest contravenes the policy of Sunni law. All that is meant is that there is no machinery available for enforcing the stipulation that it connotes.

[4] It will be noticed that on these points the Shiah law differs from the Sunni law.

[5] The Hanafi law abhors the participation of the donee and the donor in the same property. The subject of gift must be partitioned off, and it may be considered that the same objections apply to the donor and donee participating together in the fee simple of the property by way of life-interest and reversion This objection may be inapplicable on the ground that the *musha'* doctrine only applies where partition is possible, and in this case it obviously is not possible.

SECTION 444 TRUST for life.

Where a Sunni Mussulman conveys property to trustees and creates under the trust a life-interest in favour of one of the beneficiaries, it is obvious that the Muhammadan law laying down that no conditions between the donor and donee of a gift are "obligatory" or enforceable, does not apply so as to make the trusts unenforceable: because the Trusts Act says that they are enforceable.

Life interest not forbidden by nor opposed to Sunni law, though it could not be created by way of 'hiba.'

The only question that remains, therefore, to be decided is whether the purpose of the trust is forbidden by law, or defeats the provisions of any law, or is immoral, or opposed to public policy (Trusts Act, s. 4). It is submitted that no provision of law is defeated by creating a life-interest, or providing that the trustee should hold the property for the benefit of one person for life, and for another thereafter. Even putting aside the act that life-interests may be created under a 'waqf,' the Sunni law as well as the Shiah law provides for giving, without consideration, the right to the use or produce of property under the name of ''ariat,' and it is recognised that a person may give to another the use of a house, without any consideration; nor are life-interests anywhere declared to be illegal. The only effect of the intervention of a trustee is that the revocability of an ''ariat' is taken away, or in the case of the grant of a life-interest in a house, the grantor has the means of ensuring that the donee will, in accordance with his stipulation, return the subject of the gift, which could not be ensured under a 'hiba ba shart ul 'iwaz.' In other words a trust provides a method for enforcing the stipulation in a manner which was not contemplated by the Muslim jurists, such enforcement not being possible when the estate, legal as well as equitable, was passed to one donee by way of 'hiba.' These incidents of a trust, it is submitted, do not defeat any such provision of the law as to make a trust by a Sunni creating a life interest unlawful. It is obvious that if the creation of a trust added no new incident to the transaction, no trusts would ever be created. The very object of trusts is to facilitate what cannot otherwise be done. "If the objects of a trust," it has been said, "do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present moment does not apply, but a trust is a thing 'sui generis,' and when public policy is not disturbed, will be executed by the Court." [1] Again, since according to Hanafi law after a 'hiba' is completed, no stipulation between the donor and the donee having reference to the subject of the 'hiba' can be enforced, were that branch of the law applicable to a trust, it would be the trustee and not the life-tenant that would acquire the absolute interest in the trust property. Now assuming that this rule of the Hanafi law of 'hiba' can and does apply to a trust, it is clear that while on the one hand the trustee may voluntarily act upon the trust, on the other the Hanafi law cannot affect an obligation imposed upon him by the paramount authority of the Legislature. In any case on what principle can the beneficiary for life under a trust invoke the aid of the Hanafi law of 'hiba' for enlarging his beneficial interest to a fee simple? Under that law, on the same

It could by ''ariat' and in 'waqf.'

Object of trust to accomplish new results.

[1] Lewin on "Trusts" (1904, 11th Ed.) 87.

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IV. CONTRACT for limited estate

principle on which he bases his claim, no benefit at all could be claimed by him as of right, for the trustee would become the absolute owner. See s. 352 above.

Similar considerations apply with greater force when the gift comes within the Indian Contract Act s. 25 (1). See s. 351 above.

V. BEQUEST for limited period of time.

Before quitting this subject it must be pointed out that it is expressly stated that the "bequest of the service of a slave, or the occupation of a mansion, or the produce ('ghullut') of both, or of lands and gardens, is lawful. And it is lawful for a limited time or for ever;[1] for as the profits of a thing may be transferred by a person during his lifetime with or without a consideration, so they may in like manner be transferred after his death; the thing itself being in a manner detained in his ownership, that the legatee may enjoy its profits in the same way as a person in whose favour a 'wukf' or appropriation has been made, enjoys its profits by virtue of the ownership of the appropriator."[2] If, therefore, there is no power to create a life-interest 'inter vivos,' then the testamentary power of disposition must be considered to be restricted in the same manner. The transfer of the profits in the lifetime is referred to as giving an ''ariat.' Now ''ariat' is revocable at the will of the grantor, and so can hardly be considered an estate; nor is ''ariat' transferable. But when such an interest is created under a will, the testator being dead when the interest opens out, it is apparently irrevocable.[3] Thus "it is stated in the 'Moontuka,' on the authority of Abu Yusuf, according to one report, that when the occupancy of a house is bequeathed to a person without any limit of time he is entitled to it as long as he lives."[4] There seems therefore, to be less distinction between such an interest created by will, and a life-estate.[5]

'Ariat' in will irrevocable.

English law

According to English law chattels may be the subject of gift; but at law only an absolute interest in them can be given 'inter vivos,' and a grant of chattels for life vests the whole legal estate.[6]

(Sunni law.) 'Ruqba.' Its meaning and effect.

445. 'Ruqba' or a grant for the life of the donee with a condition that if the donee survives the donor, the subject of the grant shall belong absolutely to the donee, is void according to Abu Hanifa and Imam Muhammad. Abu Yusuf holds that the grant of a 'ruqba' gives to the donee the absolute estate in the subject of the gift.[7]

Illustration.

(1) D says to R "my mansion is thine 'ruqba,'" meaning, "if thou diest, it is mine; if I die it is thine." The gift is void in Sunni law.[8]

[1] "That is during the legatee's lifetime, as will be seen a little further on; and Mr. Hamilton has accordingly rendered the original word 'an indefinite period,' following, no doubt, the Persian translators."—Bail. I. 652 *n.* 1. 652 (*ll.* 1-11).

[2] Bail. I. 652, citing *Hidaya* IV. 1474; trans. IV. 527. Cf. Hed. 692 *et*

Cf. s. 426 above.

[3] Bail. I. 654 (para. 2); cf. Hed. 692-696.

[4] On the distinction between life-interest and these grants, see below, ss. 447 *et seq.*

[5] Halsbury, "Laws of England," XV. 408, s. 811.

[6] Hed. 489; Bail. I. 508, Shiah law; cf. ss 447 *et seq.*

[7] Bail. I. 508 (*ll.* 5-7).

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(2) D says to R : "This mansion," or "this land," "or this maid" or things "of which the benefit may be derived consistently with the subsistence of the thing itself is 'minha' [1] of thee"—it would be an ''ariat' loan,[2] unless a gift were intended.

(3) If D purports to make a 'minha' of food or of money [1] or of anything else "of which the benefit cannot be derived except by consumption or destruction of the substance, it would be a gift." [1]

There is little likelihood of any person in British India making the experiment of a grant by way of 'ruqba' or with the use of that Arabic term. This section is therefore mainly of academic interest.

'Ruqba' in British India in Shiah and Sunni law.

A 'ruqba' is valid in accordance with its terms under Shiah law. In the 'Shara'ya-ul-Islam' 'ruqba' is explained as a grant for a fixed term.[3]

The difference between the Sunnis and Shiahs is referred to in an interesting passage in the 'Jami'-ush-Shittat'.

"If a declaration is made in the following terms: 'I give this house to you by way of 'ruqba' and the same belongs to you so long as you live,' or 'I give away to you the corpus of this house, on condition that if you die before me, the same shall revert to me, and that if I die before you, it will continue to be yours'—it has been contended that this obviously must be interpreted to mean that the corpus of the property is permanently alienated, as has been related by the author referred to above, and by others, on the authority of the jurists of the more general (i.e. Sunni) sect; but (on the other hand) it is (equally) possible that the intention in making such a declaration refers to the enjoyment of the usufruct for the rest of the (donee's) life; and this is clearly stated in the first of the two formulae; (though) according to the common (Sunni) view (even) that is not valid (for the purpose of creating a limited interest). It is possible that what is meant by him is that a 'hiba' in this form is valid." [4]

(2) Limited Interests under Shiah law.

(Shiah law.) Creation of limited interests.

446. (1) When the owner of a property empowers another to receive under Shiah law its profits or usufruct he is said to make a grant of or to create a limited interest in the said property.[5]

Grantor. Grantee. Subject of grant.

(2) Such owner is referred to as the "grantor"; the person who is so empowered, as the "grantee"; the property as the

[1] Bail. I. 511. *Minha* is translated as *donum* by Freytag and "gift" by Richardson. But if the word had that meaning, Bail. I. 511 would be hardly explicable. See, however, Hed. 487 (col. ii. para. 3) where *minha* (spelt *moonka*) is defined as a species of loan. It may be that it implies a gratuitous loan, and so it is translated "gift" by the European lexicographers.

[2] Cf. s. 443 above.

[3] Bail. II. 226. A *ruqba* as defined in the first clause of the above s. 445 is expressly stated to be valid in Shaih law, see s. 447.

[4] I.e. if a man really intends to make *hiba*, but uses terms such as the above, and it is clearly shown that he intended to give away the corpus, it will take effect as a *hiba* of the corpus and not merely a limited interest.—*Jawahir-ul-Kalam*, IV. 618.

[5] Bail. II, 226 (*ll.* 2-5); "its object or the advantage to be derived from it (viz. this 'contract') is the empowering a person to receive the profit or usufruct of a thing with a reservation of the owner's right of property in it."

SECTION 446 "subject of the grant," [1] and the power which the grantor purports to give to the grantee as a "limited interest" in the subject of the grant.

Declaration and acceptance of grant.

(3) When the grantor signifies his intention to create a limited interest, with a view to obtaining the assent of the grantee thereto, he is said "to make a declaration of the grant;" and when the grantee assents thereto, he is said to "accept the grant."

Vesting of limited interest.

(4) A limited interest is said to become "vested," when the grantee becomes empowered to receive the profit or usufruct of the subject of the grant, in accordance with the declaration of the grant.[2]

A limited interest created in accordance with the rules contained in ss. 446-456 is referred to as a 'hubs'; it differs from a 'waqf' in strict Muhammadan law in the fact that a 'waqf' is made from a religious motive, whereas a 'hubs' is without any such motive. The distinction is similar to that between 'hiba' and 'sadaqa.' The mere use of the word 'hubs' does not take it out of the rules relating to a 'waqf' if a religious motive is expressly or impliedly indicated.[3]

(Shiah law.) 'Umra.'

447. (1) The grantor may limit the interest of the grantee in the subject of the grant to his own, or to the grantee's life, in which case it is called an 'umra' or life interest; or the grant may consist of the right of residence, in which case it is called a 'sukna'; or the grant may consist of an interest limited to a specified period of time, in which case it is called a 'ruqba.' [2]

'Sukna.'

'Ruqba.'

Succession of limited interests.

(2) The grant may consist of an 'umra' or other limited interest in the subject of the grant to the grantee, followed by similar interests to the descendants of the grantee, in which case it will continue binding on the grantor and his heirs, until the descendants of the grantee cease to exist, after which it will revert to the donor or his heirs.[4]

Quaere, whether other limited grants.

(3) It is not quite clear whether the limited interests which may be granted under Shiah law are restricted to those mentioned above, or whether the said limited interests are given merely as examples.

[1] It will be noted that by "the subject of the grant" the whole of the property, in which a limited interest is created, is referred to.

[2] Bail. II. 226.

[3] Bail. II. 227 (para. 3); see another translation of this passage below under s. 451.

[4] *Banoo Begum* v. *Mir Abed Ali* (1907) 32 Bom. 172, 180 (Ex. 9). See s. 452 below and comment thereto. That passage seems primarily to be a verbal explanation. (See above p. 49.) "According to the *Jawahir* there is no difference so far as the legal effect is concerned between an *'umra*, *sukna* or *rukba*:" Ameer Ali, I. 79. *Quaere*, if the three classes of interest may be created in succession to one another. Cf. Ameer Ali, I. 82. "a *rukba* for an indetermine period is valid, but resumable at the will of the donor. A sale of the subject of the grant would put an end to the grant." (No authority is cited.)

Illustrations. SECTION 44

(1) D says to R, "I have bestowed on thee this land for thy life." This is a declaration of the grant of an ''umra.'

(2) D says to R, "I have given thee the residence ('iskan' in Arabic) of this mansion for thy life," or "the residence of this mansion is to thee while thou livest." This is a declaration of the grant of a 'sukna.'

(3) D says to R, "I give this mansion to thee for the term of 20 years." This is a declaration of the grant of a 'ruqba."

Forms of declaration.

"The contract[1] arises by the utterance of any of the following formulae: 'I give you this house' or 'this land' or 'this residence for your life' or 'for my life' or for a definite period, 'by way of sukna' or ''umra' or 'ruqba' or by an expression serving a similar purpose; there is no difference of view, or doubt as to such a contract[1] being lawful (when made in such terms). However, there is difference of opinion as to whether they are so restricted,"[2] i.e., whether these are the only formulae by which such limited interests may be created: *quaere*, whether it is also implied that there are differences of opinion as to whether these are the only three classes of limited interests known to Shiah law. The present writer has not come across any indication to show that the Shiah lawyers considered these three to be 'sui generis,' and the only estates known to Shiah law, or on the other hand that they contemplated other classes of interests. Syed Ameer Ali, however, writes[3] as follows: "A person is entitled under Shiah law to create other limited rights over his property. For example, a person may give to another a right of way over his land for a term, without giving rise to a perpetual easement, or may authorise him to take water from a cistern, etc. Such limited rights are called 'rukbas' in a restricted sense. The word 'rukba' used in this connection implies a servitude."[3]

Easements.

'Sukna' 'umra' and 'ruqba.'

Cf. "It is reported by Abi 'Abbas Sabah al Kanani about Abi 'Abdulla (blessings be on him) as follows: He was asked about 'sukna' and ''umra.' He replied; 'If he (the grantor) has created a 'sukna' in favour of the grantee for life, then the grant must be given effect to (lit. the contract must be carried out as stipulated); and if he fixes in his (the donee's) favour and in favour of his descendants after his death to continue until his (the donee's) descendants become extinct, it does not empower them (the descendants) to sell, or inherit the subject of the grant. After that (when they are extinct) the house reverts to the first owner (grantor). And Murtuza Hamran was asked by me about 'sukna' and ''umra.' He replied, 'men must act in this matter according to stipulation: if it is stipulated for his (the grantor's) lifetime, he must live therein for his life; if it is for his (the donee's) descendants, then it is for them as stipulated, until the descendants become extinct. Thereafter the same will revert to the owner of the house.' And Hasan al Halabi quotes from the authority of Abi 'Abdullah who was asked about a man who makes 'sukna' of his house in favour of another man and after his death in favour of

Fulfilment of covenants.

[1] *Aqd*, see above, p. 54, *n.* 7.

[2] Mahommedan Law," I. 113.

[3] , IV. 618.

SECTION 447

his descendants. He replied: 'It is lawful but they cannot sell or inherit the same.' I said then, 'if a man makes another man live in his house for life-time?' He replied: 'It is lawful.' I said: "If a man makes another man live in his house and does not fix the time?' He replied: 'It is lawful and he may turn him out whenever he wishes.' It is known that the Mufti by pronouncing it lawful means that it is particularly so, having regard to the latter part of the tradition, and the texts already mentioned,[1] which means that whatever condition is made the same is binding. And likewise it is the correct tradition quoted by Husain ibn Na'im on the authority of Kazim (may the blessings of God be on him)."[2]

'Ruqba' explained.

"Now 'ruqba' is obviously derived from 'irtiqab,' which means waiting, and the contract is so called because each of the two parties waits for the contracted period; or it is (perhaps) derived from 'ruqba,' having regard to the fact that the house, etc., is given away to the donee for enjoying the usufruct for life; and it is said on the authority of some of the learned that 'ruqba' means the utterance of the formula, 'I place the service of this slave at your disposal for your life or my life'—which would imply that it is derived from 'ruqba,' which means a slave, but this is more than doubtful, as is admitted by others."[3]

'Ruqba' is stated by Syed Ameer Ali to be "a generic name for all limited estates under the Shiah law. It includes both an 'umra' and a 'sukna.' When a house is given for a limited period it is generally called an 'umra.' When a house is given for residential purposes it is called a 'sukna.' Under the Hanafi law both these will come under the head of an 'aâriat,' but whereas an 'aâriat' is resumable at the will of the donor or his heirs, an 'umra' or 'sukna' is operative for the fixed period and cannot be resumed."[4]

Limited grants in Shiah law and estates of English law.

Beaman J.[5] has thrown doubt on the decision holding that life interests may be created under Shiah law.[6] His view apparently being that the Shiah authorities mention only the right of residence or of use, and that accordingly a Shiah can either make a gift out and out of the whole 'dominium' of the subject of gift, or permit the donee to use the property by residing in it, or by taking its profits; that in the former there can be no restriction in point of time; and that in the latter there is no right over the 'corpus' and so granting the latter is not creating a life-interest (though the use may be limited during the life of a person). The force of the criticism may be admitted, but it may at the same time be pointed out that (1) the right of use granted in such a manner is irrevocable; (2) that the Shiah authorities expressly refer to the fact that power may be validly given to the grantee to transfer his rights to others; (3) that the rights of the grantee devolve upon his heirs unless they are restricted to his life-time. So that the right to use the property, or to its usufruct, during the grantee's life, does not appear to be distinguishable in material points from a life-interest;[7] no doubt the Shiah

[1] Alluding to the Quran, II, 172, "righteousness is in those . . . who fulfil their covenant when they covenant," cited above, p. 6.

[2] *Jawahir-ul-Kalam*, IV. 619.

[3] *Jawahir-ul-Kalam*, 618-619.

[4] Ameer Ali, I. 113.

[5] *Jainabai* v. *Sethna*, (1910) 34 Bom. 604; *Cassamally* v. *Currimbhai*, 13 Bom. L. R. 717, 767-768.

[6] *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172.

[7] Williams, "Real Property," 16-20, 64, 195, 324, 418, etc.

authorities draw no practical distinction between the incidents of an estate granted for a term of years, and a life-estate; and yet the latter is strictly a freehold estate, and the former not.[1] Hence it may be argued that a grant limited to the life of the grantee under Shiah law is not a freehold estate any more than a term of years; and that consequently the former is not a life-estate, for a life-estate is a freehold estate. But the distinction between freehold and other estates is based on the feudal system of land tenures in England, and cannot affect the use of an expression like "life-interest" or "life-estate" in the general and less technical sense in which alone it can apply when the nomenclature of English law is applied to the institutions of Muhammadan law.[2] When it is said that Shiah law permits the creation of life-estates, it is not meant that the life-estates of Shiah law have exactly the same incidents that life-estates have in England.

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448. A limited estate becomes vested in the grantee when the grantor makes a declaration of grant which the grantee accepts, and thereafter possession of the subject of grant is transferred to the donee.[3] *Semble*, that when the grant consists of a succession of limited interests, the interests subsequent to the first one, vest when possession is transferred to the first grantee.[4]

(Shiah law.) Possession of subject of grant.

This section is based on a passage in the 'Shara'ya' referring directly to 'waqf'; but the possession required in a 'waqf' is the same as in the case of limited interests. The distinction between 'waqf' and limited interests consists mainly in the motive with which they are respectively made, and is similar to that between 'hiba' and 'sadaqa.' See above p. 336.

As to unborn persons it is said, "if one should make a settlement beginning with a person not yet in existence as for instance one to be born, or a fœtus not yet separated from its mother, the 'wukf' would not be valid."[5]

449. The grantee of a limited interest must be in existence at the time when the grant is made. He must be competent to own property, and must be distinctly indicated; provided that where a succession of limited interests are created by the same grant, the grantee of the first interest alone need be in existence at the time of the grant, and if the succeeding grantees come into existence respectively when their interests open out, the grants to them are valid.[6]

(Shiah law.) Grantee must be in existence and competent to own property.

It seems quite evident that the Shiah lawyers contemplated a series of limited interests in succession 'ad infinitum.' And that neither creating a perpetuity

No rule against perpetuity in Shiah law, nor against unborn persons being grantees.

[1] See p. 352, *n.* 7 above.

[2] Cf. *ante*, pp. 177-178, for another instance.

[3] Bail. II. 226 (*ll.* 1-2, 13-15). *Banoo Begum* v. *Mir Abed Ali* (1907) 31 Bom. 172, 179 (ex. 8).

[4] Bail. II. 214 (*third*), referring directly to beneficiaries under *waqfs*; but possession is required equally in regard to *waqf* and other limited interests, and the two differ from each other merely in the motive with which they are made.

[5] Bail. II. 214.

[6] Bail. II. 234 (*third*) from which the first clause is taken *verbatim*. See s. 448, comment.

SECTION 449 nor giving remainders to unborn persons seemed to them to be objections invalidating settlements. This, it is submitted, will appear from the authorities that are cited below. Assuming for the present that this is so, what is the effect of the rule in British India? It is submitted that it must be given effect to at least in so far as it does not conflict with the rule [1] against creating perpetuities; whether it should be so cut down as to conform to that rule, or should be given effect to in its entirety would depend, in the first instance, on the enactment under which the Muhammadan law of gifts is enforced. Where the legislature expressly requires the Muhammadan law of gifts to be enforced, it is submitted that the Shiah law must be given effect to in spite of its infringing the rule against perpetuities; where it is enforced as a matter of justice, equity, and good conscience, the Courts may have to consider whether it should not be disregarded in so far as it infringes the rule against perpetuity, or any other rule of law which may be considered to embody a principle of public policy.[2]

When some only of a class of grantees in existence.

"A grant may be made to A for life and then to B absolutely, or a grant may be made to A for life, and then to A's children absolutely. There is some difference of opinion as to whether only children living at the time of the grant will take the remainder absolutely, or any children born to A after the grant will take also. The approved opinion seems to be that *all* the children will take, whether living at the time of the grant or born afterwards. But when the grant is to A for his life and to his children for *their* lives, only the children living at the time of the grant will take with rights of survivorship."[3]

It is submitted that these are questions concerned with the construction of the words, for it seems to be clear that unborn persons may take under a settlement.[4]

Subject of grant.

450. Anything may be the subject of the grant of limited interest which may be the subject of a 'waqf.'[5]

A mansion, a slave, furniture, and a horse are mentioned as being valid subjects of grants.[6]

"The subject of a 'hubs' may be either a slave or a horse or any of those objects the use of which may be subjected to such (i.e., limited) use. Where a person is beneficiary all kinds of objects may be dedicated for his use (lit. that he may enjoy all these benefits). Where approach to God is sought, it is possible to dedicate a slave, a horse, a camel, a donkey, and similar objects. In the case of a 'masjid' and the like, it is possible to dedicate a slave or a quadruped when any is wanted for carrying water, etc.; otherwise its use may be fully made by letting it for hire, and then the proceeds may be applied in proper

[1] *Quaere*, whether the English or Indian rule would be held to be binding? See above s. 12, p. 45. The fact that the Indian Legislature has chosen to alter that rule for India would indicate that the English rule of law is not "applicable to Indian society and circumstances." On the other hand, such applicability must be judged by the indigenous laws and customs.

[2] See Table of Acts annexed to Ch. II. p. 29.

[3] Ameer Ali, I. 112.

[4] See above p. 353; cf. pp. 49, 261, 342.

[5] Bail. II. 227 (para. 2); *Banoo Begum* v. *Mir Abed Ali* (1907) 32 Bom. 172, 178 (Ex. 8) and see below s. 476 (as to subject of *waqf*).

[6] Bail. II. 227 (*ll.* 17, 18, 28); in *l.* 28 "house" is misprinted for "horse."

ways. The discourses (of jurists) dealing with questions of this kind are very scanty." [1] SECTION 450

451. (1) Where a grant of a limited interest is made without any religious motive, and without any provision fixing its duration, it may be revoked [2] at any time by the grantor,[3] and it is determined by his death, and on its being revoked or otherwise determined, the grantee's rights in the subject of the grant cease.[4] Grant of limited interest can

(2) Save as provided above, the grant of a limited estate cannot be revoked or altered after it has become vested in the grantee.[4] Not otherwise.

Explanation—Where a grant is made for a religious object, it cannot be revoked or altered, notwithstanding that no provision has been made fixing the duration of the interest created by the grant.[5]

Irrevocability of 'hubs' or limited grant.

The explanation to this section is based on the last paragraph on 'Hubs' in the 'Shara'ya-ul-Islam,' which does not seem to be quite accurately translated by Baillie.[6] The translation should be as follows: "When a man has made a 'hubs' of [6] his horse, in the way of God, or his slave for the service of the 'Ka'ba' or of a 'masjid,' the act is irrevocable; and he cannot make any alteration (in the terms of the settlement) how long soever the subject be in existence. But when a 'hubs' is made of anything in favour of some (individual) person, and no term is fixed, and the grantor dies, that thing becomes part of his heritage, and similarly if a term is fixed, and it expires, it belongs to the heirs of the grantor.[7] Some of our doctors maintain that it is not rendered obligatory,[8] while others maintain that it is so only when there is an intention on the part of the donor of an approach to God. But the first opinion is the most common or generally received."[9] "When a term is specified for the residence, the contract becomes binding by possession, and cannot lawfully be revoked until after expiration of the time. So also if the residence is for the life of the proprietor, the contract cannot be revoked, though the life-tenant should die, and what was his is transferred to his heir, till the death of the proprietor." [10]

It may seem strange that the gift of a limited interest is normally irrevocable, whereas the gift of the whole dominium, 'hiba,' is normally revocable. The reason for the irrevocability of grants of limited interests is probably that such grants rank in the eyes of Muslim jurists as gifts in which a stipulation is made with the donee, and as stipulations are classed as return or 'iwaz' the grant becomes irrevocable. See above pp. 317, 334.

[1] *Sharh Lum'a*, 233.

[2] Bail. II. 227 (*l.* 4. of para. 3).

[3] In which case it is hardly more than a mere license; cf. Transfer of Property Act, s. 126.

[4] Bail. II. 226-227 ; see comment.

[5] Bail. II. 227 (para. 3). See comment.

[6] Bail. II. 227 (para. 3).

[7] *Jawahir-ul-Kalam*, IV. 633, mentions some precedents.

[8] Cf. above p. 262 *n.* 1.

[9] Bail. II. 226 (*ll.* 15-19).

[10] Bail. II. 227 (*ll.* 12-14 of para. 1, and see para. 3) ; *Banoo Begum* v. *Mir Abed Ali* (1907) 32 Bom. 172, 179, (Ex. 8).

SECTION 451 Cf. "From Ja'far Ibn 'Ali : He said 'sukna' is like an ''ariat' (loan). If its owner wishes to take it back, he might revoke it, and if he wishes to leave it he may do so. This refers to an indeterminate 'sukna,' but when it is limited for life, or for a fixed term it is ''umra' and 'ruqba' as you have already learnt."[1]

Terms inconsistent with or derogating from a grant.

452. *Semble*, where the declaration of a grant purports to create one of the particular kinds of limited interests mentioned in section 447 above, and also contains words which are meaningless with reference to that kind of interest, such words are of no effect.[2]

Illustration.

G says to R, "I have given this mansion to thee for life, and to thy successor," R takes a mere life-interest : and the words "to thy successor" are of no effect.[2] But if he says, "I give this house to thee, and to thy descendents by way of ''umra' (successively)," it will be binding so long as the descendants are existing.[3]

Words of limitation and of purchase.

This seems to be the principle underlying the following passage. "If he should say I have given this mansion to thee for life and to thy successor, it would be only an ''umra' for his own life, and there would be no transfer to the life-holder according to the most approved opinion ; just as if he had not said 'to thy successor.'"[2] With reference to this Syed Ameer Ali says, "the passage in the 'Sharâya' that a grant to A and his 'akab' only takes effect as a life estate, as if the word 'akab' was not mentioned, refers to the case of an 'umra,' the author of the 'Sharâya' being of opinion that the mention of the word 'akab' (which signifies literally 'a person coming after') is not like the mention of descendants, and that therefore does not convey an absolute estate, whereas the author of the 'Mabsut' is of opinion that a gift to A for life, and then for his 'akab' is tantamount to an absolute donation."[4] It is submitted that this is a question merely of the construction of the words of the grant.[5] Similar remarks apply to the following: "A grant to A in these terms, 'if you die before me, the property will revert to me, if I die before you, it will become yours,' will take effect according to some, in case the donor predeceases the donee, as an 'umra' in favour of the latter ; according to others as an absolute gift (if there is no other limitation)."[6]

An examination of this and other passages "convinced" the judges in 'Nasir Husain *v.* Sughra Begum'[7] "that there is no difference on this subject between the two systems of Mahommedan law. In fact while the Sunni Law is very distinct, the Shiah or Imameea Law is silent on the subject, the intention in the latter system evidently being the adoption and application of the Sunni rule to Shiahs," etc.[8] As may be surmised from this preliminary their

[1] *Jawahir-ul-Kalam*, IV. 618, 619.
[2] Bail. II. 226-227.
[3] See above, s. 447.
[4] Ameer Ali, I. 81-82. 112 (para. 3).
[5] See above, pp. 49, 50.
[6] Ameer Ali, I. 82. citing "*Jawahir-ul-Kalam*, chapter on Gifts."
[7] (1883) 5 All. 505.
"There can be no doubt that this view is founded on a misapprehension of the Shiah Law," says Syed Ameer Ali, I. 84. Probably the judges were not aware that Baillie's work is a literal translation of the *Shara'ya-ul-Islam* for they say : "There is a passage in Baillie's 'Imameea Law,' pp. 226-227, which, if expressing undoubted Shiah doctrine, *perhaps* deserves *some* notice."

examination of the passage in question does not throw much light on the subject. SECTION 452

Another remark made by the judges in the case last cited calls for comment. They say "the author does not explain what he is pleased to call 'the most approved opinion.'" The early Muslim writers on law based their books on precedent and authority, as much as the English lawyers do. And the phrase that that "the better opinion" is such and such is not unknown to the latter. The system of elaborate footnotes was not adopted by the Muslim jurists, who expected that the reader would refer to other books for himself, and verify the statements made. None of the authors whose works have been considered worthy of being preserved by copies made in manuscript for centuries, indulge in irresponsible statements which on verification are discovered to be unfounded. When, therefore, it is said that the "more approved opinion" is one way or the other, it has to be understood, and if necessary, tested by a comparison with the views of the other authors on the same point. This is done by commentaries which abound on the more celebrated texts.

Transfer of limited estate.

453. The grantee of a limited interest may, subject to section 454 below, and to any limitations contained in the grant, transfer or alienate his interest.[1]

"The life-tenant or holder of an estate for a term has the right of letting the property for any period not exceeding his own interest, provided there are no limitations on his power or his mode of enjoyment. He is bound, however, to return the property on the expiration of the period of his interest in proper order, natural deterioration and the lawful enjoyment of the same excepted."[2]

Right of residence restricted to granter and his family.

454. The grant of a right of residence empowers only the grantee and his family and children to reside in the subject of the grant; unless it is expressly provided that the grantee may permit others to reside therein, or may let the subject of grant for rent.[3]

Reversion remains in donor.

455. On the expiration or other determination of the period for which a grant is made, the grantee's rights in the subject of the grant cease, and it reverts to the donor or the donee's heirs as the case may be.[4]

Thus when the donor says, "the residence of this mansion is to thee while thou livest," the remainder over will revert to the donor even though the donor does not expressly provide for it by the use of some such words as "when thou diest it will revert to me."

[1] See comment to this section and s. 368 *ill*, above.

[2] Ameer Ali, I. 113 (no authority is cited).

[3] Bail. II. 227 (para. 2); *Banoo Begum* v. *Mir Abed Ali* (1907) 32 Bom. 172, 179, (Ex. 8).

[4] Bail. II. 226 (*ll.* 20-27); *Banoo Begum* v. *Mir Abed Ali* (1907) 32 Bom. 172, 179 (Ex. 8).

CHAPTER X.

'WAQF.'

§ 1.—Preliminary.

(1) Explanation of terms.

'Waqf' defined.

456. According to the law prevailing in British India 'waqf' is the dedication of property in perpetuity [1] substantially for charity, or for religious objects or purposes, or for an object of public utility.

1. 'WAQF' UNDER MUHAMMADAN LAW.

Early history of 'waqf.'

Tradition of the Prophet about 'waqf.'

The following is taken from Syed Ameer Ali's learned work, which is particularly full and instructive on 'waqf,' and to which all authors writing after him must be indebted: "The validity of 'wakfs,' says the 'Ghâit-ul-Bayân,' is founded on the rule laid down by the Prophet himself, under the following circumstances, and handed down in succession by Ibn Auf, Nâfé and Ibn Omar, as stated in the Jâmaa-ut-Termizi: Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet, and sought his counsel to make the most pious use of it, (whereupon) the Prophet declared, 'tie up the property ('asl'—'corpus') and devote the usufruct to human beings; and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God.' In accordance with this rule, Omar dedicated the property in question, and the 'wakf' continued in existence for several centuries, until the land became waste." [2]

Definitions of 'waqf.'

The following definitions of 'waqf' have been given:—"'Wakf' in its primitive sense means detention. In the language of the law—

1. "According to Haneefa—

1. Abu Hanifa's view: continuance of 'waqif's' right of ownership.

(*a*) "it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable object;" [3] or

(*b*) it "is [4] the detention [5] of a specific thing in the ownership of the 'waqif' or appropriator, and the devoting or appropriating of its profits or

[1] But see s. 10 (2) below.

[2] Ameer Ali, I. 125.

[3] Hed. 231: adding in a note: "meaning always of a pious or charitable nature."

[4] Bail. I. 549.

[5] "The meaning of the word as given in the dictionaries is merely 'detaining' or 'stopping,'" *Ib. n.* 2.

usufruct in charity, on the poor, or other good objects [1] in the manner of an 'âreeut' [2] or commodate loan." [3] SECTION 456

2. According to the two disciples—

2. His disciples: extinction of waqif's rights: transference to God.

(*a*) "'wukf' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures;" [3] or

(*b*) "'wukf' is the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind." [4]

3. The 'Shara'ya-ul-Islam' says: "'wukf' is a contract the fruit or effect of which is to tie up the original and to leave its usufruct free," [5] and later on it is stated: "the 'wukf' or subject of appropriation is transferred, so as to become the property of the 'mowkoof alehi,' [or 'persons on whom the settlement is made'] for he has a right to the advantage or benefits to be derived from it." [5]

3. Shiah definition: property transferred to beneficiary.

2. 'WAQF' IN BRITISH INDIA.

Divergence between Privy Council decisions and exposition contained in Muslim texts.

The law of 'waqf' as laid down in the Privy Council decisions differs from strict Sunni Muhammadan law on two points. The leading case is that of 'Abul Fata v. Rasamaya,' [6] which seems to refer for the law not to the recognised texts of Muhammadan law but to what must have been in the mind of the Prophet [7]—apparently in disregard of the principles on which decisions are usually given. [8] According to the Privy Council (1) a 'waqf' should necessarily be for a charitable object, (2) what is a charitable object must be decided in accordance with the definition of charity in England.

[1] "Mr. Hamilton has unnecessarily restricted the legal meaning to appropriations of a 'pious or charitable nature' (*Hedaya*, II. 339 *n.*; Hed. 231); and he has been followed by Sir William Macnaghten, who renders the word by 'endowment.' But it will be seen hereafter that the term is more comprehensive, and includes settlement on a person's self" [under Hanafi law] "and children."—Bail. I. 549, *n.* 3.

[2] "'In the manner of an *areeut* or commodate loan.'—This does not mean that the profits are merely lent: but that the objects of the *wukf* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *areeut*, when they would have the use of it, or in other words, its profits or usufruct for their own benefit so long as it remained in their possession." *Ib. n.* 4.

[3] See p. 358, *nn.* 3 & 4.

[4] Bail. I. 550.

[5] Bail. II. 211, 220 (*first*), 219 (*third*). It will be observed that this definition resembles that of Abu Hanifa, but the latter holds that the ownership is not transferred from the *waqif*, and that it is like an *'ariat* loan (cf. Bail. I. 549), whereas Shiah authorities consider it as transferred to the beneficiaries. This difference of view as to the nature of *waqf* results in a difference on the point of its revocability: under Shiah law it is irrevocable, according to Abu Hanifa it is revocable unless there is a decree of Court, after which "the right of the appropriator abates." (Bail. I. 546.)

[6] (1894) 22 Cal. 619; 22 I. A. 76.

[7] "Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and administered in India, but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their lordships know, have had their effect in moulding the law, and practice of *wakf*, as the learned judge says they have. But it would be doing wrong to the great law-giver to suppose, that he is thereby commending gifts for which the donor exercises no self-denial." Then follows the passage cited in the text later on.

[8] See above, s. 12, p. 45; cf. also pp. 41-42. The real ground of decision was no doubt that it is against the policy of law to allow family settlements in perpetuity, and also the effect that a *waqf* has on the rights of creditors.

TABLE SHOWING THE DIFFERENCE OF VIEWS HELD AS TO 'WAQFS.'

N. B.—Rules contained in [ ] are not followed in British India.

	Sunni law.			Shiah law.
	Abu Hanifa.	*Abu Yusuf.*	*Muhammad.*	
Ownership.	The ownership of the 'waqif' subsists.	The ownership of the 'waqif' abates, in favour of ownership of God.		The ownership of beneficiaries.
Revocability.	['Waqf' is revocable unless (*a*) decree of Court, or (*b*) it is testamentary]	'Waqf' irrevocable on the mere pronouncing of the word.[1]	'Waqf' irrevocable after possession given to 'mutawalli,' not before.[1]	Waqf' irrevocable after possession given to beneficiary or 'mutawalli.'[8]
'Musha'		Waqf' of 'musha' valid except as to mosque.[2]	['Waqf' of divisible 'musha' invalid]	Waqf' of 'musha' valid.[9]
Perpetuity.	Must expressly purport to be in perpetuity.	Perpetuity will be presumed if not stated.	Must expressly purport to be in perpetuity.	Must not purport to be limited to a fixed period of time.[10]
Object faili	If the object of 'waqf' fails, or is such that it may fail 'waqf' is void.[3]	If object of 'waqf' fails, it will result in favour of poor.[3]	If the object such as may fail, the 'waqf' is void.[3]	If object of 'waqf' fails, the property reverts to the 'waqif' or his heirs.
'Waqif' i. **taking benefit.**		'Waqif' may take benefit under the	['Waqif' cannot take any benefit under the 'waqf.'[4]]	Waqif' cannot take any benefit under the 'waqf."[11]
ii. **as 'mutawalli.'**		Appointment of 'waqif' as 'mutawalli' valid.[5]	[Appointment of 'waqif' as 'mutawalli,' not valid, and avoids 'waqf.'[5]]	Appointment of 'waqif' as 'mutawalli valid.'[12].
iii. **if no 'mutawalli.'**		[If no 'mutawalli' appointed, 'waqif' will be considered 'mutawalli.'[6]	If no 'mutawalli' appointed 'waqf' void[6]	If no 'mutawalli' appointed the beneficiary acts as 'mutawalli'; unless the 'waqf' is for some object of general utility.[12]
iv. **removing mutawalli.'**		The 'waqif' may validly reserve to himself the power of removing the 'mutawalli'—		
		If power not expressly reserved, it will be presumed to have been reserved.[7]	but if power not expressly reserved, the 'waqif' cannot remove the 'mutawalli.'[7]	

[1] The Hanafi authorities are equally divided on this point, though Malik, Shafi'i, and Ibn Hanbal agree with Abu Yusuf.

[2] Bail. I. 564.

[3] Bail. I. 567.

[4] Hed. 237.

[5] Bail. I. 551, 591.

[6] Bail. I. 591.

[7] The *Shaikhs* of Bukhara are said to accept Imam Muhammad's opinion in accordance with which the Fatawa 'Alamgiri says the *fatwa* is given; the *Shaikhs* of Balkh, however, adopt Abu Yusuf's view. Bail. I. 592, 591.

[8] Bail. II. 212 (para. 2); 218 (*fourth, ll.* 23-26); 219 (para. 3).

[9] *Ib.* 214 (para. 1, *ll.* 5-7).

[10] *Ib.* 218 (para. 2).

[11] *Ib.* 218 (para. 3).

[12] *Ib.* 214 (para. 3).

SECTION 456

1. As to necessity of object of 'waqf' being a charity.

As to the first point neither the Shiah lawyers nor Abu Hanifa in defining[1] 'waqf' make any mention of a charitable object being necessary for it; the definition that Abu Yusuf and Imam Muhammad give of a 'waqf' implies a charitable motive, as they call it the "detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind," but the charity is seen to be merely the ultimate destination of the property.

Objects mentioned as valid objects of 'waqf.'

The objects for which 'waqfs' may be validly created, and which are referred to in the 'Fatawa 'Alamgiri,' fall under the following heads; (1) the relief of the poor, (2) provisions for individuals, mainly the family of the 'waqif' himself, or of specified persons, (3) 'masjids,' (4) caravanserais, aqueducts, roads, bridges, etc.

Provision for poor.

Though the poor have been mentioned first, as that seems to be the ultimate destination of every 'waqf,' still far the greatest number of illustrations and rules refer to a 'waqf' for members of the family of the 'waqif' himself, and of other persons that the 'waqif' may name in the instrument of 'waqf.'

Individuals primarily contemplated as beneficiaries under 'waqf.'

The 'Shara'ya-ul-Islam' also in speaking of the objects of a 'waqf' mentions first the 'mowkoof alehi' "or person on whom the 'waqf' is made," and then adds, (as though it were an extension or application of the primary rule relating to a 'waqf') that "a 'wakf' for 'musaleh' or works of general utility, such as bridges, and 'musjids,' or places of worship, is quite valid; for such a 'wakf' is in truth a settlement on all Mussulmans though some only can participate in their advantages."[3] What the Muslim lawyers, however, refer to as the essential feature of 'waqf' is that it is made with a religious motive—a desire to approach God. It does not seem to be stated that approach to God can only be made by an object that is charitable in the sense of English law. Thus 'sadaqa' which is a gift made with a desire to approach God, 'quicquid datur Deo sacrum, ut pars opum,'[4] may be made equally to the rich and the poor;[5] and similarly 'waqf' can strictly be made for any object not prohibited by Islam.

Religious motive in 'waqf.'

2. As to provisions for family of 'waqif,' grounds on which family settlements condemned.

As to the second point, a family 'waqf' is characterised in the judgment[6] as a gift "(i) for which the donor exercises no self-denial; (ii) in which he takes back with one hand what he appears to put away with the other; (iii) which are to form the centre of attraction for accumulation of income and further accessions of family property; (iv) which carefully protect so-called managers from being called to account, (v) which seek to give to the donors and their family the enjoyment of property, free from all liability to creditors; (vi) and which do not seek the benefit of others beyond the use of empty words." Now it may be admitted that the form that a 'waqf ba-farzandan' often takes in our times in India is open to some of these objections. But it is necessary to point out, in the first place, that except under Hanafi law (and in fact except in accordance with Abu Yusuf's exposition of Hanafi law) no other school of law permits the 'waqif' to take any benefit under the 'waqf,' so that the gravamen of the criticism cannot apply to a 'waqf' made in accordance

'Waqif' can benefit under 'waqf' only according to Abu Yusuf's exposition of Hanafi law.

[1] Though Bail. II. 214 (*second*) seems to refer a *waqf* as a "charity" in connection with the age of competence to make it.

[2] Bail. I. 550 (*ll.* 7-10).

[3] Bail. II. 214 (*third*), 215 (para. 2).

[4] Freytag, cited in Bail. I. 545. *n.* 1.

[5] Bail. I. 545 (*l.* 6). cf. s. 4, *n.* 4, below.

[6] (1894) 22 Cal. 619; 22 I. A. 76.

SECTION 456
Self-denial by 'waqif.'

with any other school of law. Nor is it correct to say that the donor exercises no self-denial: for even when, being governed by the Hanafi law, the 'waqif' reserves the life-interest to himself, it is impossible for him to deal with the 'corpus' of the property; and few persons are placed in such happy circumstances that they can contemplate the giving away of this power without feeling that it may cause them great inconvenience in times of need which they cannot forestall. Next, a very important point has been overlooked when it is said that a 'waqf' does not "seek the benefit of others beyond the use of empty words": a 'waqf' is the only mode in which two classes of descendants whom Islam takes specially under its protection—women and orphans—can be provided for. The children of predeceased children, and of females are excluded by the Sunni law of inheritance; and under a 'waqf' they are generally given an equal share with the other descendants. Nothing can be considered more truly charitable than to provide for these.

Charity underlying family settlements.

In this chapter law given as interpreted by Courts.

In a work of this nature, however, it would be out of place to do otherwise than to accept the law as laid down in the decisions; unless with reference to points on which the law is not finally settled; or where it is necessary to apply analogically the grounds of decision to other points not covered by authority.

Illustrations.

It has, however, seemed necessary to include in this chapter many of the illustrations from the text books which may no more be directly applicable, because though they refer in express terms to beneficiaries under a 'waqf,' the principle involved may have a bearing on the rights of the 'mutawalli' for the administration of the 'waqf' or on the mode of succession to the office; and it seems likely that the Legislature may bring the law in India more into conformity with the texts.

3. CHARITIES IN FORMS OTHER THAN 'WAQF.'

'Waqf' not the only species of charity.

The fact that 'waqf' is the most important (so far as the law courts are concerned, but certainly not in any other sense) of the forms that charity takes amongst Mussulmans, has sometimes been the cause of a misapprehension that every charitable disposition must be classed as a 'waqf.'[1] The fact that a gift is made with a religious or charitable intention does not make it the less a gift, though it is then termed 'sadaqa,' and it comes under the class of a gift with a return, and is irrevocable.[2] Though the Trusts Act is applicable to Mussulmans, it does not affect a trust for a charitable object, whether created in the form of a 'waqf' or otherwise.

4. 'WAQF' AND TRUST COMPARED.

'Waqf' and trust. Motive.

The following points of distinction between a 'waqf' and a trust may be noted: (1) 'Waqf' requires a religious motive; necessity for such motive is all but forgotten by the British Courts, in giving decisions upon 'waqf' cases.[3] Whether it is possible to give effect to strict Muhammadan law, and to the requirements of a religious motive for its validity, is quite a different

[1] Cf. *Jainabai* v. *R. D. Sethna* (1910) 39 Bom. 604; *Cassam Ally* v. *Currimbhai* (1911) 36 Bom 214, 13 Bom. L. R. 717. On one point the former decision was altered on re-consideration in the latter.

[2] Cf. (*Muthukana Ana*) *Ramanadhan* v. *Vuda Livvai* (1909) 34 Mad. 12, 14, where *waqf* and *sadaqa* are compared and distinguished (Benson and Abdur Rahim JJ.)

[3] See, however, *Doyal Chund Mullick* v. *Keramut Ali* (1871) 16 W. R. 116, 118 (para. 2, *l.*4).

question.[1] (2) The author of the trust may be a beneficiary under it; but except under the Hanafi law, he cannot reserve any benefit under a 'waqf.' (3) A trust may be made for any lawful object; under the Privy Council rulings (but not as submitted above, in accordance with strict Muhammadan law) a 'waqf' can only be created for a charity. (4) There are limitations as to what may be the subject of 'waqf,' but any transferable property may be the subject of a trust. (5) The 'mutawalli' has more restricted powers than the trustee has under the Trusts Act, ss. 16, 20, 36, 40. (6) It is doubtful whether the 'mutawalli' can apply for the Court's directions by petition, as the trustee can. (7) The 'mutawalli' may ask for reasonable remuneration, which the trustee cannot (*ib.* s. 50). (8) A 'waqf' is perpetual. (9) It is irrevocable. (10) 'Waqf' property is inalienable. (11) A trust results for the benefit of its author when it is incapable of execution, or it does not exhaust the trust property; in a 'waqf' a general charitable intention would be presumed, and the 'cy près' doctrine applied.[2]

SECTION 456. Benefit to 'waqif.' Charity. Subject of 'waqf.' 'Mutawalli.' Revocability. Alienability 'cy près.'

457. (1) When the owner of any specific property declares that he has made 'waqf' of the said property, or that he has dedicated it in perpetuity by way of 'sadaqa' or charity, he is called the 'waqif,' and is said to make a declaration of 'waqf' or to have dedicated the property by way of 'waqf';

Declaration of 'waqf.' 'Waqif.'

(2) the property is called the "subject of the 'waqf,' or the 'waqf' property";

Subject of 'waqf.'

(3) the purpose to which the 'waqif' declares that the profits or income or benefit of the subject of 'waqf' should be devoted, is called the "object of the 'waqf'";

Object of 'waqf.'

(4) when the object of the 'waqf' is to benefit any specified persons or class of persons they are called the "beneficiaries under the 'waqf,'" and the 'waqf' is said to be created for their benefit;[3]

Beneficiaries.

(5) when the declaration of 'waqf' is in the form of a document it is called the 'waqfnama.'[4]

'Waqfnama.'

(6) when it is so made as to come into effect after the death of the 'waqif' it is called a "testamentary 'waqf'";

Testamentary

(7) 'mutawalli' means the person who is entrusted with the fulfilment of the object of the 'waqf,' and the carrying out of the directions given at the time of its declaration;[5]

[1] See above pp. 50, 336. There is much misunderstanding about the law requiring the existence of a religious motive.

[2] Of course, only so far as the subject of the *waqf* is concerned.

[3] The texts often speak of the "produce" of the *waqf* property, which is in many cases assumed to be land under cultivation. The word "benefit" is used in this chapter to include produce, rents, and profits or other advantages.

[4] See s. 459. The legal effects do not differ whether the declaration is made verbally or in writing.

[5] *Mutawalli* is the expression most often used in British India. *Nazir* or *qayyim* are also Arabic expressions referring to the same.

SECTION 457
'Sajjada-nashin.'
Charity

(8) a 'sajjada-nashin' is a spiritual preceptor; he may or may not be also the 'mutawalli' of 'waqf' property.[1]

(9) In this Chapter unless there is something repugnant in the subject or context, "charity" means any charitable or religious object or purpose, or any object of public utility.[2]

(2) Form of Declaration of 'Waqf.'

No form essential.

458. The declaration of 'waqf' may be made in any appropriate words which show an intention to make a dedication by way of 'waqf.'[3] The use of the word 'waqf' is neither essential[4] for the validity of a declaration of 'waqf' nor conclusive[5] to show that a dedication by way of 'waqf' was intended to be made. It need not be in writing.[6]

Illustrations.

(1) The following are valid declarations of 'waqf'[7]—

"This my land is a 'sadaqa' or charity fund and perpetual,[8] during my life and after my death."

"This my land is a 'sadaqa' endowed and tied up in perpetuity[8] during my life and after my death."

"This my land is 'waqf.'"

"This my land is dedicated to God Almighty for ever."

"I have made over this property to the 'Sajjada-nashin'[9] specifically for the expenses of the 'Khangah.'" But the word 'towliat' does not imply any spiritual office; it means "mastership" and does not by itself impress the property with any trust or 'waqf.'[10]

(2) The declaration of 'waqf' which is not for a religious purpose may take the form of a deed made with the consent of the Official Trustee (therein recited) assigning to him the 'waqf' property upon the terms of his applying the income thereof for the objects of the 'waqf.'[11]

(3) The declaration of a 'waqf' which is for a charitable, but not exclusively for a religious purpose, may take the form of a scheme settled by the Local Government, on the application, and with the concurrence of the 'waqif' for the administration of the 'waqf' property.[12]

[1] *Secretary of State* v. *Mohuddin Ahmed* (1900) 27 Cal. 674; *Piran* v. *Abdool Karim* 19 Cal. 203; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.

[2] "'Charitable,' 'pious,' or 'religious' purposes must be understood in their ordinary and natural meaning, i.e., in the sense analogous to that of the English law." (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai* (1909) 34 Mad. 12, 16.

[3] Bail. I. 559 (para. 2).

[4] *Piran* v. *Abdool Karim* (1891) 19 Cal. 203-215 *Jewun Doss* v. *Shah Kubeerooddeen* (1840) 2 Moo. I. A. 390. *Saliq-un-nissa* v. *Mati Ahmad* (1903) 25 All. 418 (Shiah law).

[5] *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (1873) 10 Bom. H. C. R. 7 *Muhammad Munawar* v. *Razia Bibi* (1905) 27 All. 320, 324; 32 I. A. 86.

[6] *Shurbo Narain Singh* v. *Ally Buksh Khan* (1863) 2 Hay. 415.

[7] Bail. I. 558.

[8] The word perpetual is unnecessary according to the generally accepted view, Bail. I. 558 (para. 2) and see s. 463.

[9] *Piran* v. *Abdool Karim* (1891) 19 Cal. 203.

[10] *Zooleka Bibi* v. *Zynul Abedin* (1904), 6 Bom. L. R. 1058, 1068.

[11] Official Trustees Act XVII. of 1864, s. 8.

[12] Charitable Endowments Act 1890, ss. 2, 6, 8.

SECTION 458

(4) A 'sanad' of the Emperor Shah Jahan, dated 1651-1652 granted in 'inam' to one Syad Hasan, the village of Dharoda, and other lands, "settled and conferred manifestly, and knowingly for means of subsistence of the children of the said Syad Hasan . . . that they may engage themselves in praying for this ever-enduring Government;" *held*, that this grant did not constitute a 'waqf,' that the property was not descendible 'per stirpes' nor would the grant be forfeited or avoided by neglect to pray for the said Government, nor by its downfall.[1]

(5) One Syed Ahmad Rafai (*fl.* Busreh *circ.* 500 *A. H.*) was a 'Sufi' teacher, and gained eminence in Arabia. He was the founder of the family, and came to be called 'pir,' and his descendants imputed to themselves religious attributes, and took upon themselves the office of spiritual teachers ('sajjada-nashins') which was transmitted not by descent, but by appointment by the last holder. The 'sajjada-nashin' made disciples who made offerings, or presents ('nazrana'). *Held*, that the property thus acquired was the private property of the 'sajjada-nashin,' which would descend to his heirs, nothing specific having been done to dedicate it to charitable or religious uses.[2]

On the necessity of some kind of declaration being made, see 'Banubi *v.* Narsingrao,'[3] in which case it was important to fix when the 'waqf' came into force, if at all; for, being mentioned in the will as already having been made, the question was whether such mention was enough to give it retrospective force.

459. A 'waqf' may be so made as to take effect on the death of the 'waqif,' whether or not it forms part of the general will of the 'waqif';[4] provided first that when such a 'waqf' is purported to be made of property which exceeds in value the bequeathable third of the 'waqif's' estate, it is valid and effective as to the bequeathable third, and void as to the excess,[5] unless the heirs of the 'waqif' consent to the 'waqf';[5] provided secondly that according to Hanafi law when a 'waqf' so made is for the benefit of a mosque, it is wholly void, unless the said heirs consent; and if they consent, then it is wholly valid.[6] *Quaere*, whether under Shiah law it would be valid as to the bequeathable third without such consent.[7] Provided thirdly that when a

'waqf.'

1. Must be within a third of the estate.

2. For mosque.

[1] *Mahomed Ali* v. *Gobar Ali* (1881) 6 Bom. 88.

[2] *Zooleka Bibi* v. *Syed Zynul Abedin* (1904), 6 Bom. L. R. 1058, 1060-1061.

[3] (1906) 31 Bom. 250, 9 Bom. L. R. 91, 96-97 (Beaman J., Jenkins C. J. concurring).

[4] *Jaun Bibee* v. *Abdollah Barber* (1838) Fulton 345. See comment. A testamentary *waqf* is called *waqf bil wasiat*. When a *waqf* is made *inter vivos* and it includes testamentary provisions the document is called *wasiat-bil-waqf*. *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429; *Abdul Karim* v. *Shafiabnissa* (1892) 33 Cal. 853.

[5] Bail. I. 550, 601 (*ll.* 1-6), 602 (*ll.* 7-15), *ib.* (para. 2); II. 212 (para. 2); Hed. 233 (col. i. para. 3); *Baboojan* v. *Mahomed Nurool Huq* (1868) 10 W. R. 375.

[6] Bail. I. 605 (para. 4). The reason being that a *masjid* cannot be *musha'*; it must be absolutely separated off from property not dedicated to God.

[7] The objection to *musha'* property is not recognised in Shiah law. The doubt arises as the recognition of testamentary *waqfs* in Shiah law seems to be an innovation. See comment to s. 17.

SECTION 459 Heirs beneficiaries.

testamentary 'waqf' is purported to be made, and any of the beneficiaries under it are the heirs of the 'waqif,' then the portion of the income to which the said heirs are purported to be entitled under the 'waqf' is divisible amongst all the heirs of the 'waqif' in the proportion of their rights of inheritance, notwithstanding any other directions that the 'waqif' may have given in the 'waqf' unless (after the death of the 'waqif') the heirs whose rights are affected by the 'waqf' consent to the 'waqf' being given effect to in accordance with the said directions;[1] provided fourthly that, according to the 'Ithna 'ashari' Shiah law, bequests to heirs within the bequeathable third are valid without the consent of the other heirs; and, *semble*, the same rule applies to a testamentary 'waqf.'[2]

4. Shiah law.

Illustrations.

(1) W is governed by Sunni law and

(*a*) Makes a testamentary 'waqf' for his child, and his child's child, and his 'nasl' "for ever so long as there are any, and after them for the necessitous."[3] If the 'waqf' land is in excess of the bequeathable third of W's property the 'waqf' is void as to the excess, unless W's heirs consent.[4]

(*b*) If the value of the land forming the subject of the 'waqf' in illustration (*a*) above is within the one-third of the estate, and W leaves a son, a daughter, a widow, a mother and a father; then it is evident that under the terms of the 'waqf' the son and daughter take the whole of the income of the 'waqf': and as they are heirs, the 'waqf' is inoperative, and the whole of the said income is divisible amongst all the heirs in accordance with their rights of inheritance.

(*c*) If W leaves all the heirs mentioned in illustration (*b*) but has also a grandson and a granddaughter, then each of the two grandchildren and the son and daughter respectively would have received in accordance with the terms of the 'waqf' one-fourth of the income of the 'waqf' property. The provision in favour of the grandchildren to take one-fourth each is valid, as they are not heirs; but the portions which the son and daughter are purported to be given (viz. half of the income) will be divisible amongst all the heirs in the proportion of their legal rights.[5]

(*d*) The facts being as stated in illustration (*c*), if the son and daughter die after W's death, then the whole of the income of the 'waqf' property will be divisible between the grandson and granddaughter alone, i.e. they will take a half of the income each, and the

[1] Bail. I. 601, 602. See illustrations.

[2] The *Shara'ya-ul-Islam* is silent. Bail. II. 212.

[3] This would be an illusory *waqf* under *Abul Fata Mahomed Ishak* v. *Rasamaya Dhin Chowdhri* (1894) 22 Cal. 619; 22 I.A. 76.

[4] Bail. I. 601.

[5] Bail. I. 601-603, *ib. n.* 2.

widow and parents will take nothing.[1] (Because the grandchildren are not heirs of the deceased. But if the son and daughter had predeceased W the case would have been different, for then the grandchildren would have been heirs.)

(2) If W had been governed by the 'Ithna 'ashari' Shiah law the 'waqf' in each case would have been valid within the bequeathable third of the estate.

(3) W states in his will that he has at a former time given away or set apart a portion of his property to a charity. This does not form a testamentary declaration of 'waqf,' though it may be evidence of a 'waqf' having been made by W in his lifetime.[2]

Testamentary 'waqf' under Shiah law.

Mahmood J. had held[3] that inasmuch as the Shiah law requires that possession should be given of the 'waqf' property in order to complete the 'waqf,' no testamentary 'waqf' can be valid under that law. Though there do not seem to be any direct references to a testamentary 'waqf' in the Shiah books of authority, this decision was overruled fourteen years later by the Privy Council, who held[4] that a Shiah equally with a Sunni may make a testamentary 'waqf.' They proceeded on the ground[5] that possession is necessary for a gift as much as for a 'waqf,' and as a testamentary gift (or bequest) is allowed under Shiah law, there was no reason why a testamentary 'waqf' should not be allowed. Perhaps their lordships overlooked the fact that the religious motive in the mind of the 'waqif' is of extreme importance,[6] hence a 'waqf' must be differentiated from a gift, and except according to one exponent of Hanafi law (Abu Yusuf) the 'waqif' cannot reserve to himself any benefit under the 'waqf.' As to Sunni law, Abu Hanifa is stated to have expressly excepted a testamentary 'waqf' from his general rule that a decree of the court is necessary to complete it. But this report is stated in the 'Hidaya' to be altogether unfounded.[7] Imam Muhammad held transfer of possession to be necessary, and his view of the law agrees in most particulars with the Shiah law. It would be of interest to find out whether he recognised a testamentary 'waqf.' However, as the law is administered in India, the Privy Council could hardly have decided otherwise: religious motives cannot have the same recognition in a secular system (like Anglo-Muhammadan law) as they have in religion.[8]

(3) Competence of 'Waqif.'

Majority or puberty.

460. Any Mussulman who has attained majority and is of sound mind may make a 'waqf,' provided that it is not made to defraud or defeat his creditors.[9]

[1] Bail. I. 602.

[2] *Banubi* v. *Narsingrao* (1907) 31 Bom. 250.

[3] *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429.

[4] *Baqar Ali Khan* v. *Anjuman Ara Begum* (1902) 15 All. 236, 30 I.A. 94. See also *Murtuzai Bibi* v. *Jamima Bibi* (1890) 13 All. 261.

[5] Their general basis of reasoning is given above, ss. 11, 12, p. 45 *q. v.*

[6] Cf. *Doyalchund Mullick* v. *Keramut Ali* (1871) 16 W. R. 116.

[7] Hed. 233 (col. i. para 1, *l.* 18).

[8] See above, pp. 50, 24.

[9] Bail. II, 214 (para. 2); Bail. I. 552.

SECTION 460 *Quaere*, whether a Mussulman who has attained the age of puberty [1] but not of majority under the Indian Majority Act can make a 'waqf.' [2]

Illustration.

One Fatmabibi prayed in 1881 to have a 'waqf' purported to be made by her, declared void, on the ground, amongst others, that it was declared by her when she was fourteen years old (in 1866). *Held*, that though the dedication by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having been questioned by her husband (to whom she was married in 1866 and who died in 1872) and she having for fifteen years confirmed her own act, by a continued acceptance of the profits of the estates from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects, or want of an accompanying volition.[2]

Indian Majority Act.

The Indian Majority Act does not except 'waqf,' unless it be considered that it falls under a religious right or usage—which is unlikely. The applicability of the Act with reference to various questions of Muhammadan law has been already considered in previous chapters, and the reader is referred to them.[3] The 'Shara'ya-ul-Islam' mentions "a report which favours the legality of charity" by "one who has attained to ten years only," but "the preferable opinion" is stated to be that 'waqf' by him "is forbidden because the inhibition under which he is placed by reason of his youth is not removed until he has attained to puberty and discretion." These last words may imply that puberty is the period of life after which 'waqf' is permissible because then the person is competent to act; hence in British India the age of majority under the Indian Majority Act would no doubt be taken to apply.

'Waqf' delaying or defeating creditors, void.

461. A 'waqf' cannot be validly declared so as to defeat or delay the rights of creditors; and when a 'waqf' is purported to be so made, it may be avoided by any creditor whose rights are so defeated or delayed.[4]

"It is a further condition that the party making the appropriation is not under inhibition at the time, either for facility of disposition or debt." [5]

(4) *Completion of 'Waqf.'*

I. Hanafi law.
(a) Abu Yusuf: mere declaration.
(b) Muhammed
(i) Appointment of 'mutawalli.'
(ii) Possession.

462. (1) Under Hanafi law a 'waqf' is completed, according to Abu Yusuf, by the mere declaration [6]; according to Imam Muhammad it is not completed unless, after the declaration a

[1] Ameer Ali, I. 137-142.

[2] *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42. Cf. *Delroos Banoo Begum* v. *Nawab Asghur Ally* (1875) 15 Ben. L. R. 167, where the deed was set aside, being by a *pardanashin*.

[3] See above pp. 46, 186, 222.

[4] Cf. (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai* (1909) 34 Mad. 12.

[5] Bail. I. 555 (para. 2).

[6] Hed. 233, 239 (col. i. para. 2), 240 (col. ii.); Bail. I. 551, (*ll.* 1-3), 591 (para. 1). "The opinions of the learned seem to be nearly balanced between them, two authorities declaring that the *futwa* is with Aboo Yoosuf, while two more allege that it is with Mohummad." Bail. I. 551 (*ll.* 4-7). Cf. *Doyal Chand Mullick* v. *Keramut Ali* (1871) 16 W. R. 116 (chief elements of *waqf*: (*a*) special words of declaration, (*b*) proper motive).

'mutawalli' is appointed, and possession is delivered to him[4]; according to Abu Hanifa it is not completed without a decree of the Court, unless it is a testamentary 'waqf.'[1]

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(c) Abu Hanifa: decree.

(2) It was held in an early case that the exposition of Hanafi law by Abu Yusuf prevails in India;[2] but more recently the Allahabad High Court has held that Imam Muhammad's opinion must be followed in preference to that of Abu Yusuf.[3] It is not quite clear whether it was intended to lay down anything beyond this that the mere utterance of the declaration of 'waqf' cannot by itself complete it,[4] or that it was also intended to lay down that a 'waqf' is not complete without the appointment of a 'mutawalli' and transfer of possession to him.[4]

Hanafi law in British India.

(3) Under Shiah law a 'waqf' is not completed unless possession[5] of the 'waqf' property is given either to the 'mutawalli,' or to the first beneficiary under the 'waqf'; provided that where the object of a 'waqf' is a charity, it is not completed unless a 'mutawalli' is appointed, and possession is given to him.[6]

II. Shiah law, possession.

Explanation I—Where the object of 'waqf' is a charity, the possession which is above referred to as being necessary for the completion of a 'waqf'[7] may be transferred by the subject of the 'waqf' being utilised for the said object.[8]

Completing 'waqf' by giving to it.

Explanation II—Where the declaration of a 'waqf' is not acted upon by the 'waqif,' and its objects are not given effect to, it may be presumed[8] that the 'waqf' was not completed.[9]

Presumption of non-completion if not acted upon.

Explanation III—Where a 'waqf' has been declared and completed, its validity is not affected by the misfeasance of the

After completion not affected by breach.

[1] Hed. 233 : Bail. I. 550.

[2] *Doe d. Jaun Beebee* v. *Abdoollah* (1833) Fulton 345. This opinion is stated to be formed "after obtaining all the information we are able to collect through the means of our moulvies and a reference to the authorities." Cf. (*Khajah*) *Hossein Ali* v. *Hazara Begum* (1869) 12 W. R. 344, per Kemp. J. (affirmed *ib.* 498) : decisions are primarily given according to Abu Yusuf, and next according to Imam Muhammad. Ameer Ali, I. 128-129 says that "Abu Yusuf's enunciations are recognised as law throughout the Sunni world" (citing *Fatawai 'Alamgiri*, II. 454), and that "Mohammed's views were adopted only by some of the Bokhariot schoolmen, and have no application in any other part of the Sunni world" (citing *Tashil* and *Fatawai 'Alamgiri*, II. 455. "That (i.e. like Abu Yusuf's) is also the view of the three Imams [Malik, Shafei and Ibn Hanbal] and of the bulk of the learned : and is followed by the jurists of Balkh and on that is the *fatwa* : so in the *Fathul Kadir* and *Munieh*. And on that is the *fatwa* : so says the *Siraj-ul-Wahaj* also."

[3] *Muhammad Azizuddin* v. *Legal Remembrancer* (1893) 15 All. 321.

[4] Cf. *Banubi* v. *Narsingrao* (1907) 31 Bom. 250.

[5] *Ib.* Bail. II. 212 (*ll.* 8-9) 182 (*ll.* 27-29).

[6] Bail. II. 219 (para. 3). Cf. s. 383 comment.

[7] But such user is not conclusive proof, nor in itself sufficient to create *waqf* : payments out of rent of a property for expenses of a mosque is not proof of itself that the property is endowed : *Shurfoonnissa* v. *Koolsoom* (1876) 25 W. R. 447.

[8] See illustrations : *Explanations I., II.* and *III*, are complementary.

[9] *Muhammad Azizuddin Ahmad Khan* v. *Legal Remembrancer N. W. P. and Oudh* (1893) 15 All. 321. *Dilroos Banoo Begum* v *Nawab Asghur Ally* (1875) 15 Ben. L. R. 167 ; *Zooleka Bibi* v. *Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1066 *et seq.*

SECTION 462 'mutawalli' [1] nor by the debts or liabilities of the 'waqif' arising subsequently to the completion of the waqf.[2]

Illustrations.

(1) A Shiah purports to make a 'waqf,' but dies without giving possession of the subject of 'waqf' to the 'mutawalli' or to the beneficiaries. The 'waqf' is void, [unless the beneficiaries are the 'waqif's' minor children, or the minor children of his sons or (according to the better supported opinion) he is the executor of the father or grandfather of such minor children.[3] *Quaere*, whether such a 'waqf' would be held invalid in British India].

(2) W makes a 'waqf' in favour of B, and after him for BA, and then to the poor. Possession is sufficiently transferred according to Shiah law if it is given to B, and all regard to possession ceases in the subsequent steps.[4]

(3) When a plot of ground is designated or specified by a Mussulman governed by the Hanafi law for the purpose of being dedicated by way of 'waqf' as a cemetery, the 'waqf' is completed, according to Abu Yusuf, by the mere declaration of 'waqf,' according to Imam Muhammad by (such a declaration followed by) the burial of at least one person in it, and according to Abu Hanifa by a decree of the Court, unless the 'waqf' is made under a will. According to Shiah law the 'waqf' is completed by formal words of declaration, and by the burial of the first individual.

(4) As to a 'masjid' see below, s. 515.

Important to know when 'waqf' completed.

A 'waqf' being a voluntary transaction, according to general principles of law, where anything in such a transaction is left undone, the law will not oblige it to be done. Hence, it is important to note when a 'waqf' will be considered to have been completed.

I. Hanafi law.

First, as to Hanafi law : Abu Hanifa and his disciples take different views on this point ; the view of the latter prevails, but that of the former is also given below in order to make the point clear by contrasting the opposite view.

1. Abu Yusuf's view : mere declaration enough.

(1) Abu Yusuf holds that a mere declaration of 'waqf' completes the 'waqf' and operates as a transfer from the 'waqif' to the implied ownership of God.[5]

2. Imam Muhammad.
(a) Declaration.
(b) Mutawalli.
(c) Possession.

(2) Imam Muhammed considers three elements necessary for completing the 'waqf' : (*a*) the declaration, (*b*) appointment of a 'mutawalli,' (*c*) transfer of possession to the 'mutawalli.'[6]

[1] *Doyal Chund Mullick* v. *Keramut Ali* (1871) 16 W. R. 116. *Reasut Ali* v. *Abbott* (1869) 12 W. R. 132. But see *Explanation II.*; where the *waqif* is himself the *mutawalli* and he has never given effect to the *waqf* it naturally raises a doubt whether a *waqf* was ever intended to be created, and if so, ever actually completed : see *Kulsom Bibee* v. *Golam Hossein* (1905.) 10 C. W. N. 449 : and comment below

[2] *Fegredo* v. *Mahomed Mudessur* (1871) 15 W. R. 75 ; cf. as to prior mortgage, etc : *Hajra Begum* v. *Khajah Hossein Ali Khan* (1869) 4 Ben. L.R. (A.C) 86 12 W. R (344), 498.

[3] Bail. II. 218 (*ll.* 27-35), and see above, s. 400 relating to gift.

[4] Bail. II. 219 (para. 3).

[5] Note that Abu Hanifa does not adopt the theory of the transference to the implied ownership of God He considers the *waqf* property to be detained in the ownership of the *waqif*, Bail. I. 549 (*l.* 3). On the other hand, Syed Ameer Ali says : "It is a transfer to the legal ownership of the Almighty, for substantial consideration, viz., His reward which is obtained the moment the *waqf* is created," I. 143. Religious merit or approach to God is, it is true, likened by the Muslim jurists to a "return." "In the matter of charity it has been cited as a proof of its being obligatory that inasmuch as a return from God is also an *'iwaz*, so it falls under the head of a gift with a return." *Jami'-ush-Shittat, Hiba*, 392. But the return differs materially from "consideration." The return is not enforceable.

[6] Cf. "Abu Yusuf says his (i.e. the *waqif's*) ownership ceases by mere declaration . . . . (Imam) Muhammad says it does not cease till he appoints a manager for the *waqf*, and

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3. Abu Hanifa decree of court.

(3) Abu Hanifa considers a decree necessary for extinguishing the 'waqif's' power to resile from the waqf;[1] and this could be obtained by a procedure which has been compared to the fines and recoveries of English law: "The way to obtain which (viz. the decree of the Qazi) is for the appropriator to deliver the subject of the 'wukf' to the 'mootuwuli' or superintendent and then require it back from him on the ground that it is not obligatory; whereupon the judge may pronounce the decree that it shall be obligatory."[2] This refers primarily to the revocability and not the completion of a 'waqf' but it may be said that a 'waqf' is not brought to its entire completion unless it is made irrevocable; and the more so as, according to Abu Hanifa, the 'waqf' property continues to be detained in the ownership of the 'waqif.'

II. Shiah law: possession.

Next as to Shiah law, it is nearly to the same effect as Imam Muhammad's exposition of Hanafi law. See subsection (3).

Completion of 'waqf' distinguished from its execution after it has been completed.

The completion of a 'waqf' is of course distinct from the acting upon a 'waqf' after it has been completed. But the acting upon a declaration of 'waqf' may be evidence[3] to show that it has been completed, e.g. where transfer of possession is necessary, for showing whether such transfer has been made. See explanations to this section.

Facts irrelevant as to interpretation of 'waqf' may be relevant as to completion.

Hence where there is a written declaration of 'waqf' the intention of the 'waqif' may, by operation of the Evidence Act, ss. 91-92, have to be gathered from the document alone; and evidence of the 'waqif' having been acted upon, or not, would be excluded, just like all other oral evidence to contradict, vary, add to, or subtract from its terms.[4] But a person may have fully intended to create a 'waqf,' and yet not have completed it: in which case it will be inoperative. And thus even where there is a written declaration of 'waqf,' evidence as to its never having been given effect to, may show that it was never completed,[5] and indeed in some cases the 'waqf' being acted upon forms an integral part of its completion. See s. 514 below. With reference to 'Muhammed Azizuddin *v.* The Legal Remembrancer'[6] it was remarked in a recent case[7] that upon the line of reasoning followed in it, "it would be impossible ever to hold an appropriator who had constituted himself the first 'mutawalli' to the terms of his 'waqfnama.'"[7] This remark, it is submitted, overlooks the distinction between acting upon a 'waqf' that has been already completed, and acts of ownership exercised by the 'waqif' over the subject of the 'waqf' adduced as evidence that the 'waqf' was never in fact completed. The Court, it is presumed, will not complete an inchoate 'waqf,' any more than any other voluntary act.

gives the property in his charge." *Fathul-Qadir* II. 856, 879, cf. *Fatawa Qazi Khan*, III. 294.

[1] The reason why Abu Hanifa thinks that a *waqf* is revocable is that he holds there is no transfer of ownership to God. Hence there is no "approach to God" in making a *waqf*, hence no return for the transfer.

[2] Bail. I. 550. See p. 262 *n.* 1.

[3] *Saliq Ram* v. *Amjad Khan* (1906). All. W. N. 159.

[4] *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C.W.N. 449, 484: "It is of course clear that if there was a real intention to give effect to the documents as *wakfs*, and *wakfs* were formally constituted *and perfected*, it is wholly immaterial, in this suit, whether their provisions were carried out or not, for that is a matter of breach of trust only" (per Woodroffe, J.)

[5] *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1067. (para. 2.)

[6] (1888) 15 All. 321.

[7] *Abdul Rajak* v. *Bai Jimbabai* (1911) 14 Bom. L. R. 295, 301.

SECTION 462 Civil Procedure Code, s. 92.

Should it in any case be deemed necessary to get a decree of the court vesting the 'waqf' property in a 'mutawalli,' the Civil Procedure Code, s. 92, will apply. See s. 475 below.

§ 2.—Legal Incidents of 'Waqf.'

(1) Perpetuity.

I. Hanafi law: 'waqf' void if for limited period.

463. (1) Under Hanafi law—

(*a*) A 'waqf' purported to be made only for a limited period of time is void; provided that where it does not expressly purport to be limited in point of duration, it will, according to Abu Yusuf, be presumed to be perpetual, and effect will be given to it.[1]

Or for objects that will fail (Abu Yusuf dissenting).

(*b*) According to Abu Hanifa and Imam Muhammad, where a 'waqf' is purported to be made for objects which will fail, the 'waqf' is void.[2] According to Abu Yusuf, such a 'waqf' does not fail, but it will be presumed that, on failure of the objects expressly referred to, it is for the benefit of the poor in perpetuity.

Or not expressly purporting to be perpetual.

(*c*) The Courts of British India have followed the opinion of Abu Hanifa and Imam Muhammad that the 'waqf' must be expressly stated to be perpetual, and for objects which can never

II. Shiah law: 'Waqf' for limited period void.

(2) According to Shiah law—

(*a*) A waqf purported to be made only for a limited period of time is void.[4]

When objects may fail 'waqf' either—
(*a*) void from beginning or
(*b*) valid until they fail then revert to
(i) 'waqif' or
(ii) beneficiaries.

(*b*) Where the objects for which a 'waqf' is made are such that they will not necessarily continue in perpetuity, and will in all probability fail, and it is not provided who are to be benefited by the 'waqf' property when the said objects fail, there, according to some Shiah authorities, the 'waqf' is void from the beginning; but the 'Shara'ya-ul-Islam' supports the view of other authorities who hold that the 'waqf' will be given effect to so long as the said objects are in existence, and thereafter the 'waqf' property will revert to the 'waqif' or his heirs; other authorities hold that after the failure of the said objects, the 'waqf' property

[1] "As the terms appropriation or charity do clearly argue thus much," Hed. 234; Bail I, 557. Cf. "Abu Yusuf says: if any object is named which is not perpetual it would be valid and the waqf would be for their benefit after it (the named object) ceases; although he does not mention them (i.e. the poor)"—*Fathul Qadir*, II, 863.

[2] Bail. 557-558.

[3] *Fatmabibi* v. *Advocate-General of Bombay*, 6 Bom. 42; *Nizamudin Gulam* v. *Abdul Gafur* (1888) 13 Bom. 264; affirmed *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom. 1; 19 I.A. 170.

[4] Bail. II. 218 (*fourth*).

will revert to the heirs of the beneficiaries; but this view is stated in the 'Shara'ya-ul-Islam' to be less well supported by traditional authority. SECTION 463

(3) *Semble*, under the rulings of the British Courts such a 'waqf' would apparently be held to be valid under all schools of Muhammadan law, provided that its object is a charity but not otherwise; (*quaere*, whether not even under Shiah or Shafi'i[1] law); and when the charity fails, the 'waqf' property would be applied to other charities in accordance with section 481 below. III. In British India charity considered perpetual.

Illustrations.

(1) A says, I make a 'waqf' of this house for a month, and afterwards the 'waqf' will cease. The 'waqf' is void 'ab initio.'[2]

(2) A says, I have made a 'waqf' in favour of B, or for B and his sons and daughters. According to Abu Hanifa and Imam Muhammad the 'waqf' is void (as also according to a minority of Shiah lawyers). According to Abu Yusuf the 'waqf' is valid, and after B, or B and his sons and daughters (as the case may be) the 'waqf' property will be devoted to the poor. According to the 'Shara'ya-ul-Islam' the 'waqf' property will, after B (and his sons and daughters), revert to A or his heirs.[3]

(3) A 'waqf' in favour of "my son," or "the poor of my kindred, being good persons," is invalid according to Imam Muhammad, because the objects would fail, but it is valid according to Abu Yusuf. So if a man were to dedicate property to a named or specified person, or to his children, they would be entitled to the produce of the subject of 'waqf,' which would, after his death, be given to the poor according to Abu Yusuf.[4]

In a case where the 'waqif' was a follower of Shafi'i, the point was left undecided whether a 'waqf' could be validly made for the purpose merely of conferring a perpetual and inalienable estate on a family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries."[5] Such a 'waqf' would now apparently be held to be void under the Privy Council decisions.[1]

(2) Inalienability of 'Waqf' Property.

464. After the completion of a 'waqf,' its subject passes out of the ownership of the 'waqif'[6] and it cannot be alienated Subject cannot be alienated.

1 Cf. Per Macleod J. in *Mahomed Abdulla* v. *Abdul Rehman Jitaker* (1907) Bom. L. R. 998.

2 Bail. I. 557 (*ll.* 15-20).

3 See s. 463 (2) (*b*).

4 Bail. I. 559.

5 *Phate Saheb Bibi* v. *Damodar Premji* (1879) 3 Bom. 84.

6 Hed. 235; *Jewun Doss Sahoo* v. *Kubeeroddeen* (1840) 2 Moo. I. A. 390; 6 W. R. (P.C.) 3; *Doyal Chund Mullick* v. *Keramut Ali* (1871) 16 W. R. 116; *Hidayatoonnissa* v. *Afzul Hossien* (1870) 2 N. W. 420 (Shiah case). Cf. *Ismail Ariff* v. *Mahomed Ghous* (1893) 20 Cal. 834, where the claim was for a declaration that the plaintiff was sole absolute owner, but the Court declared merely that he was lawfully entitled to possession.

SECTION 464 or transferred either by the 'waqif'[1] or the 'mutawalli';[2] nor do their heirs take it by way of inheritance.[3]

Lease or alienation by beneficiaries.

Provided that according to Shiah law the beneficiaries under a 'waqf' may validly make a lease[4] of or otherwise transfer or alienate[5] the 'waqf' property for the period during which they are entitled to the benefit of the 'waqf,' but so that such lease or transfer or alienation does not prejudice the rights of any succeeding beneficiaries.[4] *Semble*, the Hanafi law is to the same effect.[6]

Alienation of part of property, another party of which is 'waqf.'

Explanation—Where part only of a property forms the subject of the 'waqf,' or where the whole of its income or produce is not devoted to charitable or religious purposes, that portion which is not the subject of 'waqf' may be alienated.[7]

Legal ownership of 'waqf' property.

The authorities take different views as to where rests the ownership of 'waqf' property.[8]

(1) Abu Hanifa says it is in the 'waqif.'[9]

[1] See p. 373, *n.* 6.

[2] The inalienability of the *waqf* property must, it seems, not be so understood as to militate against the power in the *mutawalli* (always to be exercised however with the previously obtained sanction of the Court) to "vary the investment" (so to say) in a proper case Thus we find it stated by Syed Ameer Ali (citing *Surrat-ul-Fatawa*, 221). "In the *Tattima* it is reported from Hisham and Mahommed that when a *waqf* (property) is in such a condition that the beneficiaries cannot derive benefit therefrom, the Kazi is authorized to sell it, and with its price to buy another, and this power nobody else can exercise excepting the Kazi."—"Mahommedan Law" I. 339. I have not been able to verify the original, but the *Bahr-ur-Raiq*, V. 223, 237, and the *Qazi Khan*, III. 383 seem to lay down the law in similar terms. Cf. also: "In the *Siyar-i-Kabir* it is stated that although some jurists have held the change of *waqf* property not to be lawful; but in the *Muhit*, it is stated that the following question was put to Shams-ul-Aimma Halwani, 'whether when the *waqf* of a mosque (property consecrated to a mosque) becomes useless, and cannot yield an income the *mutawalli* can sell it, and in its stead buy another?' He answered, 'Yes, it would be lawful.' He was then asked, 'whether it would be lawful to do so when the property does yield an income, but with its price a better property can be purchased.' He answered, 'Yes, it would be lawful.' Though some of the jurists hold against exchange or sale of *waqf* property, I have already stated that we conform to the rule laid down by Abu Yusuf." Ameer Ali, I. 339,340 citing the *Surrat-ul-Fatawa*, 422-423. The former proposition seems to be accepted in the *Bahr-ur-Raiq*, V. 223; and the latter (with some limitations) in the *Fatawa Qazi Khan* III. 302. Again the same learned author says: "The author of the *Manah* was asked regarding a house consecrated in favour of a mosque, whether it would be lawful for the Kazi to direct its sale, if he was of opinion that with the price thereof a piece of land may be purchased, which would bring considerably more profit to the *waqf*. The author of the *Manah* answered 'the question is for the Kazi to decide judicially, so that if he considers deliberately that such sale and investment is for the benefit of the *waqf*, it is lawful, and this is according to the opinion of Kazi Imam Abu Yusuf "—referring to *Surrat-ul-Fatawa*, 420. 421.

[3] *Jaafar Mohiudin Sahib* v. *Aji Mohiudin Sahib* (1863) 2 Mad. H.C. R. 19. *Fegredo* v. *Mahomed Mudessur* (1871) 15 W. R. 75.

[4] Bail. II. 222.

[5] Mortgage good so far as interest of the beneficiary concerned: *Amrutlal Kalidas* v. *Hussein* (1887) 11 Bom. 492. This case must be taken to be overruled so far as it held that the *waqf* was valid though it created a perpetual family settlements; *Abul Fata* v. *Russomoya* (1894) 22 Cal. 619; 22 I.A. 76.

[6] Cf. Trusts Act s. 56.

[7] *Fulloo Bibee* v. *Bhurrut Lall Bhukul* (1868) 10 W.R. 299; *Kuneez Fatima* v *Saheba Jan* (1866) 8 W. R. 313; and see comment; and cf. Trusts Act II. of 1892, s. 83; cf. below s. 478.

[8] Cf. *Phate Sahcb Bibi* v. *Damodar Premji* (1879) 3 Bom. 84 (*mutawali* the owner).

[9] Bail. I. 549 (*ll.* 2-3).

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(2) Abu Yusuf and Imam Muhammad hold it to be "in the implied ownership of God."[1] "The 'futwa' is in conformity with the opinion of the two disciples."[1]

(3) The Shiah authorities that it is transferred so as to become the property of the beneficiaries or object of the 'waqf.'[2] The Shiah law relating to the grant of limited interests (ss. 446 etc. above) is closely allied to that of 'waqf'—the two differing in this, that 'waqf' is (*a*) perpetual, (*b*) made with the intention of "approach to God."

Reason why 'waqf' property inaliena ble.

The reason of the rule contained in this section is forcibly explained by Sir Barnes Peacock in the Privy Council: "If this property is to be sold," he says, "it must be taken out of the hands of the trustee altogether, and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. . . . Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan law? For example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known that disputes and bitter feelings frequently exist between Hindus and Mahomedans at the time of the Mohurrum?"[3] The proviso to this section seems to follow from the Shiah law to the effect that the property in the subject of 'waqf' is vested in the beneficiaries. It is based, however, on an illustration in the 'Shara'ya-ul-Islam'[4] referring to a lease by the beneficiaries where the point directly under discussion is whether a lease so granted becomes void on the death of the beneficiaries granting the lease? The answer is that the beneficiaries themselves having only a life-interest, cannot in any event lease away for a longer period. Reference is also made to the question (as to which the authorities are divided) whether even the full owner of property may make a lease which should continue in force after his death.[4] Similarly it is stated: "If then a person should appropriate his share in a slave, and subsequently emancipate him, the emancipation would not be valid, because the right of property in the slave has passed out of him; but neither would it be valid if the 'mowkoof alehi' (beneficiary) should emancipate the slave, because of the right which future generations have in the slave."[5] Cf. Trusts Act, ss. 58, 56.

Alienation of property not itself subject of 'waqf' but forming part of that which is subject of 'waqf.'

With the *explanation* to this section the following statement of English law may be compared: "A charitable trust may be so limited as to affect part only of the property granted or devised, as when property is given subject to or in trust to make specified charitable payments which do not exhaust the whole estate. In those cases where the donor has not expressed a general intention to devote the whole property to charity, the donee takes beneficially, subject only to the specific appropriation."[6] Again, any person acquiring such property with notice of the charity charged upon it, is bound by it.[7] Conversely, the 'mutawalli'

[1] Bail. I. 550 (*ll.* 8-9); *Moohummud Sadik* v. *Moohummud Ali* (1798) 1 S.D.A. Cal. 17.

[2] Bail. II. 220 (*first appendage*). See s. 465.

[3] *Bishen Chand* v. *Nadir Hossein* (1887) 15 Cal. 329; 15 I.A. 1.

[4] (Case 9) (Calc. ed.) p. 239; Bail. II. 222 (*sixth*).

[5] Bail. II. 220 (para. 2).

[6] Halsbury, "Laws of England," IV. 143. s. 225. Cf. s. 481 below and footnotes, and Trusts Act, s. 83.

[7] *Charitable Donations Commrs.* v. *Wybrants* (1845) 2 Jo. & Lat. 182, 198.

SECTION 464 has generally the right of remuneration for administering the 'waqf' (see below s. 496), and though this might give him a sort of beneficial interest in the 'waqf' property,[1] nevertheless the 'corpus' of the estate cannot be sold (in execution of a personal decree against him), nor can any specific portion of the 'corpus' of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties.[2] In another case it was alleged that the office of 'mutawalli' was transferred by sale according to custom, and hence could be attached; but the custom was held to be opposed to public policy, and the office incapable of being attached in execution.[3] So that not only can the trust property not be attached for the debts of the trustee, but if he purports to sell it and the purchaser is aware of the trust he will be bound by it, and if he is not a fit person to administer the trust, the Courts will no doubt appoint another trustee. But on the other hand, where part only of a property is the subject of the 'waqf,'[4] there is nothing to prevent the alienation of the other part, which does not form the subject of a 'waqf' at all.

Suit to set aside unlawful alienation.

465. Where the subject of a 'waqf' is purported to be alienated, any person interested in the objects of the 'waqf' can sue to have the alienation set aside and the 'waqf' given effect to.[5]

But a person who has no interest in the 'waqf' property cannot institute a suit.[6] This, as pointed out by Sir R. Wilson, is based on "the general principle of law that possession is sufficient as against a mere trespasser."[7]

(3) *Revocation or Alteration of 'Waqf.'*

'Waqf' cannot be revoked or altered.

466. (1) A 'waqf' cannot be revoked after it has been completed.[8] *Semble* no portion of the declaration of 'waqf' can be altered by the 'waqif' after the 'waqf' has been declared;[9] unless the power to alter has been reserved in the declaration of 'waqf.'[10]

[1] Cf. *Mohiuddin* v. *Sayiduddin* (1893) 20 Cal. 810.

[2] *Bishen Chand* v. *Nadir Hossein* (1887) 15 Cal. 329; 15 I. A. 1.

[3] *Sarkum Abu Torab* v. *Rahaman Buksh* (1896) 24 Cal. 83.

[4] Cf. s. 478 below.

[5] (*Kazi*) *Hassan* v. *Sagwa Balkrishna* (1899) 24 Bom. 170.

[6] *Bhurruck Chandra Sahoo* v. *Golam Shurruff* (1868) 10 W.R. 458.

[7] "Anglo-Muhammadan Law." 367, 345. referring to *Ismail Ariff* v. *Mahomed Ghous* (1893) 20 Cal. 834.

[8] Hed. 231-232; Bail. I. 550, II. 212; *Fatma Bibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42.

[9] E.g. the *waqif* having laid down that the *mutawalli* is to be selected from a specified class of persons, he cannot appoint some one outside the class: *Advocate-General* v. *Fatma Sultan Begum* (1870) 9 Bom. H. C. R. 19, and see *illustration*.

[10] Cf. Ameer Ali, I. 341, citing the *Surrat-ul-Fatawa*: "In the Chapter on *wakf* in the *Khazanat-ul-Fatawa* it is stated that the *Sahib-ul-Manah* (the author of *Manah*) was asked about a deed of *wakf* in which there was a condition to the effect that the *wilayet* of the trust should appertain only to the *wakif's* male decendants, but now a deed has been discovered bearing a prior date, in which the *towliat* was given to his male as well as female descendants; the question was which deed should be acted upon (in regard to the *towliat*). The *Sahib-ul-Manah* answered, 'If the *wakif* in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management, etc., of the *wakf*, in that case the second deed should be acted upon, that is, the deed in which the

SECTION 466

(2) *Quaere*, whether a right of revocation or alteration may be validly reserved in a 'waqf.'[1] When it purports to be made subject to an option to the 'waqif' to revoke it, according to Imam Muhammad the 'waqf' is void.[2] Abu Yusuf is of opinion that it is valid where the option is limited for three days; provided first that where the object of the 'waqf' is a 'masjid' Abu Yusuf and Imam Muhammad are agreed that the 'waqf' is absolutely valid, and the option is void, notwithstanding that it may be purported to be made subject to an option (restricted to three days) to the 'waqif' to revoke it;[3] provided secondly that a testamentary 'waqf' may be revoked at any time by the 'waqif';[3] and its validity is not affected by its expressly purporting to be subject to the power of revocation or cancellation either wholly or in part: and whether exercisable on the happening of a contingency or absolutely.[4]

Can right of revocation or alteration be reserved.

Option for three days.

Testamentary 'waqf' revocable.

Explanation—A 'waqf' purported to be made with a reservation of a power to sell the subject of 'waqf' and to expend its proceeds on the 'waqif' or settlor is void.[5]

Reservation of power to sell avoids 'waqf.'

According to Abu Hanifa a 'waqf' is revocable unless and until there is a decree of the Court confirming it. But the opinion of Abu Yusuf and Imam Muhammad is opposed to Abu Hanifa's, and it is stated that the 'fatwa' is in conformity with their opinion.[6]

Irrevocable only after completion.

There is another opinion attributed to Abu Hanifa that "the appropriator's right of property is extinguished in consequence of his suspending that upon his decease"[7] to which the 'Fatawa 'Alamgiri' refers,[8] but the 'Hidaya' states there is no foundation for its being so attributed.[7]

It has been said[9] that previous to Islam "appropriations were absolute (i.e., irrevocable), but our law has rendered them otherwise" viz., according

Irrevocability of 'waqf.' Its explanation.

towliat is restricted to his male descendants. But if he reserved to himself in the original *wakf* no such power, in that case the first deed of *wakf*, viz, in which there was no restriction, should be acted upon.'"

"In the 'Asaaf' it is stated that the *wakif* cannot go beyond the conditions laid down at the time of dedication."

"In the *Fawaid* it is stated from Khassaf that when there are two contradictory conditions made by a *wakif*, the second is to be acted upon, unless it is beyond his powers."

"When there are two contradictory provisions in a *wakfnamah*, the one which follows will be given effect to, according to us (Hanafis) as the last condition overrides the first."

'Surrat-ul-Fatawa,' p. 425.

[1] Cf. *Assobai* v. *Norbai* (1905) 8 Bom. L. R. 245, 250-251; *Hidaitoonnissa* v. *Afzul Hossein* (1870) 2 N.W. 420, *Cassamally* v. *Currimbhai* (1911) 36 Bom. 214. 13 Bom. L. R. 717. See comment.

[2] Bail. I. 557 (*ll* 5-9). This is the period for which the law permits an option in a sale and other transfers of property: Hed. 238. *waqf* must not be subject to option: *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42.

[3] Ameer Ali, I. 144 (para. 2).

[4] *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All. 663. But see *Pathakitti* v. *Avathalathyku* (1888) 13 Mad. 66. Cf. s. 474 below.

[5] Bail. I. 556 *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42.

[6] Bail. I. 549-550. The word "obligatory." Bail. I. 549 (last line) may be misleading at first: It is opposed to "voluntary" and means revocable. See above p. 262 *n*.

[7] Hed. 233 (col. i., paras. 1, 3).

[8] Bail. I. 550 (*ll*. 3-7) 605 (*l*. 7 of para. 3), 609 (*l*. 6). I.e., a testamentary *waqf*.

[9] Hed. 232 (col. i. *ll*. 35-42): by Shirrah.

SECTION 466 to Abu Hanifa, who is alone in holding them to be revocable ; the ground he gives is that the Prophet said "property cannot, after the decease of the proprietor, be detained from division among his heirs." No one else shares this view with Abu Hanifa; and whether a 'waqf' was revocable or not previous to Islam, according to Muhammadan law it is irrevocable, because though a voluntary transaction, it brings an ''iwaz' to the 'waqif' in the form of approach to God ('qurbat') and such transactions become irrevocable. Abu Hanifa does not consider 'qurbat' a necessary constituent of "waqf,' hence in his view it is possible to class it under revocable transactions. The revocation of a testamentary 'waqf' may be evidenced in the same manner as of bequests generally, e.g., by the way in which the testator subsequently dealt with the subject of the 'waqf.'[1]

Reservation of power to alter.

With reference to reserving a power to alter the terms of a declaration of 'waqf'—

1. Hanafi law. Power may be reserved to employ produce at option of—

(1) For Hanafi law cf. "When a man has said my land is a 'sudukah' appropriated to Almighty God for ever, on condition that I may employ the produce as I please, he may lawfully do so.[2] But if he should apply it to the indigent or in pilgrimage or to a particular individual he cannot reclaim it, even though he should say in doing so 'I have given it to such an one.'[3] He may give it to one set after another. Yet if he were to apply it to himself the 'wukf' would be void. It would be different if he had said 'on condition that I may give it to whomsoever I please.' When a man has settled his land on condition that he may give the produce to whom he pleases, the 'wukf' is lawful, and he has the power of doing so while he lives, but it ceases on his death ; and he cannot eat of the produce himself. He may, however, bestow it on the rich, or even on one rich person in particular. A man makes a 'wukf' of his estate on condition that the administrator may give the produce as he pleases; this is lawful, and he may give it to rich and poor. If he should say 'on condition that such an one may give the produce to whomsoever he pleases' it is lawful, and the power may be exercised during the life of the appropriator and after his death ; and the person authorised may give to his own child and 'nusl' and also to the child and 'nusl' of the appropriator but not to himself."[4]

(i) 'Waqif.'

(ii) of 'mutawali.'

(iii) of a third party.

2. Shiah law—

(2) For Shiah law cf. "If one should make an appropriation with a condition that the property is to revert to him in case of need, the condition would be valid, but the 'wukf' void,[5] and the property would remain in the condition of a 'hoobs'[6] until the occasion should arise, while if he should die, it would go to his heirs. And if he made it a condition that he shall have the power of excluding whomsoever he may please, that would invalidate the

(i) Provision that the property should revert to 'waqif' makes it void

(ii) power to exclude void.

[1] *Abdul Karim* v. *Shofiannissa* (1906) 33 Cal. 853. Cf. Bail. I. 618 (para. 2), 619; II. 231 (para. 2).

[2] But see *Mujibunnissa* v. *Abdur Rahim* (1900) 23 All. 233, 243-245.

[3] I.e., though he purports to give it merely as a gift, it is not revocable : being impressed with the *waqf*.

[4] Bail. I. 587-588.

[5] Under Shiah law any condition for the benefit of the *waqif* avoids the *waqf*.

[6] "Retention ; but also devotion to a particular purpose," Bail. II. 226, *n.* 2. A *waqf* requires a religious motive and a "detention" not having such motive differs from a *waqf* just as *hiba* differs from *sadaqa*. A provision for the benefit of the *waqif* interferes with the religious motive in the opinion of all jurists except Abu Yusuf, and thus avoids the *waqf*.

'wukf.'[1] But if the condition were that he may add to those in whose favour the appropriation has been made, some yet to be born, the condition would be lawful, whether the appropriation were for others or his own children. If again the condition were that he may make an entire transfer from those on whom the settlement has been made to others subsequently to come into being, that would not be lawful, and the 'wukf' would be void. Some have said that when one has made a settlement on his young children, he may lawfully make others participate with them without reserving any express power to that effect; but this opinion is not to be relied upon.[2]

SECTION 466 (iii) power to add valid. (iv) power to transfer void. (v) can power to add be exercised without express provision?

Some of the rules referred to in the extracts given above, are no doubt merely of moral obligation.

467. The declaration of a 'waqf' may validly empower the 'waqif' to exchange the land forming the subject of the 'waqf' for other land. or to sell the land and to purchase another land; and thereafter the land so taken in exchange or purchased would become subject to the 'waqf'; provided that the 'waqif' may not validly exchange or sell the 'waqf' land except in strict accordance with the terms of the declaration.[3]

Power may be subject of 'waqf.'

Where the declaration of 'waqf' empowers the 'waqif' to exchange the land for another land, the 'waqif' cannot exchange the land more than once, nor can he exchange the land for a mansion. See above p. 374, *n.* 2.

468. A 'waqf' purported to be made subject to a contingency is void.[4]

Contingent 'waqf' void

In 'Rasamaya Dhur Chowdhuri *v.* Abul Fata Mahomed Ishak'[5] the High Court held that the primary object of a 'waqf' being a charity, if it is postponed to provisions for the family of the 'waqif' it is void, because the 'waqf' depends upon the uncertain contingency of the possible extinction of the 'waqif's' family.

Family 'waqf' held to be contingent.

A 'waqf' was purported to be executed in which it was provided that "the deed of 'waqf' shall come into force from the date of its registration;" and it was held that this made the 'waqf' contingent and thus void under Shiah law.[6] The decision was based on the remarks of Mahmood J., in 'Aga Ali Khan *v.* Altaf Hasan Khan.'[7] That case was seven years later expressly overruled by the Privy Council.[8]

Does postponement of effect make it contingent.

[1] Probably on the ground that this amounts to a power to revoke the *waqf*.

[2] Bail. II. 219 (para. 2).

[3] Bail. I. 586-587. This is in accordance with the opinion of Abu Yusuf from whom Imam Muhammad dissents. Cf. Trusts Act, s. 40.

[4] Bail. I. 556, Bail. II. 218 (*fourth*, *ll.* 5, 6 25, 26); *Pathukutti* v. *Avathala Kutti* (1888) 13 Mad. 66, contingent on the *waqif* dying without issue, but *semble* this would have been valid as a testamentary *waqf*, see ss. 457, 459 and 466); *Kalub Hosscin* v. *Mehrum Beebee* (1872) 4 N. W. 155, (Shiah parties). *Fatmabibi* v. *Advocate-General of Bombay* (1881). 6 Bom. 42; *Cassamally* v. *Currimbai* (1911) 36 Bom. 214: 13 Bom. L. R. 717, 772.

[5] (1891) 18 Cal. 399, upheld 22 Cal. 619, 22 I.A. 76. The P. C. did not express any opinion on this point, which is rather novel.

[6] *Syeda Bibi* v. *Mughal Jan* (1902) 24 All. 231.

[7] (1892) 14 All. 429 (F.B.).

[8] *Baqar Ali Khan* v. *Anjuman Ara Begam* (1903) 25 All. 236; 30 I. A. 94.

SECTION 469

(4) *Application of Income of 'Waqf' Property.*

Repairs first charge on income, then the objects of the 'waqf' to be given effect to.

469. The benefit or income or proceeds of the 'waqf' property is to be applied for the following purposes in the following order: (1) for the maintenance and repairs of the subject of the 'waqf'[1] (2) for the specified objects of the 'waqf,'[1] (3) for that which is necessary for the general purpose of the specified objects,[2] (4) for the benefit of the poor,[3] [or other charity; provided that a general charitable intention is shown by the 'waqif'; [4] otherwise, *semble*, there will be a resulting trust for the 'waqif' or his heirs.]

Repairs do not include improvements.

Explanation I—By repairs is meant the preservation of the 'waqf' property in the state in which it is at the time when it is dedicated; improvements in the property are not included.[5]

Court may order suspension of 'waqf in order to provide for repairs.

Explanation II—Where the repairs of the subject of 'waqf' are not made the first charge on its income or proceeds, the Court may order that the said income or proceeds should be suspended from being applied to the objects specified in the dedication of 'waqf,' and that the repairs should be made thereout; but neither the 'mutawalli' nor the beneficiaries have the authority to do so without an order of the Court.[6]

Poor ultimate beneficiaries under Hanafi law.

The ultimate destination of 'waqf' property is, according to Hanafi law, always assumed to be the benefit of the poor.[7] So that if the express object of the 'waqf' is to provide residence for pilgrims, "when the days of the season (of 'haj') have passed, it should be let, and kept in repairs out of the rents; and the surplus, if any, distributed amongst the poor,"[8] and according to Abu Yusuf, if an intention to create a 'waqf' is validly declared, but no object is expressed, the 'waqf' does not become void, but it will be for the benefit of the poor. The effect of the rule of law that the ultimate beneficiaries under a 'waqf' are always the poor, according to Abu Yusuf's exposition, has a threefold aspect—

Unexhausted or unappropriated part devolves on poor.

Assuming that there is a valid declaration of 'waqf,' the property being already impressed with a 'waqf': (1) if the objects of the 'waqf' are not mentioned the property will be devoted to the poor; (2) if the objects fail there is a resulting 'waqf' for the poor; (3) if the objects of the 'waqf' do not fail,

[1] Hed. 236; Bail. I. 661 (*ll.* 715) 565, 568-569, 596 *l.* 3).

[2] Bail. I. 565. *Jugatmoni Chowdrani* v. *Romjani Bibee* (1884) 10 Cal. 533: excess income to be devoted to same purpose as originally specified.

[3] Bail. I. 558 (paras. 1, 2), 559; see comment.

[4] Cf. ss. 463 and 481.

[5] Hed. 236 (col. ii. para. 2); but see Bail. I. 608 (para. 2), showing that a minaret may be added to a mosque if necessary for making the call to prayers heard, and cf. p. 213, *n.* 6 above.

[6] See comment below ss. 498 *et seq.*

[7] Bail. I. 588 (paras. 1, 2) 559, 610. Kemp J. says, referring to the *waqf* in *Khajah Hossein Ali* v. *Hazara Begum* (1869) 12 W. R. 344 (affirmed *ib.* 498): "The poor are provided for, which is the primary object of every *waqf*." *Bikani Mia* v. *Shuk Lal Poddar* (1892) 20 Cal. 116,157 (per Ameer Ali J.). Cf. *Radd-ul-Muhtar*, III. 670, cited Ameer Ali, I. 291.

[8] Bail. I. 610 (para. 1). Cf Ameer Ali, I. 150, 151.

but exhaust only a part of the income, the rest will be for the poor. According to the rulings of the Courts of British India, with reference to the first case the doctrine of 'cy près' applies when "a general charitable intention" has been shown, but not otherwise. The second case is contemplated by Abu Yusuf chiefly regarding individual beneficiaries, and the descendants of the 'waqif' in particular; but a 'waqf' is not considered valid in British India if it is primarily made for such objects; thirdly, where the 'waqif' provides for the application of a part only of the income of the 'waqf' for specified charitable objects, it would probably be held that part of the property is alone the subject of the 'waqf,' and the rest is outside the scope of the 'waqf,' hence it would continue to be the private property of the 'waqif,' and remain alienable and heritable.[1]

Temporary suspension of 'waqf' for repairs.

Explanation II is based on the following illustration: A 'waqf' is dedicated in favour of an individual for life and after him to the poor. If the beneficiary occupies the house but does not repair it, nor pay for the repairs, it must be taken from his possession and let out until sufficient rent is realised for the repairs; and after they are completed the house will be returned to him.[2]

All benefit equally and simultaneously.

470. Where several objects or beneficiaries are referred to as being entitled in a declaration of 'waqf,' they take the benefit of the 'waqf' property simultaneously, and in equal shares, unless it is stated that some one or more take in priority to the others, or a greater share, or that one is to succeed the other, or a contrary intention appears in any other way.[3]

Failure of some objects.

471. (1) Where some of the objects for which a 'waqf' is purported to be made, fail, or cannot be given effect to, the validity of the other objects of the 'waqf' is not thereby affected[4] except as provided in this section.

Failure of first object.

(2) According to Shiah law, if the object which is to benefit in the first instance in point of time fails, then the whole 'waqf' is void.[5]

When ciaries tainabl take it.

(3) Under Hanafi law, according to Abu Yusuf, when the terms in which the beneficiaries under a 'waqf' or its objects are referred to in the declaration, cannot apply to any existing person or object, the benefit of the 'waqf' property will be given to poor Mussulmans, provided that if thereafter the said terms apply accurately to any person or object he or it will be entitled to the said benefit.[6]

[1] Cf. s. 464. *Explanation* above, and s. 478 below.

[2] Hed. 236 (col. ii).

[3] Cf. Bail. II. 221 (*ll.* 10-12), I. 579 (para. 3) cited in comment to s. 485.

[4] Bail. I. 553; *Bikani Mia* v. *Shuk Lal Poddar* (1897) 20 Cal. 166 (F.B.) (per Prinsep, Ghose and Ameer Ali JJ., Petheram C. J. and Trevelyan J. dissenting); but see *Ramanadhan* v. *Vada* (1910) 34 Mad. 12, 18-20, comment. cf. *Kalub Hossein* v. *Mehrum Bee* (1872) 4 N. W. 155 (s. 39, *n.* 2) *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264; affirmed (1882) 17 Bom. 1; 19 I. A. 170.

[5] Bail. II, 214 (para. 4), 218 (last para.).

[6] Bail. I. 574 (para. 3), But see s. 469 above.

SECTION 471
Acceleration.

(4) *Semble* the benefit which one of several objects of a 'waqf' takes under it, may be accelerated by the failure of a prior object.[1] *Quaere*, whether under Shiah law a subsequent object of 'waqf' may be accelerated by the failure of a prior one.[2]

Illustrations.

(1) W purported to create a 'waqf' for the benefit (*a*) of his family who are to receive Rs. 400 a year, and (*b*) of the poor who are to be paid Rs. 75 a year, and (*c*) on failure of his descendants upon the poor of Dacca. *Held*, that the provisions in favour of the family were void; but the provision for payment of Rs. 75 annually to the poor is valid.[3]

(2) "If a non-Muslim says, devote the produce to such and such a temple, and then if the temple is ruined, the produce should be given to 'faqirs' and the indigent; in such a case the produce will be devoted to the 'faqirs' and the indigent and not to the temple, so it is stated in the 'Muhit.'"[4]

Family' waqf invalid.

As has been pointed out before, the Privy Council have not accepted the correctness of the exposition of the law of 'waqf' contained in the 'Fatawa 'Alamgiri,' 'Hidaya,' and other commentaries on Hanafi law, and have held, contrary to the express statements contained in the said commentaries, that a family settlement cannot be a valid object of 'waqf.' Hence consequential changes must be made in the other rules contained in the said commentaries. So that the rule stated by Abu Yusuf that as soon as a declaration of 'waqf' is made, the property becomes subjected to 'waqf,' and consequently the failure or even the illegality of the object does not cause the 'waqf' to fail, but in that case the property will be applied 'cy près' to other and valid objects of 'waqf'—this rule must be read now with the proviso, that where the settler's real intention is to make a family settlement, there the use of the word 'waqf' is a "mere verbal fiction" on his part and it cannot change the nature of the property, nor make it the subject of 'waqf'; the settler never having intended to create a valid 'waqf' but to create a family settlement, there is nothing like a general charitable intention or, to paraphrase that expression, nothing like a general intention to devote the property to purposes which are valid objects of 'waqf,' on which the Court can proceed 'cy près.' Where, of course, apart from the use of the word 'waqf' a general

Not applied 'cy près' to poor.

[1] See illustration (2) Bail. I. 553. But see *Fatima Bibee* v. *Arif Ismailjee Bham* (1881) 9. C. L R. 66.

[2] When the one that fails is the first of those mentioned in the *waqf*, all the subsequent objects fail. See s. 42 (2). But it is said that "the seisin that is required is that of the first of all the *mowkoof alehi* or persons for whom an appropriation is made; and all regard to possession ceases in the subsequent steps."—Bail. II. 219 (para. 3). So if the second object fails, would the third be accelerated if it is valid?

[3] *Bikani Mia* v. *Shuk Lal Poddar* (1892) 20 Cal. 116 (F.B.) Prinsep, Ghose, Ameer Ali JJ., Petheram C. J. and Trevelyan J. dissenting

[4] *Fatawa 'Alamgiri*, *Waqf*, Ch. 1; cf. Bail. I. 553 (*ll.* 5 *et seq*). The endowment in favour of the temple being void under s. 482.

charitable intention is shown and the particular object which is mentioned is illegal, the charity is diverted to the lawful objects of charity.[1] SECTION 471

In England "a personal bequest attached to a void charity as an endowment must fail."[2]

Interest disclaimed by beneficiaries accrues to poor (if general charitable intention).

472. (1) Subject to sections 480 and 481 below, according to Abu Yusuf's exposition of Hanafi law, where the beneficiaries under a 'waqf' consist of a number of persons, and

(*a*) they all disclaim their interest under the 'waqf' the whole of the benefit must be devoted to the poor; but

(*b*) if some of them disclaim and others accept it, then

(i) if the beneficiaries are identified in the instrument of 'waqf' as a class, under a general description, which applies to those who have accepted, in that case they take the whole of the benefit;

(ii) if the beneficiaries are named or otherwise specifically identified in the instrument of 'waqf,' in that case the share in the benefit of those who disclaim must be distributed amongst the poor.[3]

(2) *Quaere*, whether the rule contained in sub-section (1) can be of any effect consistently with section 480 below; and *semble*, where any portion of property which is purported to be dedicated by way of 'waqf' for an object which may fail, without an ultimate reversion to charitable or religious objects, such portion forms part of the private and heritable property of the 'waqif,'[4] provided that it can be separated from the rest of the property which is validly dedicated by way of 'waqf' for a charity.

Explanation—Where the object of a 'waqf' is to benefit a community holding specified religious tenets, and some of its members secede from it, by renouncing the said tenets, such members are considered to have disclaimed the benefit of the 'waqf.'[5]

'Waqf' presumed in Hanafi law to be perpetual ultimately for poor.

The Hanafi law according to Abu Yusuf is to the following effect: If the intention of creating a 'waqf' is shown, then it will be presumed to be—

(1) a perpetuity, and

[1] *Ramanadham* v *Vada* (1910) 34 Mad. 12, 18 20; *Salebhai* v. *Bai Safiabee* (1911) 36 Bom. 111, 13 Bom. L. R. 1025; see also *A.G.* v. *Vint* (1850) 3 De G. & Sm. 704 (for supplying alcoholic drink to workhouse); *Moggridge* v. *Thackwell* (1802) 7 Ves. 36, 75, citing *A.G.* v. *Baxter* (1684) 1 Vern. 141 (charity for ejected ministers) and *DeCosta* v. *DePas* (1754) Amb. Part I. p. 228 (by a Jew for establishing a Jesuba or assembly for reading the law and for instructing people in that religion).

[2] *A-G.* v. *Whitchurch* (1796) 3 Ves. 141. See also *Thomson* v. *Shakespear* (1860) 1 De G. F. & J. 399.

[3] Bail I. 600 (para. 2); cf. Bail. I. 574 (para. 2) above.

[4] *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264 (1892) 17 Bom. 1; 19 I. A. 170; *Pathu Kutti* v. *Avathalakutti* (1888) 13 Mad. 66.

[5] See illustration (2) to s. 481 below.

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(2) ultimately for the benefit of the poor, which must be supposed to be the appropriator's design, though he should fail to mention it.[1]

In British India 'waqf' must be for charity.

The Privy Council on the other hand hold that a 'waqf' is valid only if it is for charitable or religious uses, hence it follows that its object can never fail; but they permit mere charges upon the profits of the estate for objects which are not charitable and which may fail; if these charges are on the whole of the 'waqf' property, then on their failure the whole property is devoted to the charity, free from the said charges. If the said charges are on specific portions of the property (e.g. a definite fraction of it) and that portion of the property never goes to charity at all, or the charity with reference to it is illusory, then the said portion is not 'waqf' property at all.

Quaere, how far provision for 'waqif' and his family may be consistent with 'waqf.'

The Privy Council have not determined how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character as establishing a 'waqf.'[2] The question may come up some time before the courts whether provisions for the family of the 'waqif' and all his descendants how remote soever as long as they exist, may be so blended with charitable or religious objects as to be inseparable from them and yet not be such as to make the charity illusory. Such provisions are recognised as valid if they take the shape of maintenance and salary for a 'sajjadanashin,' or spiritual preceptor (and his family) attached to religious institutions.

Maintenance and salary of 'sajjadanashin.'

For other rules of a similar nature see below, s. 512.

(5) Provisions that may be Contained in a 'Waqfnama.'

Life-interests and limited states under 'waqf.'

473. Subject to sections 480 and 481 below, provisions similar to life-interests or other limited interests may validly be made in a declaration of 'waqf' for the benefit of a succession of persons, during their lives, or during specified periods; and notwithstanding that at the time of the declaration of 'waqf' the said persons are not in being.[3]

Defeasible interests.

474. (1) According to Hanafi law it may be validly provided in a declaration of 'waqf' that a beneficiary therein named should cease to take any benefit thereunder on the happening of some future event.[4]

Power to add beneficiaries valid—not to exclude.

(2) According to the 'Shara'ya-ul-Islam' the 'waqif' may reserve the right to himself to add to the beneficiaries, but he cannot reserve to himself the power to exclude from the benefit

[1] Bail. I. 558 (para 1, *ll.* 7-8 of para 2), 559 (para 1). Ameer Ali, I. 142 (para. 3). *Ramanauadham* v. *Vada* (1911) 39 Mad. 12, 18-20.

[2] *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889) 17 Cal. 498 : 17 I. A. 28.

[3] Bail. I 570-584. There does not seem to be any rule of Hanafi law that the first beneficiary should be in existence : cf. s. 449 above for Shiah law : a disposition for the benefit of individuals under the Shiah law would no doubt be considered in the nature of a *hubs* rather than *waqf* in British India.

[4] Bail. I 589 (para. 2). See comment. It will be observed that these rules refer primarily to individual beneficiaries.

of the 'waqf' any person that he may choose,[1] nor to transfer the benefit from the existing beneficiaries to others subsequently to come into being. SECTION 474

Thus, according to Hanafi law, a 'waqf' may be dedicated for the benefit of a person on condition that if the said person marries, the benefit of the 'waqf' property is to be given to another person.[2] The Contract Act, s. 26, apparently does not affect this rule of law, but according to Shiah law a 'waqf' with a condition that the 'waqif' may exclude whomever he chooses from its benefit, is void. But if the condition were that he may add to the beneficiaries some yet to be born, the 'waqf' would be valid, whether the 'waqf' is for others or his own children. But if the 'waqif' purports to reserve a power of transferring the benefit from the existing beneficiaries to others subsequently to come into being, the 'waqf' would be void.[3] See above s. 466. Benefit to cease on marriage.

(6) Legal Proceedings for Enforcing a Waqf or other Reliefs.

475. (1) In[4] the case of any alleged (i) breach of trust in the administration of a 'waqf,' or (ii) when the direction of the Court is deemed necessary for the administration of a 'waqf' (i) the Advocate-General or (ii) two or more persons having an interest in the 'waqf,' and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government, within the local limits of whose jurisdiction the whole or any part of the subject of 'waqf' is situate to obtain a decree— Civil Procedure Code s. 92. Parties to suit (i) Advocate-General or more persons consent of Advocate-

(*a*) removing any 'mutawalli,'

(*b*) appointing a new 'mutawalli,'

(*c*) vesting any property in a 'mutawalli,'

(*d*) directing accounts and enquiries, accounts

(*e*) declaring what proportion of the 'waqf' property or of the interest therein shall be allocated to any particular object of the 'waqf,' allocation of benefit,

(*f*) authorising the whole, or any part of the 'waqf' property to be sold, mortgaged or exchanged, sale or mortgage

(*g*) settling a scheme, or scheme.

(*h*) granting such further or other relief as the nature of the case may require.[4]

[1] Bail. II. 219 (para. 2).

[2] Bail. I. 589 (para. 2). Other instances of the condition are going out of a named city, or pursuing legal studies, leaving the sect of Abu Hanifa and adopting that of Shafi'i, or apostatising.

[3] Bail. II. 219.

[4] S. 475 is the Civil Procedure Code, 1908, s. 92 (Act XIV. of 1882, s. 592), putting in *waqf* for "trust for public purposes of a charitable or religious nature."

SECTION 475 (2) Save as provided by the Religious Endowments Act, 1863 (i.e. in section 520 below), no suit claiming any of the reliefs specified in sub-section (1) can be instituted in respect of any 'waqf' except in conformity with the provisions of the said sub-section.[1]

It seems best to give this section as a whole, but the application of it on the various branches of the law will be found noted in their appropriate places. See ss 462, 469, 481, 489, 493, 500, 501, etc.

§ 3.—Subject of 'Waqf' or 'Waqf' Property.

(1) Hanafi law. **476.** According to Hanafi law the subject of 'waqf' may consist either of

(a) Immovable property. (*a*) immovable property,[2] or

(b) Accessories to it. (*b*) movable property which is accessory to immovable property,[3] or

(c) Beasts of burden, arms. (*c*) beasts of burden, or arms,[2] or

(d) Books Not things which consumed by use. (*d*) Qurans or other books,[4] or

(*e*) such other property as it is customary to make the subject of 'waqf';[5] provided that, according to the general opinion held amongst the Sunni authorities, things which are consumed by use cannot validly be the subject of 'waqf.'

(2) Shiah and Shafi'i law: whatever is not consumed by use. (2) According to Shiah and Shafi'i law the subject of 'waqf' may be land, and everything which admits of use without being consumed by use.[6]

(3) Money, shares *quaere*. (3) *Quaere*, whether money,[7] and shares in a limited liability company, are objects which are consumed by use, and cannot therefore validly be the subject of a 'waqf.' The High Courts of Madras and Bombay have held [8] that they cannot be the subject of 'waqf.' In Allahabad it has been held that they cannot be.[9] The High Court of Calcutta has given two decisions [10] in accordance with the former view, and another in accordance with the latter.[11] It is

[1] See p. 385, *n* 4.
[2] Bail. I. 558.
[3] Bail. I. 561 (*ll*. 1-4).
[4] Bail. I. 562 (para. 1).
[5] Bail. I. 562 (para. 2).
[6] See comment.
[7] In *Banubi* v. *Narsingrao* (1906) 31 Bom. 250, 257 9 Bom. L. R. 91, 96, Beaman J. expresses the opinion that movables may be the subject of *waqf*, and also money. Jenkins C. J. sat with him. It is stated, however that the point is not necessary for the decision of the case.
[8] *Khadir Ibrahim* v. *Mahomed* (1909) 33 Mad. 118. *Fatmabai* v. *Gulam Husen* (1907) 9 Bom L. R. 1337.
[9] *Abu Sayid* v. *Bakar Ali* (1910) 24 All. 190.
[10] *Fatima* v. *Ariff Ismailjee Bham* (1881) 9 C. L R. 66, *Kulsom Bibee* v. *Goolam Hossein* (1905) 10 Cal. W. N. 449.
[11] *Sakina Khanum* v. *Luddun Sahiba* app from O. D. 110 of 1900 decided on 10th June 1902; *unreported*—referred to by Ameer Ali, I. 182, *n*. 1.

submitted that the decision in Allahabad and the later decision in Calcutta are in accordance with the Muslim authorities. 476

The law as stated in the 'Fatawa 'Alamgiri' may be thus summarized. The subject of 'waqf' must be immovable, or accessory thereto,[1] or beasts of burden or arms,[2] or Qurans or other books or such property as it is the custom to make 'waqf' of.[3] According to the general opinion held amongst the Sunni authorities, things which are consumed by being used cannot be the subject of a 'waqf'; but in some places it is the custom to make 'waqf' even of money, or grain, and decrees are given in favour of such 'waqfs,' and where a 'waqf' is permitted to be made of money, it is lent to the poor and taken back again; or given in 'muzaribat'. (or partnership) and the profit is given in charity; or grain is given to the poor to sow, to be returned afterwards, or clothes lent to wear.[4] The 'Hidaya'[5] shows on the other hand the different views taken by the authorities, which are tabulated below.

'Fatawa 'Alamgiri' on subject of 'waqf.'

Money.

'Hidaya.'

THE TEXTS ON WHAT MAY BE THE SUBJECT OF 'WAQF.'

Hanafi law			*Shafi'i and Shiah law.*
Abu Hanifa.	*Imam Muhammad.*	*Abu Yusuf.*	
Land alone, movable property even if accessory to land cannot be the subject of 'waqf.'[5]	Lands, together with accessories; also instruments of husbandry.[1] Horses, camels and arms may be lawful subject of 'waqf' for war against the infidels.[5]		Land, and everything which admits of use without destruction of the subject and of everything lawfully saleable, because such articles as admit of usufruct resemble land, horses or arms.[7]
	All movables may be subject of 'waqf' of which 'waqfs' are customarily made, e.g., spades, shovels, axes, saws, planks, coffins (with their appendages) stone or brazen vessels and books.[6]	[Abu Yusuf disagrees with Imam Muhammad, holding that 'waqf' is not valid of movables customarily made 'waqf' of.]	
	Semble furniture and clothes cannot be subject of 'waqf.'		

The 'Shara'ya-ul-Islam'[8] mentions four conditions as being required in the subject of 'waqf:' it must be (1) a substance, (2) the property of the 'waqif,' (3) capable of being used without being consumed, (4) also capable of being delivered.[9] The last two requirements are alone applicable to the present section, and as illustrations are mentioned: "'Aqár' or lands and houses, clothes, furniture, lawful instruments, and generally everything

'Shara ya ul-Islam.'

[1] Bail. I. 561 (*ll.* 1-4).

[2] Bail. I. 558. Sheep together with their wool and milk are referred to as the subject of a *waqf*: Bail. II. 212 (para. 3).

[3] Bail. I. 562 (para. 1).

[4] Bail. I. 562 (para. 2).

[5] Hed. 234.

[6] *Ib.* As to Qurans, all are agreed that they may be the subject of *waqf* but Imam Muhammed (Abu Yusuf *dissentiente*, *ib.* 235. col. i. *l.* 29) holds that other books may also be the subject of *waqf*. "Most lawyers have passed decrees according to the opinion of Imam Muhammad," *ib.*

[7] Hed. 234, Bail. II. 213.

[8] Bail. II. 213.

[9] Hence not an absconded slave.

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from the use of which any benefit[1] can be lawfully[2] derived with the preservation of the thing itself." About money it is said that the doctors are divided on the question whether it may be the subject of 'waqf,' but the opinion which is the most manifest and best supported by traditional authority is stated by the author of the 'Shara'ya-ul-Islam' to be that it cannot validly form the subject of 'waqf.'[3]

Subject of 'waqf': movables generally.

The different views as to what kind of movable property may form the subject of 'waqf' may be classified under the following heads :—

(1) As to movable property generally :

(*a*) Abu Hanifa holds that movables cannot be the subject of 'waqf.'[4]

(*b*) Others hold that all "movables which constitute the subject matter of every-day transactions and dealings between people are valid,"[5] *sed quaere.* This view is stated to be—

(i) Abu Yusuf's opinion as stated in the 'Mujtaba,'[6]

(ii) of Shams-ul-aimma as-Sharakhshi as stated in Qazi Khan,[7]

(iii) of Imam Muhammad,[8]

(iv) of the majority of jurists as stated in the 'Zahiria,'[9]

(v) of the author of the 'Ramz-ul-Hâkaik,'[10]

(vi) of the author of the 'Wajiz-ul-Muhit.'[11]

(*c*) Another view is that "Custom and usage regulate what movables can be the subject of 'waqf.'"[12]

(*d*) Shafi'i says that everything the sale of which is valid, and which can be renewed from time to time by its usufruct, or otherwise, can be validly dedicated and this is also the opinion of Malik and Ahmed Ibn Hanbal.[13]

(*e*) The Shiah authorities according to the 'Shara'ya-ul-Islam' permit everything to be the subject of 'waqf' from the use of which any benefit can be lawfully derived with the preservation of the thing itself: and clothes, furniture, lawful instruments, are given as instances.[14] It is also assumed that sheep may be the subject of 'waqf' and it is said if "a man should appropriate a sheep, the wool and milk existing at the time are included in the 'wukf' unless specially excepted from a regard to custom, as would be the case if the animal were sold."[15]

[1] E.g. trained dog or cat. *ib.*

[2] Hence not hogs, which are *extra commercium, ib.*

[3] Bail. II. 213.

[4] Hed. 234, 235.

[5] This is from Syed Ameer Ali's learned work: but Woodroffe J. held in *Kulsom Bibee* v. *Golam Hossein* (1905) 10 Cal. W. N. 449, that the correct translation of the passages referred to by the learned author should be, "Everything which it is the practice to make *waqf* of." If this is so (as seems likely) then clause (*b*) and (*c*) above should be amalgamated.

[6] Ameer Ali, I. 176 (para. 4), 177 (*ll.* 13-15 *sed quaere*, cf. Hed. 234 (col. i. *l.* 29). According to Imam Muhammad the *waqf* of movables is unrestrictedly valid, and according to Abu Yusuf the *waqf* of such movables as form the subject of business transactions is lawful—so stated in the Mujtaba on the authority of the 'Siyar,' cited in the 'Fath-ul-Qadir' and in the Bahrur-Raiq.' Ameer Ali, I. 177.

[7] Ameer Ali, I. 178 (para 5).

[8] Ameer Ali, I. 177 (*ll.* 5-6).

[9] Ameer Ali, I. 177 (*ll.* 9-11),

[10] Ameer Ali, I. 181 (para. 1).

[11] Ameer Ali, I. 181 (para. 2).

[12] Ameer Ali, I. 176 (para. 5), citing *Qazi Khan*, 181 (para. 2), citing *Wajiz-ul-Muhit* 184 (para. 1), citing *Radd-ul-Muktar*.

[13] Ameer Ali, I. 180 (para. 5) : also as to Shafi'i, *ib.* 181 (para. 2) from *Wajiz-ul-Muhit*.

[14] Bail. II. 213 (*first*).

[15] Bail. II. 212 (para. 8).

(2) Next, coming to particular kinds of movables, we find it stated that— SECTION 476

Particular

(*a*) The 'waqf' of shrouds and books is valid.[1]

(*b*) 'Waqf' of milk of a cow is valid if customary.[2]

(*c*) "Ornaments can be dedicated, for Hafsa, the daughter of Omar (the Caliph) dedicated her ornaments, and such has been the practice."[3]

(*d*) With reference to money— Money.

(i) "The author has stated in the 'Manah,' "in our time in the countries of Rum [Turkey] etc., it is customary to make 'wakf' of 'dirhems' and 'dinars' so the 'wakf' of 'dirhems,' and 'dinars' comes within the dictum of Muhammed, which is that every article which forms the subject of business transactions, a 'wakf' 'thereof is lawful,' and on this is the 'fatwa' and all this is patent."[4] "Ansâri, who was a disciple of Imam Zaffar, was asked if the 'wakf' of money (original 'dirhems') and whatever can be weighed or measured is valid or not. He replied, yes, a valid 'wakf' may be made thereof. Asked how such things can be made 'wakf,' he replied such money should be invested in some partnership business and its profit applied to the purposes of the 'wakf,' and if it is an article it should be sold, and its price invested similarly."[5]

(ii) In the 'Shara'ya-ul-Islam' it is stated: "Whether again 'dinars' and 'dirhems' can be validly appropriated is a question which some of our doctors have assumed in the negative; and their opinion is the most manifest, or best supported by traditional authority, because they are things from which no benefit can be derived except by spending them. Others, however, insist that the appropriation of them is valid, because some advantage from them may easily be imagined with preservation of the originals."[6]

Money and shares as subject of 'waqf.'

In British India the controversy really lies around the question whether money, shares in joint stock companies, and Government promissory notes can be the subject of 'waqf.'

Reason why some jurists hold that money cannot be subject of 'waqf.'

It is submitted that in regard to a point of this nature, eminently 'cessante ratione cessat ipsa lex.' It is necessary therefore to examine the reasons for the opinion of those jurists who hold that money cannot be the subject of 'waqf,' and then to consider whether those reasons continue, or have ceased to apply at the present day to money, and whether they can in either case apply to other classes of property (such as shares). Those reasons are not far to seek: as 'waqf' must be perpetual, its subject must necessarily be property of such a nature as is not consumed by use. Now the jurists who held that money cannot validly be the subject of 'waqf' did so because they considered it to be one of those articles which cannot be put to a productive use; and their ground for holding so was twofold; first it was assumed that there is only one means for using money so as not to consume it in the use, viz., to lend it on interest; and secondly that taking

1. Money consumed by use, unless lent on interest.
2. To lend interest is unlawful.

[1] Ameer Ali, I. 176 (para. 5).

[2] Ameer Ali, I. 176 (para. 5), 179, (*l.* 15).

[3] Ameer Ali, I. 180 (para. 3), citing 'Fath-ul-Qadir' II. 636.

[4] Ameer Ali, I. 177 (*ll.* 20-25),

[5] Ameer Ali, I. 180, para. 3, citing *Fath-ul-Qudir*, II. 636, *ib.* 182 (para. 2), citing *Tashil Jowharat-ul-Nayereh* and *Ghait-ul-I*

[6] Bail. II. 213 (*first*).

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These reasons have ceased to apply.

or giving interest is against the policy of law. The first part of the reasoning was traversed even by some of the earliest Muslim jurists immediately succeeding those who gave the first comprehensive expositions of the law, and it certainly is not correct in British India to assert as a fact that money cannot be productively employed when so many investments and methods for making money lawfully productive are known and recognised.[1] The second part of the reasoning is equally inapplicable, as is shown by the usages prevailing amongst Mussulmans, no less than by legislative enactments and decisions of the Courts.

Hence it might have been held that money may be subject of

For these reasons it may have been expected that the British Courts would hold that money may lawfully be the subject of a 'waqf.' The more so as the difference of opinion amongst the 'Mujtahids' leaves an option of following either view.[2] But some of the decisions of the Courts not only assume that money cannot be the subject of 'waqf,' but have even proceeded to extend the invalidity to shares and securities.[3] Thus in the case of 'Fatima Bibi *v.* Ariff Ismailji,'[4] Wilson J. after saying (1) that all the authorities agree in holding that land may be the subject of 'waqf,' and (2) that the validity has been extended to certain other kinds of property, though the authorities are not agreed as to the exact degree of the extension, concluded: (3) but it is agreed that it does not apply to such things as perish in the use, under which head money appears to be included, and if money cannot be appropriated, it seems to me clear that the possibility of receiving money hereafter in the form of dividends cannot be."

Wilson J.'s reasons for holding that shares cannot be subject of 'waqf' considered.

Thus it will be seen that that very able and learned Judge proceeds on the cases that where a 'waqf' is declared of shares in a Company, its subject consists of the right to receive the dividends—whereas in reality it consists of the shares themselves. The income of the subject of the 'waqf' is confused (it is submitted with the greatest respect) with the corpus. If that reasoning were correct, might it not be equally held that the possibility of receiving money as the rents of a house cannot be the subject of a 'waqf,' and consequently that the 'waqf' of a house is invalid. Yet all authorities are agreed that land may be the subject of 'waqf' without restricting it to the case where its produce or income or benefit takes the shape of money. Again it is submitted that it is incorrect to say that shares in a Company are to be classed as money:[5] if it is necessary to bring this quite modern form of property under one of the transactions known to the Muslim jurists who wrote half a dozen centuries ago, it would be more correct analogy, it is submitted, to include it in 'muzaribat'—for the subscribers in a Company are partners and some of them contribute labour (with capital) and others only capital, and the profits are divided by all.

Shares distinguishable from right to receive money.

Conclusion.

For the reasons above referred to it is submitted, with respect, that a 'waqf' with money as its subject may be held to be valid in British India, and that in any event the 'waqf' of shares is not invalid.

[1] The moneys of minors are frequently ordered to be invested. As to interest, see above p. 32 s. 4 and *nn.*

[2] See above pp. 26, 27 and *nn.*

[3] See s. 476 (3).

[4] (1881) 9 C. L. R., 66.

[5] "Savigny Oblig. II. 112, truly observes that ordinary shares in companies are not obligations but parts of ownership, producing, therefore, not interest but dividends." Holland, "Jurisprudence," 275 *n.* 3. Cf. *Colonial Bank* v. *Whinney* (1885) 30 Ch. D. 261; (1886) 11 App. Ca. 426.

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'Waqif' must possess subject of 'waqf.'

477. The subject of 'waqf' must be owned by and in the possession [1] of the 'waqif' at the time when the 'waqf' is made.[2]

Illustrations.

(1) A usurps certain property belonging to B and purports to make a 'waqf' of it; he then purchases it from its rightful owner. The 'waqf' is invalid. But if B, the rightful owner, ratifies the 'waqf' it is valid.[3]

(2) A bequeaths certain land to B. B purports to make a 'waqf' of it in A's lifetime and then A dies. The 'waqf' is not valid.

(3) A makes a lease of his land and then makes a 'waqf' of it before the term of the lease expires or is otherwise determined; the 'waqf' is valid, subject to the lease.[4]

(4) A pledges (gives a mortgage with possession) his land and then declares a 'waqf'; the 'waqf' is valid subject to the pledge (mortgage).[5]

(5) The right to recover money under a decree cannot validly be the subject of 'waqf' [in the absence of a custom authorising it].[6]

'Musha'' as subject of

478. The subject of 'waqf' may consist of a 'musha'' (undivided part of property) notwithstanding that the property is divisible,[7] and, *semble*, the subject of 'waqf' may consist of a charge upon property;[8] provided that according to Hanafi law where the object of the 'waqf' is a masjid or a tomb, an undivided part of any property [9] cannot validly form the subject of the 'waqf.'[7]

As to Hanafi law this section is in accordance with Abu Yusuf's exposition thereof.[10] Imam Muhammad held that an undivided part of property which is capable of division is unlawful, "because actual possession is held by him to be essential . . . so also that without which possession cannot take place is also an essential, namely division; and this can only be in a thing capable of division."[11]

When property is endowed in favour of a mosque, the 'waqf' does not become void by the charge upon the profits, of items which must lapse in the course of time, leaving the whole benefit to the mosque.[12]

[1] Hence an absconded slave cannot be the subject of a *waqf*. Bail. II. 213.

[2] Bail. I. 554, II. 213, 214 (*l.* 1).

[3] Bail. I. 554 (*ll.* 8-10), II. 214 (*ll.* 1-4).

[4] Bail. I. 555 (*ll.* 16-21). The lease is determined under Muhammadan law by the death either of the lessor or lessee (*ib ll.* 33-35).

[5] Bail. I. 555. In *ll.* 25-2, "it should remain for *two* years in the hands of the pledger," read *some* years. See 4 Ben. L. R., (A. C. J.) 90.

[6] *Kadir Ibrahim Rowther* v. *Mahomed Rahumudulla Rowther* (1909) 33 Bom. 118.

[7] Hed. 233; Bail, I. 564, II, 214 (para. 1). In *Mahomed Hamidulla Khan* v. *Lotful Huq*, the *waqf* property consisted of a four anna share: (1881) 6 Cal. 744, 8 Cal. L R. 164.

[8] See above, s. 464 *Explanation*.

[9] Whether it is capable of division or not

[10] "The moderns decide according to Aboo Yoosuf, and that is approved," Bail. I. 564 (para. 2). "M. Clavel tells us that such *waqfs* are common in modern Egypt. *Droit Musulman Wakf ou Habous*, vol. I, p. 222."—Wilson, "Anglo-Muhammadan Law," 344.

[11] Hed. 233 (col. ii.).

[12] *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (1870) 13 W. R. 235.

SECTION 479 Certainty.

479. When a 'waqf' is purported to be made, but its subject is not defined with certainty, the 'waqf' is void.[1]

Illustrations.

(1) A 'waqf' is purported to be made of land on which there are trees, excepting the trees. The 'waqf' is invalid according to Hanafi law, as its subject is not certain.[2]

(2) A 'waqf' purported to be made of "*a* horse" or "*a* mansion" without specifying which, is void.[3]

(3) W purports to make a 'waqf' [for the benefit of his family[4]] and provides that concurrently a sum to be fixed by the 'mutawalli' at his discretion should be given to charity. The gift to the charity is void because its subject[5] is uncertain.[6]

It must be observed that certainty is required in the subject of 'waqf'; but not in the object of 'waqf'; for if a general charitable intention is disclosed the Court will apply the property to charity.[7]

§ 4.—*Object or Purpose of 'Waqf.'*

(1) Objects that are Valid.

Substantial dedication to charity.

480. (1) To constitute a valid 'waqf' the property forming its subject must be substantially dedicated to a charity.[8]

Provisions for the family.

Explanation I—It is consistent with the constitution of a valid 'waqf,' to make provisions for the family of the 'waqif'[9] out of the 'waqf' property, provided that the said property is substantially dedicated to charitable purposes,[10] and the charity is not illusory either by the small proportion that it bears to the said property, or from the uncertainty and remoteness of the time when the provisions relating to charity are to take effect.[11]

Settlement in perpetuity on family with ultimate charity void.

Explanation II—A settlement in perpetuity on the family of the 'waqif' is not a valid 'waqf'[12] notwithstanding that it contains

[1] Bail. I. 555-556, II. 213. *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42.

[2] Bail. I. 556. Cf. as to the *musha'* doctrine, above ss. 374 *et seq.* and s. 382.

[3] Bail. . 213.

[4] See s. 480 below.

[5] Not its object; see below s. 48.

[6] *Mujibunnissa* v. *Abdur Rahim* (1900) 23 All. 233.

[7] See s. 481 below; Ameer Ali, I. 174.

[8] See s. 456 above; Bail. II. 215 (para. 2). *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889) 17 Cal. 498; 17 I.A. 28 *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdri* (1894) 22 Cal. 619; 22 I.A. 76 *Mujibunnisa* v. *Abdul Rahim* (1900) 23 All. 233; 28 I. A. 15; 5 C. W. N. 177. See case cited in *ill.* (1), (*p.*) below p. 394 *n.* 8 and p. 400.

[9] As to the validity of provisions in favour of the *waqif* himself, see s. 486 below.

[10] *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889), 17 Cal. 498, 17 I.A. 28 approving *Muzhurool Huq* v. *Puhraj Detarey Mohapattur* (1869) 13 W.R. 235 *Deohi Prasad* v. *Inait Ullah* (1892) 14 All. 375.

[11] *Abul Fata Mahomed* v. *Rasumaya* (1894). 22 Cal. 619, 634, 22 I. A. 76; it may be "illusory whether from its small amount, or from its uncertainty and remoteness," followed *Mahommed Munawar Ali* v. *Rasulan Bibi* (1899) 21, 329.

[12] Cf. *ill.* (3) to this section.

an ultimate provision for the benefit of the poor or other charitable object [1] on the extinction of the 'waqif's' family.[2] SECTION 480

Explanation III—Where a declaration of 'waqf' contains provisions for the benefits of specified individuals other than the 'waqif' and the members of his family, or otherwise for the benefit of objects which are not charitable, they are governed in British India by the same rules as those contained in *Explanations I* and *II* above, with the necessary changes.[3] Provisions for objects other than charity.

(2) It has been held that the Shafi'i law of 'waqf' is the same as regards making provisions for the family of the 'waqif' as the Hanafi law.[4] Shafi'i law.

Illustrations.

(1) The following are valid objects of 'waqf'[5]—

(*a*) to perform 'haj' every year out of the income,[6] or

(*b*) to bestow every year in charity instead of my sins of omission,[6] or

(*c*) to pay my debts, with an ultimate dedication to the poor, or [7]

(*d*) for 'jihad' or religious wars, or [8]

(*e*) for endowing a teacher for a school,[8]

(*f*) for the salary of an imam or leader of prayers,[8]

(*g*) for shrouds for the dead, or for digging their graves,[6]

(*h*) for funeral expenses of poor people,[6]

(*i*) for sinking wells or tanks,[6]

(*j*) for celebrating the birth of 'Ali, the third Khalifa and son-in-law of the Prophet,[9]

[1] *Abul Fata Mahomed Isak* v. *Rasamaya Dhur Chowdhri* (1894), 22 Cal. 619; 22 I. A. 76 *Murtuzai Bibi* v. *Jamuna Bibi* (1890), 13 All. 261 (testamentary *waqf* by a Shiah, but no Shiah authority cited); *Munawwar* v. *Razia Bibi* (1905) 27 All. 320; 32 I. A. 86; *Hamid Ali* v. *Mujawar Husain Khan* (1902) 24 All. 257; *Fazlur Rahim Abu Ahmud* v. *Mahomed Abedul Azim: Abu Ahsan* (1903) 30 Cal. 666; 7 C. W. N. 916; *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233 (P.C.); *Bikani Miya* v. *Shuk Lal* (1892) 20 Cal. 116; *Fazlar Rahim* v. *Mahomed Obedul Azim* (1903) 30 Cal. 660.

[2] For there the settlor used the word *waqf* as merely a "veil to cover arrangements for the aggrandisement of the family, and to make the property inalienable."—*Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 511; 17 I.A. 28.

[3] "The mere charge upon the profits of the estate of certain items which in the course of time must necessarily cease (being confined to one family) and which after they lapse, will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Muhammadan Law"—per Kemp J. *Muzhurool Huq* v. *Puhraj Detarey Mohapattur* (1869) 13 W. R. 235, cited with approval by the P. C. in *Mahomed Ahsanulla Chowdhry* v *Amarchand Kundu* (1889) 17 Cal. 498, 17 I.A. 28.

[4] *Mahomed Abdulla Jitaker* v. *Abdul Rahiman Jitaker* (1907) 9 Bom. L. R. 998. (Macleod J.) In regard to Shiah law the right to create life interests in the form of dispositions which the Courts do not class as *Waqfs*, have been recognised. See above ss. 446 *et seq.*

[5] Bail. 566.

[6] *Ib.* Hed. 240 *ib. Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42 *Asoobai* v. *Noorbai* (1905) 8 Bom. L.R. 245.

[7] *Ib. Luchmiput Singh* v *Amir Alum* (1882) 9 Cal. 176; 12 C.L.R. 22.

[8] Hed. 240.

[9] *Biba Jan* v. *Kalb Husain* (1909) 31 All. 136; *Ramanadham* v. *Vada* (1910) 34 Mad. 12. See cases cited in *nn.* 3, 6, 7.

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for making ' ta'zias ' in the month of Muharram,[1]

(*l*) for celebrating the anniversary (' barsi ') of the death of the ' waqif ' and the members of his family,[1] *sed quaere*,[2]

(*m*) for the performance of the ' qadam-i-shauf,[3]

(*n*) for reading the Quran in public or in a private house,[4] *sed quaere*,[5]

(*o*) for works of general utility,[6]

(*o*) for a feast for the community,[7]

(*p*) The[8] performance of ' Fatiha '[9] (in the sense of distribution of alms to the poor accompanied with prayer for the welfare of the souls of deceased persons) which so far as it involves the expenditure of money consists in feeding the poor, is a valid object of ' waqf.'[9]

(2) The following are not valid objects of ' waqf ':

(*a*) for lawyers,[10]

(*b*) for reading the Quran at graves,[11] —*Sed quaere.*

(3) " The creation of a family endowment " is not " a religious and meritorious act ": nor " the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate, a charitable purpose, " and neither is a valid object of a ' waqf.'[12]

(4) The following are stated in the ' Fatawa 'Alamgiri '[13] to be not valid objects of ' waqf ': *sed quaere:*[14]

(*a*) for mankind,[14]

(*b*) for the people of Baghdad and when they fail for the poor,[14]

(*c*) for reading the Quran,[15]

(*d*) for the students in a school,[14]

(*e*) for the teacher in a ' masjid,'[14]

(5) W transfers property to his son upon trust to support out of its income such of his descendants and kindred as might be in great want and in need of support, and subject thereto for certain charitable objects. The object of the ' waqf ' being charitable, the ' waqf ' is not invalidated by the provisions in favour of W's descendants and kindred.[16]

[1] See p. 393, *n.* 9.

[2] *Kaleloola* v. *Nusurudeen* (1894) 18 Mad. 201 ; *Fakhruddin* v. *Kifayatulla* (1910) 7 All L. J. 1095.

[3] *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All 211.

[4] *Mazhar Husein* v. *Abdul Hadi Khan* (1911) 33 All. 400. Cf *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264, Affirmed (1892) 17 Bom. 1, 19 I.A. 170.

[5] See *ill.* (3) (*c*) below. Cf. *Asoobai* v. *Noorbai* (1905) 7 Bom. L. R. 245, 246, 2 (*c*).

[6] Bail. II. 215, bridges and masjids are given as instances.

[7] So held by Macleod J. in Chamber in *Hejtulla Abdul Ali* v. *Sharaf Ali Mamooji* Suit 334 of 1909 O.S. decided by Macleod J. on 22 June 1909 ; see also *Asoobai* v *Noorbai* (1905) 7 Bom. L. R. 245, 246.

[8] (*Mutukana Ana*) *Ramanadham Chettiar* v. *Vada Levvai Marakayar* (1909) 31 Mad. 12.

[9] *Fatiha* means opening. It is generally meant to refer to the title of the opening *sura* or chapter of the Quran Reading the *Fatiha* forms part of almost every religious ceremony of the Mussulmans. Mr. Lane-Poole refers to it as the Lord's Prayer of the Mussul-

[10] Bail. I. 566 (*ll.* 21-22 of para. 2).

[11] *Kaleloola* v. *Nusurudeen* (1894) 18 Mad 201. Cf. *Zoolekha Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom L. R. 1058.

[12] *Mujibunnissa* v. *Abdur Rahim* (1900) 28 I. 28 I A. 15

[13] Perhaps the reason is that rich and poor are alike to benefit under it. See *n.* 488 ; or possibly for uncertainty. See s. 483.

[14] Bail. I. 566 (*ll.* 21-22 of para. 2) ; but it has been held otherwise, see *ill.* (1) (*m*) above.

[15] *Inaitullah* (1892) 14

(6) W purports to make a 'waqf' of property yielding Rs. 850 per year for the benefit (*a*) of his family, (*b*) for charities according to the custom of the family. If (i) the customary charities require the expenditure of Rs. 500 per year, the 'waqf' is valid,[1] but if (ii) they do not entail more expense than is becoming in a Muslim family of the same social position as that of W to give in charity, then the 'waqf' is void [2]; similarly it is void if the amount to be expended in charities is left entirely to the discretion of the 'mutawalli.' [3]

(6) W purports to make a 'waqf' of four houses valued at Rs. 1,50,000, and appoints his son M 'mutawalli.' The declaration of 'waqf' provides (i) that W should have a right of residence in the largest house (valued about Rs. 1,10,000); (ii) that M and all succeeding 'mutawallis' (who were to be members of W's family) should have the same right; (iii) that W's wife *F* and her children should, subject to clause (vi) below, have the same right; (iv) that the rates, taxes, etc., be paid out of the income of the 'waqf' property; (v) that the net income should then be divided into three equal parts to be spent respectively for (*a*) the repairs and maintenance of the 'waqf' property, (*b*) expenses of a mosque, (*c*) feeding of learned men from Mecca, Medina, Baghdad, Samarqand, Bukhara and other places noted for learning; (vi) That the said house should, subject to the rights under clauses (i) and (ii) above, be for the accommodation of the said learned men; *held*, that the waqf is valid.[4]

(7) W and WA executed a deed purporting to be a 'waqfnama' and commenced with an invocation to God, proceeded to describe the objects of the 'waqf' as follows: for the benefit of our children, the children of our children and the members and relatives of our family and their descendants in male and female lines, and in their absence for the benefit of the poor, and beggars and widows and orphans of Sylhet, on valid conditions and true declarations hereinafter set forth below. Then W and WA declared themselves to be the first 'mutawallis' and that the 'waqf' properties were thenceforth taken out of their ownership and enjoyment in a private capacity and that in order to maintain the name and prestige of their family they would make reasonable and suitable expenses according to their means and position in life. It was expressly stated that the objects of the 'waqf' was that "the properties may be protected against all risks and the name and prestige of the family, maintained," etc. There was no reference to religion except the invocation to God to perpetuate the family, and preserve the property and the casual mention of religious purposes, etc. There was a gift to the poor and to widows and orphans but they were to take nothing, not

[1] *Phul Chand* v. *Akbar Yar Khan* (1986) 19 All. 211, see next note.

[2] *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498; 17 I.A 28.

[3] *Mujibunnissa* v. *Abdul Rahim* (1900) 23 All. 233. 28 I.A. 15.

[4] *Kulsom Bibi* v. *Golam Hossein* (1905) 10 C.W.N 449, 485, Under Shiah law clause (i) would have invalidated it. See s. 436 (2) below. If there is a lack of learned men, and the object of the *waqf* fails, "the court will on being invited to do so, doubtless apply it *cy près*. If the learned men come and *F* and her children do not vacate the house for their accommodation, there would be a breach of trust for which the *mutawalli* may be removed."

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even surplus income, until the total extinction of the blood of the settlors whether lineal or collateral. *Held*, (*a*) that Muhammadan law was applicable to the point, but (*b*) the texts cited by Ameer Ali J. in 'Mahomed Israel Khan *v.* Shasti Churn Ghose'[1] and in 'Bikani Mia *v.* Shuklal Poddar'[2] are of an abstract nature and the precedents very imperfectly stated; and that there was not material enough to judge whether they would be applicable at all. (c) There was no answer to the question how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions which are illegal when made by ordinary words of gift become legal if only the settlor says that they are made as 'waqf' in the name of God, or for the sake of the poor. (*d*) That a charity postponed till all the members of a family are extinct cannot be held to be any real charity, or to validate a 'waqf'[3] without making words of more regard than things, and form more than substance. (*e*) Hence in this case there was no substantial gift to the poor: for (*f*) a gift may be illusory whether from its small amount[4] or from its uncertainty and remoteness.[5]

Judicial decisions:

1. Charity necessary.

The following dicta may be of interest to show the trend of decisions leading up to 'Abul Fata's' case: (1) "To constitute a valid 'waqf' there must be a dedication of the property solely to the worship of God or to religious or charitable purposes."[6] (2) There must be a substantial dedication to charity some time or the other.[7] (3) The instrument would not operate to establish 'waqf' as it did not devote a substantial part of the property to religious or charitable purposes;[8] the property must be substantially and not merely colourably dedicated to such purposes.[9] (4) A mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the 'waqif' is not sufficient to validate the 'waqf.'[10] (5) A 'waqf' the "purpose of which is merely to create a family settlement without a charitable object is void."[11] (6) *Quaere*, whether a family trust is invalid without express mention of a charity in favour of beneficiaries who cannot fail.[12] (7) Family settlements

2. Ultimate charity will validate family settlement.

[1] (1892) 19 Cal. 412.

[2] (1892) 20 Cal. 116.

[3] As is done by Syed Ameer Ali J. in the two cases cited above and by West J. in *Fatma Bibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 58; and Farran J. following it in *Amrutlal Kalidas* v. *Shaik Hussein* (1887) 11 Bom. 492.

[4] "As if a man were to settle a crore of rupees and provide ten for the poor, that would be at once recognized as illusory." P. C.

[5] *Abul Fata* v. *Rasamaya* (1894) 22 Cal. 619: 22, I.A. 76. Remoteness and uncertainty are thus referred to: "It is equally illusory to make provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position."

[6] *Mahomed Hamidulla Khan* v. *Lolful Huq* (1881) 6 Cal. 744; 8 C.L.R. 164 in identical words: *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (1873) 10 Bom. H. C. R., 7.

[7] *Abdul Gafur* v. *Nizamudin.* 17 Bom. 1; 19 I.A. 170.

[8] *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889) 17 Cal. 498; 17, I. A. 28.

[10] *Muhammad Munawar Ali* v. *Rasulan Bibi* (1899) 21 All. 329.

[11] *Fatma Bibi* v. *Arif Ismailjee Bhaw* (1881) 9 C. L.R. 66.

[12] *Phate Saheb Bibi* v. *Damodar Premji* (1879) 3 Bom. 84; see s. 468: comment.

can only be valid when the term 'sadaqa,' is used and even supposing they were then valid, the 'waqif' must reduce himself to a state of absolute poverty.[1] (8) If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a 'waqf' is not rendered invalid by an intermediate settlement on the founder's children and their descendants.[2] The last three decisions are no more law. SECTION 480

The question referred to in *Explanation III* to this section was considered in 'Casamally *v.* Currimbhai.'[3] The reservation of a life-interest in favour of the 'waqif' himself and his creating life-interests in favour of others fall under distinct heads; and different considerations apply to them: (1) The reservation of any benefit whatever, (whether consisting of a life interest or otherwise) in favour of the 'waqif' is not permissible under any system of Muhammadan law except the Hanafi; and even under the Hanafi law only according to the exposition of Abu Yusuf—whose opinion however prevails. According to all other schools he cannot participate in the benefit of the 'waqf' property but must part with all interest in it. (2) Secondly, the creation of life interests in favour of others than the 'waqif' may be attacked on two grounds, (*a*) on the assumption that life interests are a kind of estate not known to Muhammadan law at all. But it is quite clear, apart from the question of the validity of life-interests created in modes other than by way of 'waqf,' that where a 'waqf' is declared for the purpose of making a family settlement, a series of life-interests are permitted under strict Muhammadan law. It may possibly be argued, however, that such life-interests are an integral part of the special branch of law relating to 'waqfs' for family settlements and that the Privy Council ruling holding that a family settlement with an ultimate charity is not a valid object of 'waqf' abrogates all the law relating to family settlements, including the rule permitting the creation of life-interests in a 'waqf.' This is an extreme view, and it would not have been necessary to mention it but for some unguarded statements of an absolutely general nature about life-interests which are occasionally encountered in the reports. The next and the only real point is (*b*) whether the creation of a series of life-interests of itself makes the 'waqf' illusory or colourable. That must depend on the extent and duration of the interests in each case. The 'waqf' will be valid, in the words of the Privy Council, "if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the family,"[4] or to individuals, or to objects which are not charitable.

481. When a 'waqf' is purported to be made expressing a general intention of charity, but either particularising no objects, or particularising objects which have failed, the property may, by an order of the Court, be devoted to the poor,[5] **doctrine.**

[1] *Mahomed Hamidulla Khan* v. *Lotful Huq* (1881) 6 Cal. 744; 8 Cal. L. R. 164.

[2] *Fatmabibi* v. *Advocate-General of Bombay* (1881). 6 Bom. 42, followed *Amrutlal Kalidas* v. *Hussein* (1887) 11 Bom. 492.

[3] (1911) 13 Bom. L. R. 717, 762, 763. *Mujibunnissa* v. *Abdur Rahim* (1900 23 All. 233. 242; 28 I.A. 15.

[4] *Muthukana Ana Ramnaadpan* v. *Vada Livvai* (1909) 34 Mad. 12, 17, where it was apparently left to the discretion of the trustees to fix portions of income to be spent in charity; and it was held that the law provides that each object should benefit equally.

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or to charitable objects as near to those that have failed, as possible.[1]

'Waqf' for "good objects" shows general charitable intention.

Explanation I—A 'waqf' may be validly made generally for charity or for good objects, without specifying[2] them, and it will be given effect to by the Court framing, if necessary, a scheme for a charity.[3]

No failure if members of community secede.

Explanation II—Where the object of a 'waqf' is to benefit a community of persons, holding particular religious tenets, it will enure for the benefit of the persons professing the religious tenets held by the said community in its origin, so long as they exist; and the secession of a number of persons originally forming part of the said community, does not mean that the said object has failed, and will not affect the operation of the 'waqf,' notwithstanding that the said seceders form the vast majority of those who originally formed the said community.[4]

Illustration.

(1) In the will of a Khoja Muhammadan, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right" is a valid charitable bequest and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects by analogy to Act 43, Eliz. c. 4. Where, however, the will is in the native language and the word 'dharm' or 'dharam' is used, the word is *held* too vague and uncertain for the gift to be carried into effect by the Court, the word 'dharm' or 'dharam' including many objects not comprehended in the word "charity" as understood in English law.[5]

(2) A[6] Shiah Isma'ili missionary, Pir Sadruddin, came to India about the middle of the 15th century, and converted a number of persons, who called themselves 'Khojas,' which means both "the honourable and worshipful person," and "the disciple" [343].[7] The

[1] *Salebhai* v. *Bai Safiabu* (1911). Bom 111; 13 Bom. L.R. 1025 and see comment. Cf. *ill*, to s. 480 above. "Cf. when the purpose of a *waqf* fails it is lawful to apply the income of the *waqf* property to an object nearest in its nature to the original purpose (*jins-i-qarib*). For example, if the object of a *wakf* is a fountain the income may be applied to a tank or canal; if it is a mosque the income is to be applied to another mosque, or to fasting, prayers, etc."—*Fatawa Qazi Khan*, III. 298; Ameer Ali, I. 313, states the same proposition, referring to *Radd-ul-Mukhtar*, III. 574.

[2] Bail. I, 553 (*ll.* 9-12), 558 (last 3 lines), 559 (para. 1, last 3 lines), II. 216 (last line), 217 (*ll.* 1-2); *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42: (after specifying objects: the income to be spent in such other manner "as the trustees may think fit"); *Gangbhai* v. *Thavar Mulla* (1863) 1 Bom. H.C.R. 71 (to be disposed of in charity as my executor shall think right).

[3] See s. 475 above.

[4] See *ill.* (2) to this section.

[5] *Gangbhai* v. *Thavar Mulla* (1863) 1 Bom. H. C. R. 71.

[6] *Advocate-General of Bombay, ex relatione, Daya Muhammad* v. *Muhammad Hussen* (1866) 12 Bom. H. C. R. 323, known as *the Aga Khan's (First) Case*. Cf. the great "Scotch Kirk Case," i.e., *Free Church of Scotland* v. (*Lord*) *Overton* [1904] A. C. 515, 613-617, (per Lord Halsbury); 643-645 (per Lord Davey).

[7] Pages of the report are cited in [ ]. . .

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Khojas transmitted voluntary offerings out of religious feeling to the 'Imam' for the time being of the Isma'ilis, whom they revered as their "murshid" or religious head, and made pilgrimages to Persia. They also paid to the 'Imam' fees on births, deaths, marriages, at new moons, etc. and people outside Bombay paid a percentage of their income, but out of these offerings and contributions (which were primarily paid to the 'Imam') the necessary local expenses of the various Khoja 'jamâ'ats' were defrayed. With a few exceptions, the Khoja community would make no contributions at all for public or caste purposes except in the name and primarily on account of the 'Imam' [347]. The Aga Khan claims and is recognised by the Khojas to be the present 'Imam' [363]. Some of the Khojas having refused to pay the said percentage they were out-casted; and re-admitted only on payment of it. Later the same members were out-casted a second time, as they opposed the Aga Khan on the question whether the Hindu or the Quranic law of inheritance governed the Khojas. In 1861 the Aga Khan published a paper asking the Khojas to profess openly the Shia Imami Isma'ili creed and no more to perform their "marriages, ablutions, and funeral ceremonies" [349] in accordance with the Sunni forms, as they had hitherto done [350] out of 'taqia,' i.e. mental reservation, or rather concealment of their own religious opinions and adoption of alien religious forms, either from a desire to avoid giving offence, or from dread of persecution [335, 355-357], and to sign in a book their adherence to that sect. The vast majority of the Khojas signed accordingly; the only exceptions being (*a*) a few families in Bombay who said that they were Sunnis, and (*b*) others in Bhavnagar who said they were already Shiahs, and there was no need to sign the book. The former were excommunicated, after being given an opportunity to pay the fees and to agree to abide by the rules framed by the whole Jama'at, and they accordingly filed a suit for an account against the 'mukhi' and 'kamaria' (treasurer and accountant) of the Khoja community of all property held in trust by them for or belonging to the Khoja community; for their removal; for a declaration that no person professing Shiah opinions in matters of religion can share in the said property, or have any voice in its management; for a scheme; and for an injunction against the Aga Khan interfering with the said trust property, and in the affairs of the Khojas. *Held*,[1] that when the Court in the exercise of its charitable jurisdiction is called upon to adjudicate between the conflicting claims of dissident parties in communities held together or distinguished by some religious profession or denomination, the rights of the litigants will be regulated by reference to what, upon inquiry, turn out to have been the religious tenets and opinions held by the community in its origin, or at its foundation. A minority, however numerically small, holding fast by these opinions, will be entitled to prevail against a majority, however numerically large, which can be shown to have seceded from, or renounced them. [329] Hence suit dismissed with costs.[2]

[1] Citing *Shore* v. *Wilson* (1839) 9 Cl. Fin. 355.

[2] See p. 398 *n.* 6.

SECTION 481

1. CY PRÈS IN MUHAMMADAN LAW.

'Waqf' in the way of God or for charity in general.

With illustration (1) to this section compare the following: "Where a person has made an appropriation 'in the way of God' it is applied to whatever is productive of reward in a future state, such as religious warfare, the greater and lesser pilgrimages, and the erection of 'musjids' or places of worship, and bridges. So also if he should say 'in the way of God, and way of rewards, and way of good,' the purposes are all considered as one and the same, and there is no necessity for dividing the proceeds of the 'waqf' into three different parts."[1] Cf. "The 'Serajul-Wahaj' states that 'when a person constitutes a 'wakf' generally without designating the object to which it should be applied, it is lawful—and this is correct,'—and then goes on to say that there are several words which are express in their meaning and the use of which clearly constitutes a 'wakf' because they convey in themselves the intention to dedicate, for example, 'wakafto,' 'haramlo,' 'habasto,' 'sabalto,' etc. 'I have dedicated,' 'I have consecrated,' 'I have tied up,' 'I have given in the way of God'[2] .... According to the 'Wajiz-ul-Muhit,' 'If a man were to say "this my land is 'moukoofa' (dedicated) or 'muharrama' (consecrated) or 'mahboosa' (tied up)," it would constitute a valid 'waqf' according to Abu Yusuf, and this is most correct, for he (the 'wakif') has mentioned 'wakf' unrestrictedly[3] and an unrestricted 'wakf' is for the poor by custom and practice, and what is customary is as if conditioned.'"[4]

The object of the 'waqf' need not be mentioned, and where a clear intention is shown to make a 'waqf, it will be applied for the benefit of the poor.

Waqf' for specified object of general utility.

The first sentence of the following passage from the 'Shara'ya-ul-Islam' hardly differs from a statement of the 'cy près' doctrine of English law: "If one should make an appropriation for a 'musluhut' or object of general utility, which has ceased to be used, it is to be applied to any good and pious purpose, and if it is for such purposes generally, it is to be expended on the poor and indigent and in any other way by which an approach is made to Almighty God."[5] Mr. Justice Abdur Rahim has stated the same principle in the following terms as applicable to Hanafi law: "If however the specified objects be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the wakf will be good and the income or profit will be devoted for the benefit of the poor, and in some cases to objects as near to the objects which failed, as possible. This rule is analogous to the doctrine of 'cy près' of the English law."[6]

Cy près' doctrine.

In '(Muthukana Ana) Ramanadham *v.* Vadd Tevvai'[7] there is a careful and instructive judgment (by Benson and Abdur Rahim JJ.) citing texts and stating the result of the law of 'waqfs' prevailing in India with great lucidity. It was held in effect that the 'waqf' purporting to be for family purposes and concurrently for charities, (1) it must be assumed that each object was intended to benefit equally, (2) that benefiting the family not being a valid object of 'waqf' it cannot be given effect to, and (3) therefore the whole benefit must accrue to the charity. On the third point, however, with the greatest deference

[1] Bail. II. 220. Cf. "The words 'This my land is a *sadakah* dedicated to what is good,' or 'to good purpose' also amount to a *wakf*." —Ameer Ali, I. 156.

[2] Ameer Ali, I. 149.

[3] I.e. without defining its objects.

[4] Ameer Ali, I. 150 (para. 2).

[5] Bail. II. 216 (para. 3).

[6] Abdur Rahim, "Muhammadan Jurisprudence," 305, cited with approval by Beaman J. in *Salebhai* v. *Safiabu* (1911) 36 Bom. 111 13 Bom. L. R. 1025, and see illustration to this section.

[7] (1909) 34 Mad. 12.

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it is submitted whether the judgment is correct. The texts that are cited in the judgment are, it is submitted, no more directly applicable—inasmuch as they proceed on the basis that provisions for members of the family are not only valid objects of 'waqf' but must fall under the head of showing a general charitable[1] intention. Now the Privy Council have held that such provisions do not show any such intention; it is submitted that assuming this to be the law by which a 'waqf' is to be governed, where and in so far as such provisions are concerned, the property charged with them is not the subject of a 'waqf' at all—and no general charitable intention being shown about such dispositions the doctrine of 'cy près' cannot be applied to it. Were the Madras decision correct all the 'waqfs' which have been upset by the Privy Council would have been totally and exclusively applied for the benefit of the poor, or the other illusory charity for which it was purported to be made. There are decisions of the Calcutta and Bombay High Courts[2] which support the view submitted above; they do not seem to have been brought to the notice of the Madras High Court, nor is the decision of that Court cited in the last case on the point.

Quaere whether 'cy près' doctrine can apply when and in so far as 'waqf' for family.

The following illustration seems to be directly opposed to the principle on which the rulings that bequests to 'dharam' by Hindus are void: "Suppose a non-Muslim makes a 'waqf' for 'good objects,' now in his opinion building temples, or repairing a fire temple, or giving by way of 'sadaqa' to the poor, would equally be good objects; hence the proceeds will be devoted to the poor, and the other objects will be rejected. This is in the 'Havi.'"[3] This difference again illustrates the distinction between the powers of the Qazis and of the British Courts respectively. The Courts constituted on the English basis renounce jurisdiction in such cases on the ground that their function is to construe and to give effect to dispositions and not to draft grants or make wills for individuals.

Bequest to 'dharam' void for uncertainty.

2. DISTINCTION BETWEEN ENGLISH AND MUHAMMADAN LAW.

A similar distinction must be observed between Muhammadan and English versions of the doctrine of 'cy près'—the former requires the income allotted to objects which have failed to be devoted to the poor;[4] whereas the doctrine of English law is that it will be applied as near as possible to the object specified by the donor.[5]

Muhammadan law permits diversion of funds for any kind of benefit to the poor.

The distinction might in itself not have been of great importance, for when the Muhammadan law requires that it should be devoted to the poor, it may practically be paraphrased as implying that the property may be applied in any charitable manner whatever; thus merely leaving a wider discretion to the

[1] This word is misleading: strictly we should say "general intention to make a *waqf*." Now under the P. C. ruling *waqf* implies charity—hence an intention to make a valid *waqf* must include a general charitable intention, and where it is clear that the only intention, is to make family provisions, it is clear that no charitable intention is shown—hence no intention to make a *waqf* is shown.

[2] *Bikani Mia* v. *Shuk Lal Poddar* (1892) 20 Cal. 116 (F.B.); *Mahomed Hassan* v. *Mahomed Ibrahim* (1908) 5 Bom. L. R. 624; *Abdul Rajak* v. *Bai Jeentabai* (1911) 14 Bom. L. R. 295.

[3] *Fatawa 'Alamgiri*, *Waqf*, Ch. 1. Cf. Bail. I. 553 (*ll.* 5, 10 *et seq.*) See *ill.* (1) to this section and cf. *Runchordas* v. *Parvatibai* (1899) 23 Bom. 735.

[4] Cf. ss. 469, 472 above.

[5] *Re Lambeth Charities* (1853) 22 L. J. (CH.) 959; *Moggridge* v. *Thackwell* (1802) 7 Ves. 36, 69; *Mills* v. *Farmer* (1815) 1 Mer. 55; *A.-G.* v. *Bristol Corporation* (1820) 2 Jac. & W. 294, 308; *Chamberlayne* v. *Brockett* (1872) 8 Ch. 206; *A.-G.* v. Price (1908) 24 T. L. R. 763. *Re Prison Charities* (1873) L. R. 16 Eq. 129, 146.

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Qazi,[1] as is the case in most other matters.[2] Even under the rule of English law, when no charity can be found bearing a similarity to the original object, the fund will be devoted to a purpose which has no trace of resemblance to it.[3] The distinction however leads us to the consideration noticed below, whether the Muhammadan law defeats its purpose by being too wide and unrestricted, and thus is incapable of being enforced by the Courts as constituted in British India.

3. OPERATION OF 'WAQF' FOR GOOD OBJECTS GENERALLY.

Trust for unspecified charity.

Sir Roland Wilson remarks with reference to this as follows: "The assertion in Ameer Ali's 'Mahomedan Law,' note i. p. 325, that the principle laiddown in 'Morice *v.* The Bishop of Durham' is not applicable to trusts or consecrations under that law seems to be founded on a misapprehension of the principle, which if rightly understood is seen to be involved in the very nature of civil jurisdiction." Then he says that if a trust "for good purposes unspecified" is construed as exempting the trustee from all judicial control, it is no trust at all, but a beneficial bequest to him personally. If, on the other hand, it is construed (with Syed Ameer Ali) as empowering the 'Hakim' to frame a scheme at his own discretion, "it is to confer upon the officer so designated a function which is not judicial but administrative; it is to make the so-called 'wakf' in effect a bequest to the State—only that the State is to estimate the goodness of different purposes by a Muhammadan standard. If this is really the Muhammadan Law it is outside the province reserved for that law in British India." Illustration (1) to this section shows both that it is the Muhammadan law, and that it is enforceable in British India. But, quite apart from the question whether the Muhammadan law is capable of being enforced in British India or not, there is a great distinction in strict Muhammadan law between giving a person an absolute beneficial interest in property, and giving it to him by way of 'waqf,' leaving it to his discretion to spend it in good purposes unspecified, or even for his own benefit; for as soon as property becomes 'waqf' it becomes inalienable, and the interest of the trustee—or rather, in the case in point, of the grantee—would then be restricted to his life-time. It becomes something like an entailed estate. This portion of the law is no doubt a dead letter in India owing to the decisions of the Privy Council. But what Sir R. Wilson refers to as the second horn of his dilemma appears to the present author to be based on an oversight of the "distinction [which] was taken by Lord Hardwicke,

[1] Some passages in Ameer Ali I. 336, consisting of translations from *Surrat-ul-Fatawa* p. 420, seem to give such wide powers to the Qazi, that the criticism of Sir R. Wilson referred to in the next following paragraph of the comment may seem to be justified. Thus it is said, "If he has made the condition that so much grain should be bestowed on the beggar asking for alms at the door of his mosque, the condition may be varied, and the alms may be bestowed on such beggars as do not ask for alms there." (*a*) "If he has made a condition that cooked food should be bestowed on the recipients, the 'mutawalli' has the power of giving them the value thereof, and the recipients can even ask for payment in cash." (*b*) "If the *imam* is a learned and pious man, and the allowance fixed by the *wakif* for him is not sufficient, the Kazi has the power of increasing it." (*c*) "If there is a condition to the effect that the *wakf* property should never be changed, should the Kazi deem it advisable, he has the power to authorise the same." The last proposition is supported by the *Bahr-ur-Raiq* V. 241.

[2] See above, pp. 22, 27, and cf. Ameer Ali I. 300: "If there are no provisions in the *wakf-namah* for the carrying out of the purposes of the trust, the Kazi or Judge has absolute discretion to frame a scheme"—citing *Kiniat-ul-Munia*.

[3] *A. G.* v. *Boultbee* (1794) 2 Ves. 388; *Clepham* v. *Edinburgh Corporation* (1869) L. R. 1 Sc. & Div. 417, 421.

Chancellor, that where[1] the devise is to a superstitious use, and made void by statute, or to a charity and made void by statute of mortmain, there it should belong to the heir at law; but where it is in itself a charity but the mode in which it is to be disposed, is such that by the law of England it cannot take effect, . . . there the Crown by sign manual directed to the Attorney-General, may give orders in what charitable manner it shall be disposed."[1]

General intention of charity but no object particularised.

The point is made very clear in Lewin on Trusts, Ch. IX. s. 1,[2] under the last (seventh) remark applicable to resulting trusts generally, where it is "noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts;[3] for upon the construction of instruments of this kind, . . . (i) where a person . . . expresses a general intention of charity, but either particularises no objects, or such as do not exhaust the proceeds, the Court . . . will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied; (ii) where . . . . in consequence of an increase in the value of the estate an excess of the income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner, with the original amount: (iii) but even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir at law, or will belong to the donee of the property subject to the charge, if the donee be [as in the case of a charitable corporation] itself an object of charity."[2]

Settlement of scheme.

Lord Hardwicke's remark cited above and the first of the exceptions referred to in Lewin on Trusts, seems to cover the case of a "bequest to the State" (as Sir R. Wilson chooses to call it), provided that a general intention of charity is expressed. It is submitted that the Muhammadan law does not differ on this point from English law; nor does the difficulty that the State should estimate the goodness of different purposes by a Muhammadan standard seem unsurmountable. The Advocate General is the guardian of all charities and he has the power—or even if it be assumed that he has not—he can be empowered, to take the assistance of the community in arriving at a decision, and in preparing the scheme which he has to lay before the Court; or the Court can take evidence on the point.

Resulting trusts and doctrine of 'cy

The same learned author[4] says, referring to the exceptions cited above, "that they were established [in England] at an early period when the doctrine of resulting trusts was imperfectly understood. The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee. Were the subject still unprejudiced by authority there is little doubt but the Court would at the present day follow the general principle, and hold a trust to result."[4] These remarks apply with less force to the Muslim doctrine of 'cy près' in a 'waqf' for here the case is analogous to that of a gift to a charitable corporation to which Lewin refers in the last sentence of (iii) cited above.

[1] *DaCosta* v. *DePas* (1754) Amb. Part I. p. 228.

[2] Lewin, "Trusts" (12th Ed. 1911), 181.

[3] *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522, having been cited for the proposition that when the intention not to benefit the grantee is expressed on the trust, but no trust is declared, there is a resulting trust. Lewin, 169. In that case Lord Eldon carefully distinguished *liberality* (the word used by the Ustalrix) from *charity*, saying at p. 530: "the meaning of liberality is so extensive that it is impossible to define it."

[4] Lewin "Trusts" (12th Ed. 1911) 183.

SECTION 482

(2) *What are not Valid Objects of 'Waqf.'*

Object prohibited by Islam.

482. A 'waqf' cannot be made for an object which is prohibited by Islam.[1]

Erection of churches and temples forbidden.

Explanation I—A 'waqf' cannot be made for the erection, repair or support of a place of worship in accordance with the tenets of a religion other than Islam.[1]

Benefit of human beings always lawful object.

Explanation II—The benefit of no human being is prohibited by Islam, notwithstanding that the said person be a non-Muslim, or an apostate; provided only that he is not the subject of a hostile State.[2]

Necessity of "nearness" between the 'waqif' and the object of 'waqf.'

The section is based on the following passages: "It is a further condition that there be a nearness, that is some relation between the appropriator ('waqif') and the objects of the appropriation,"[3] and then instances are given that a Muslim cannot make a 'waqf' for a church or a temple; nor a 'zimmi' for the enemy. As the Muhammadan law applies only to Muslims in India, they alone can make 'waqfs' and therefore 'waqfs' must have nearness to Islam. But according to strict Muhammadan law non-Muslims may make a 'waqf' for purposes "which have nearness to themselves"—though they could not for a temple or "house of fire."[4] "Even though he should make the 'wukf' to his son and his descendants and then to the poor, on condition that if any of his children become Mooslims they shall be excluded from the charity, the condition would be binding; so also if he should say whoever turns to any other religion than Christian is excluded, regard would be paid to the condition. It is stated in the 'Fatawa' of Aboo Leith that when a Christian makes a settlement ('wukf') upon his children and his children's children for ever, so long as there are any descendants, or makes the ultimate destination to the poor as is customary, and some of his children become 'Mooslim' they are nevertheless to receive."[5]

'Waqf' by a non-Muslim.

Valid so long as object not opposed to Islam.

"A 'Mooslim' cannot make a settlement on an alien enemy, though a blood relation; but he may make it on a 'zimmi' or infidel subject, even though a stranger or in no way related to him. Yet an appropriation by him for Jewish synagogues or Christian churches is not valid. So also if he should make an appropriation in favour of fornicators or highway robbers, or drinkers of wine or for the copying of what are now called the 'Towreet' and 'Injeel' (the Law and Gospels), for they are altered and perverted versions. But if the appropriation were by an infidel it would be lawful."[6] See comment to s. 456 above.

Explanation II is based on the first sentence above cited, and the following passage: "A 'wukf' in favour of a 'zimmee' or infidel subject is lawful, because it is a transfer of property, and is like a permission to take the usufruct. Some say, however, that it is not valid because it implies a pious intention, and is good only when made for the benefit of a parent; while others maintain that it is good when for the benefit of any relative. But the first opinion (which sustains it generally) is the most approved. So also a settlement

[1] See comment to this section.
[2] Bail. II. 215; see comment.
[3] Bail. I, 552, 553.
[4] Bail. I. 523 (*ll.* 27-30).
[5] Bail. I. 552.
[6] Bail. II. 215 (para. 3).

in favour of an apostate is valid, while there is some doubt as to one in favour of an alien enemy, the more approved opinion being entirely against it." [1]

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If no objects mentioned: in Shiah law void.

483. (1) Where a declaration of 'waqf' is purported to be made, but its objects are not mentioned, under Shiah law the 'waqf' is void.[2]

(2) According to Abu Yusuf's exposition of Hanafi law, making a declaration of 'waqf' is conclusive proof for inferring a general charitable intention under section 481 above; but *semble* the Hanafi law as enforced in British India [3] is to the same effect as the Shiah law above referred to.[4]

The first subsection is based on the following translation from the 'Shara'ya-ul-Islam': "If a man should make an appropriation without mentioning its objects, the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, 'for one of these two, or for one of the two "mushids"'; or 'two "fureeks,"' the whole would be void."[5] And it has been held in a Punjab case that the object of a 'waqf' should be certain, otherwise it will fail.[4]

Option to the 'mutawalli' to give to one of several objects.

On the other hand it is laid down in the 'Fatawa Alamgiri' that where "a man makes a 'wukf' of his estate, on condition that the administrator may give the produce as he pleases this is lawful, and he may give it to rich and poor. If he should say 'on condition that such and one may give the produce to whomsoever he pleases,' it is lawful, and the power may be exercised during the life of the appropriator, and after his death."[6] A disposition in such terms would no doubt be construed in British India as an absolute gift to the donee with void conditions against alienation, etc., though in a case wnere a general charitable intention is declared the doctrine of 'cy près' would be applicable. The principle of Hanafi law, at least as expounded by Abu Yusuf, is (to paraphrase it into the language of English law) that by the very declaration of 'waqf,' a general charitable disposition is shown. It must be assumed that this is not the law enforced in British India. But where there are other circumstances besides the mere declaration of 'waqf,' showing a general charitable intention, the question may have to be considered. It, cannot however, be pressed too far without an argument in a circle; for, if once it is held that there is the intention to create a 'waqf,' under the law of British India it must imply that there is a charitable object. Probably the only real point of importance is that according to Abu Yusuf the mere use of the word 'waqf' is conclusive evidence of the intention to make a 'waqf'; and that is not the law in British India.[7]

Private tomb not valid

484. A 'waqf' cannot be made for the repairs and upkeep of a private tomb;[8] provided that the tomb of a saint may be the object of a 'waqf.'[9]

[1] Bail. II. 217 (para. 2).
[2] Bail. II. 217 (para. 3), cf. s. 36.
[3] Cf. s. 458 above.
[4] *Shahabuddin* v. *Sohan Lal* (1907) 42 Punj. Rec. No. 75, (CIV. JMTS. p. 389). See also *Advocate-General* v. *Hormusji* (1905) 29 Bom. 375.
[5] Bail. II. 217 (para. 3).
[6] Bail. I. 588.
[7] See above s. 458.
[8] *Kaleeloola Sahib* v. *Naseeruddeen Sahib* (1894) 18 Mad. 201; cf. *Zoolcka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058; (*Muthukana Ana*) *Ramanadham* v. *Vada Livvai* (1909) 12, 16, 17. cf. "If the *waqif* purports to direct that the Quran be read for ever over his grave, the direction may be disregarded" *Bahr-ul-Raiq V.* 246.
[9] Cf. *Futtoo Bibi* v. *Bhurrut Lal Bhukul* (1868) 10 W R. 299. *Delroos Banoo Begum* v. *Asghur Ali* (1875) 15 Ben. L.R. 167.

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Illustration.

W purports to dedicate certain movable and immovable properties for the upkeep of her husband H's tomb and for the expenses of lighting frankincense, flowers, and salaries of repeaters of the Quran, and readers of benediction, etc., as well as for the annual 'fatiha' ceremonies of H, and after *W's* death for her annual 'fatiha' ceremony. A traveller's inn was erected by *W* as an appurtenance to the tomb, and the performance of the ceremonies necessaraly involved the distribution of charity, and the lights at the tomb were of use to the passers by; *held* (reversing Davies J.) that no valid 'waqf' was created.[1]

(3) 'Waqf' for Individual Beneficiaries.

(a) Competence to be Beneficiary under a 'Waqf.'

1. Individual 'waqf.'

485. (1) According to Shiah law, subject to sections 480 and 482 above, the beneficiaries under a 'waqf' must be—

(*a*) in existence ; [2]

(*b*) competent to hold property ; [3] and

(*c*) distinctly indicated ; [4]

at the time when the 'waqf' is made, otherwise it is void.[2]

(Shiah law.) If first beneficiary not in being the whole 'waqf' fails

Explanation—Where the 'waqf' purports to be for the benefit of a series of persons succeeding one another, it is valid if the person who is entitled to its benefit in the first instance is at the time of its declaration [2] in being, and competent to take beneficially under a 'waqf,' [5] and notwithstanding that a succeeding beneficiary is not in being or otherwise not competent to take beneficially under a 'waqf.' Where the said person is not in existence at the said time, or is incompetent to own property [6] [or is incompetent to be a beneficially under a 'waqf,' under this section [7]] there (in accordance with what is stated in the 'Shara'ya-ul-Islam' to be the more approved opinion), the 'waqf' fails, notwithstanding

[1] *Kaleloola Sahib* v. *Nuseerudeen Sahib* (1894) 18 Mad. 201 ; cf. *Zoolekha Bibi* v. *Zeinul Abidin*. (1904) 6 Bom. L. R. 1.58.

[2] Bail. II. 214-215. The following passage from Ameer Ali, I. 322 (based on Hanafi authorities) illustrates the point. "The object of a *wakf* may be non-existent in two ways:—Firstly, the beneficiary may be non-existent when the *wakf* is made, when it is called *wakf muntaka-ul-awwal* (cut off initially); and secondly, the persons for whom the *wakf* is made, may cease to exist after the creation of the *wakf*, when it is called *wakf muntaka-ul-wasat* (cut off in the middle). Examples of both classes are given by *Kazi Khan*, e.g. a man makes a *wakf* for the children born of his loins, if he has no children at the time it is *wakf muntaka-ul-awwal*, and the rents and profits will be applied to the poor." (*Kazi Khan* IV. 87.) "If children are born to him afterwards then the rents and profits will be paid to them." "Similarly as stated in the *Asâf* where a settlement is made in favour of one's *walad* (child) and there is no *walad* existing at the time, but there is a grandson, the income of the *wakf* will be given to the grand-child until a child is born to the *wakif*," citing *Raddul Mukhtar* III. 341.

[3] Bail. II. 215 (*ll.* 5-12).

[4] Bail. II. 217 (para. 3).

[5] Cf. *Mahomed Ahsanulla* v. *Amarchand Kandu* (1889), 17 Cal. 408 ; 17 I.A. 28.

[6] The instance given is that of a slave.

[7] This is not expressly stated.

that the next succeeding beneficiary under it is in existence,[1] or is competent to own property [and to be a beneficiary under a 'waqf'].

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(2) According to Hanafi law, where a 'waqf' is purported to be made in favour of a person who is not in being, or who cannot be ascertained at the time of the declaration, the benefit of the 'waqf' will go to the poor until such time (if any) when the beneficiary comes into being, or can be ascertained, after which it will accrue to the benefit of the said beneficiary.[2]

(Hanafi law). "Shifting" of benefit.

Explanation—According to Hanafi law a child is considered to be in existence at the time of the declaration of 'waqf' if it is born six months thereafter;[3] *quaere* whether the Shiah law is to the same effect.[4]

Period of gestation.

(3) *Quaere*, whether subject to section 480 the rules above mentioned apply to any and if so to what extent where the object of a 'waqf' is a charity; or whether they are abrogated by the rule contained in section 480 above.

Subsection (2) states what seems to be the principle of the following: "If one should make a settlement on the heirs of Zeyd, and Zeyd is living, there is nothing for his heirs, and the whole produce passes to the poor. But if Zeyd should die, the whole of the produce must then be divided among his existing heirs, according to the number of them, males and females sharing alike, and if some of them should die, their shares would belong to those alive at the time of the coming of the produce; while if only one survived, half of the produce would be for him and the other half to the poor.[5] If instead of the heirs, he should say 'the children of Zeyd, being such an one, and such an one' naming them up to five, none but the five would be entitled, and if a child were born subsequently he would have no share."[6]

(*b*) *The 'Waqif' as a Beneficiary.*

486. Subject to section 480 above—

2. The 'waqif' may be beneficiary under his 'waqf'

Sunni law.

(1) A 'waqf' may be validly dedicated according to Hanafi law in favour of the 'waqif' in the first instance,[7] and then for

[1] See p. 306, *n.* 2.

[2] See comment.

[3] Bail. I, 568 (para. 3 last sentence).

[4] The *Shara'ya-ul-Islam* seems to point the other way: Bail. II. 214-215.

[5] Bail. I. 574 (para 3). Cf. "Where a *waqf* is declared for the benefit of Zaid's children, (and Zaid has no children existing at the time) or for a *masjid* which has not been erected, the appropriation is valid, and the rents and profits will be applied to the support of the poor, until children are born to Zaid or the *masjid* is erected."—*Fatawa Qazi Khan*, III. 316. Syed Ameer Ali (I. 322) cites a passage to the same effect from the *Raddul Muktar*, 641, which refers to the *Imadia* for the proposition, and then continues: "In the *Nahr-ul-Fâik* it is stated further, that when the object for which the settlement is made has not come into actual existence, but the purpose can be carried into effect, the rents and profits will be applied to that purpose so far as it is possible to do so. For example, when a man makes a grant for the support of students of a *madrassa* which has not been erected, if lectures are given to students in any other building, such students are entitled to support from the *waqf*."

[6] Bail. I. 574-575.

[7] *Fatimabibi* v. *Advocate-General of Bombay*, (1881) 6 Bom. 42.

SECTION 486 other beneficiaries, or in favour of the 'waqif' after other beneficiaries named therein.[1]

Not under Shiah law.

(2) According to Shiah law the 'waqif' cannot reserve to himself any benefit under the 'waqf';[2] provided that where the beneficiaries consist of a class of persons, and subsequent to the declaration of the 'waqf' the 'waqif' comes under the description by which the said class is identified, he may be a beneficiary under it, and the 'waqf' does not thereby become void.[3]

Illustrations.

(1) The following are valid dedications by way of 'waqf'[4] according to Hanafi law—(*a*) "My land is a 'sadaqa' settled on myself."[5] (*b*) "I have settled my land on myself and after me on such an one and then upon the poor."[6] (*c*) "My land is settled on such an one and then upon me."[5] (*d*) "My land is settled upon my child, and after him on the poor."[7] (*e*) "My land is settled on my child, and the children that may by born to me, and when they fail, upon the poor."

(2) According to Shiah law the dedications (*a*) and (*b*) are void,[8] (*c*) is void so far as it is a settlement on the 'waqif' himself,[9] (*d*) and (*e*) are valid.[10] See however s. 480 above.

(3) W makes a 'waqf' for the benefit of the poor, or for lawyers, and W subsequently becomes poor or a lawyer. The 'waqf' is valid, and W may participate from its benefits.[10]

(4) W a Shiah makes a 'waqf' with a condition that the 'waqf' property is to revert to himself in case of need, the 'waqf' is void, but the property will remain in the condition of 'hoobs'[11] until the occasion should arise, while if W dies it will devolve on his heirs.[11]

It has been held that appropriations in the nature of a settlement of property on a man and his descendants can only be treated as validly falling under the designation of 'waqf' when the term 'sadaqa' is used; "even supposing they could be so treated, it would be necessary in order to validate such a 'waqf,' that the 'waqif' should reduce himself to a state of absolute poverty."[12] Family

[1] Bail. I. 567, 585-586; Hed. 237 (col. i, para. 6). *Luchmiput* v. *Ameer Alum* (1882) 9 Cal. 176; 12 C.L.R. 22.

[2] Bail. II. 218 (para. 3) Imam Muhammad held the same view. Hed. 237. In *Kalib Hossein* v *Mehrum Beebee*, (1872) 4 N. W. 155. The *waqif* purported to reserve to herself for life two-thirds of the income of the *waqf* property and devoted the rest to charitable and religious purposes; the reversionary *waqfs* as to the two-thirds were held void.

[3] Bail. II. 219 (para. 1).

[4] Bail. I. 567-568.

[5] This is in accordance with Abu Yusuf's opinion who takes a dedication in perpetuity to the poor as implied. According to Abu Hanifa and Muhammad it would have to be expressed.—Bail. I. 567. But see s. 480.

[6] *Fatmabibi* v. *Advocate-General of Bombay*, (1881) 6 Bom. 42. But see s. 480.

[7] In which case the child who may be in existence at the time of the produce enters into the benefit of the *waqf* whether he were born at the time of the dedication or not. But see s. 485 above.

[8] Bail. II. 218 (para. 3.)

[9] Bail. II. 220 (*Third.*)

[10] Bail. II. 219 (para. 1.)

[11] Bail. II. 219 (para. 2): *Hoobs*: the word should, it seems, be pronounced *habs* (with a *kasra*) and is defined as "detention." The distinction between *habs* and *waqf* seems to be that the former is not perpetual, and without a religious motive. Cf. s. 434 above.

[12] *Mahomed Hamidulla Khan* v. *Lotful Hug*, (1881) 6 Cal. 744; 8 C.L.R. 164.

settlements are no more valid objects of 'waqf' in British India, nor does it seem that the other portions of the ruling referred to can be operative now. SECTION 486

(c) Other Individuals as Beneficiaries.

487. Grants to an individual in his own right for the purpose of furnishing him with the means of subsistence, cannot validly form the object of a 'waqf.'[1] cbject.

This must be taken to be merely an exemplification of the rule contained in s. 480 above.

488. A 'waqf' purported to be made in favour of the rich alone is not valid. Where the beneficiaries consist of a class of persons some of whom may be poor and others rich, there the benefit of the 'waqf' property must be applied for the poor alone out of the said class.[2] not valid.

Exception—The kindred of the Prophet may validly be made the beneficiaries under a 'waqf.'

So it is said in the 'Fatawa 'Alamgiri' that a 'waqf' for travellers is valid, but it is to be applied for the poor amongst them to the exclusion of the rich.[3] On the other hand Syed Ameer Ali cites the following from the 'Fath-ul Qadir:' "The 'wakif' may give the produce to whomsoever he likes, and the reason of it is that though a desire to approach the Deity should form the ultimate motive of all 'wakfs', yet if without such an (immediate) desire, a person were to dedicate a property in favour of the affluent, the 'wakf' would be valid in the same way as a 'wakf' in favour of the indigent, or for the purposes of a mosque, for in giving to the affluent there is as much 'kurbat' (nearness[3]) as in giving to the poor, or to a mosque, and though the profits may not have been [expressly] given in charity [to the poor] on the extinction of the affluent, yet it is 'wakf,' and will be treated as 'wakf' before their extinction."[4]

§ 5.—Administration of 'Waqf.'

(1) The 'Mutawalli.'

(a) Competence to be 'Mutawalli.'

489. (1) Competence to be 'mutawalli' is not affected by sex or religion, nor by the fact of being the 'waqif';[5] provided that where the administration of the 'waqf' involves the possession of qualifications having reference either to sex,[6] or religion, or to any other matter, it cannot be administered by a person who does not possess the said qualifications.[7] A female, non-Muslim, or himself competent.

[1] *Kuneez Fatima* v. *Saheba Jan* (1867) 8 W.R. 313.

[2] Bail. I, 566.

[3] Or "approach to God."

Ameer Ali I. 194 (para. 1.). The ( ) and [ ] are the learned author's.

[5] See *ill.* (1), (2), (3) below and *nn.* thereto.

[6] E.g. a male may be practically disqualified to be the *mutawalli* of an institution peculiarly for the benefit of females, Cf. *ill.* 8 as to when females disqualified.

[7] Cf. Indian Trusts Act, s. 10.

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Minor or lunatic incompetent. 'Mutawalli' during minority of incumbent.

(2) Where an infant or person of unsound mind is purported to be appointed as a 'mutawalli' his appointment is void.[1]

(3) Where the office of 'mutawalli' devolves upon a person who is a minor, the Court may appoint another 'mutawalli' to act in his place during his minority.[2]

Illustrations.

(1) The 'waqif' may appoint himself 'mutawalli'[3]

(2) A female is competent to be 'mutawalli.'[4]

(3) A non-Muslim is competent to be 'mutawalli.'[5]

(4) A body of persons constituting a committee may be entrusted with the administration of the 'waqf.'[5]

(5) A Shiah may be the 'mutawalli' of a 'waqf' made by a Sunni.[6]

(6) The Official Trustee may (with his consent) be appointed 'mutawalli' of a 'waqf' which has no religious purpose, by the deed containing the declaration of 'waqf'; provided first that the consent of the Official Trustee is recited in the declaration,[7] and secondly that the Official Trustee cannot lawfully be appointed 'mutawalli' along with any other person, but he shall, whenever appointed, be sole 'mutawalli.[7]

(7) Property[8] which is dedicated by way of 'waqf' for a charitable purpose,[9] may vest in the Treasurer of Charitable Endowments[8] (in the same manner as in a 'mutawalli') by order of the Local Government, made on an application by the 'waqif' on such terms as to the application of the property or the income thereof as may be agreed on, between the said Government and the 'waqif,' provided that the duty of administering the 'waqf' property will not be imposed upon the said Treasurer by the vesting order;[10] nor unless the said

[1] *Sed quaere* as to infant. Cf. The Trusts Act, s. 10.

[2] See comment.

[3] Bail. I. 591. Bail. II, 214. Muhammad *ibn* Alfazl is stated (Bail. I. 591) to have said this (i.e. the *waqif* declaring himself *mutawalli* is lawful according to all). Hed. 238 (col. ii) states that it is unlikely that Imam Muhammad's view was to the same effect. Since, however, the Shiah authorities also hold that the *waqif* may be the *mutawalli*, it seems likely that Imam Muhammad had the same views.

[4] *Wahid Ali* v. *Ashruff Ali* (1882) 8 Cal. 732; 10 Cal. L. R. 529; even for the temporal affairs of a mosque, as in *Hussain Bibee* v. *Hussain Sherif* (1867) 4 Mad. H. C. R. 28. *Hyatee Khanum* v. *Koolsoom Khanum* (1807) I. S. D. A. Cal. 214; *Doe d. Jaun Bebee* v. *Abdoollah Barber* (1838) 1 Fulton, 345; reproduced *in extenso*, Ameer Ali, I. 169-174.

[5] As in the case of Jum'a Masjid, Bombay, see. s. 492, *Explanation I.* (3).

[6] *Doyal Chund Mulbick* v. *Keramut Ali* (1871) 16 W. R. 116. But see *Shahoo Banoo* v. *Aga Mahomed* (1906) 34 Cal. 118 (P.C.): Babi lady not incompetent but not proper to be *mutawalli* of Shiah endowment.

[7] Official Trustees Act (XVII of 1864.) ss. 8-13.

[8] Charitable Endowment Act, VI. of 1890.

[9] "'Charitable purpose' includes relief of the poor, education medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship." Sir R. Wilson quotes (p. 362, s. 341) from speeches in the Legislative Council relating to the Act: "Diocesan Schools have been established not so much to give religious instrution as to prevent general education from being wholly secularised; there is some direct religious teaching and the work of each day is begun and ended with some acts of Christian worship; but the main aim and object is to impart a sound general education, pervaded throughout with a moral and religious tone. The funds of any trust founded on a mixed basis of this character may certainly be vested in the Treasurer, and the Local Government will be competent to sanction a scheme for its management."

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Government with the concurrence of the 'waqif' settles a scheme for the administration of the property so dedicated or proposed to be so dedicated. On the scheme being so settled, the said Treasurer becomes the 'mutawalli' of the 'waqf.'[1]

(8) When the office of 'mutawalli' entails the preformance of religious or spiritual duties which cannot be performed by females[2] or minors or non-Muslims, they are disqualified from acting as 'mutawalli' or 'sajjadanashin,'[3] but where females[4] are excluded,[5] it does not necessarily imply that the male descendants of female members of the family of the 'waqif,' or of the last 'mutawalli' will also be excluded.[6]

(9) A 'mutawalli' who has been once removed from his office for neglect or misconduct in his office may be re-appointed by the Court.[7]

Nomination by 'mutawalli' of his successor.

"The last incumbent can on his deathbed nominate his successor, and such nomination would be valid without any judicial order. But in order that the nomination may be effective, it is necessary that the person so appointed should be adult and possessed of understanding. In the 'Fatawai Alamgiri' the rule is thus stated: 'and it is a condition to the validity (of the appointment of a 'mutawalli') that he should be adult, and possessed of understanding; and thus it is stated in the Bahr-ur-Raik.' Mr. Baillie in the first edition of his Digest did not give the meaning of this passage, but it appears in the second edition in the following words. 'But puberty and understanding are essential in all cases to a valid appointment' . . . The office of 'mutawalli' is an office of personal trust, and a person who cannot discharge, the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy. The same condition is laid down in the 'Durrul Muhtar,' and the 'Fatawai Kazi Khan' that a minor cannot be appointed a 'mutawalli.' The learned pleader however contends upon the authority of a passage in the 'Alamgiri' that the appointment of a minor 'mutawalli' is not invalid, but, remains in abeyance until he attains his majority.[8] But that passage must be read with the previous condition which insists upon puberty as a 'sine qua non.' As a matter of fact, however, it refers not to a case of express appointment, but to the devolution of the office by virtue of some provision in the trust deed, or otherwise. For example a 'waqfnama' may provide that the 'tauliat' should be confined to the male descendants of the 'waqif' or the members of a particular family, and it may happen that at some time the person on whom the office devolves by virtue of this provision, is a minor. The

Appointment of minor 'mutawalli'—

Distinguished from devolution of 'tauliat' upon minor.

[1] See p. 410, *n.* 8.

[2] *Hussain Bibee* v. *Hussain Sherif* (1867) 4 Mad. H. C. R. 23 *Mujavar Ibrahim Bibi* v. *Mujavar Hussain Sheriff* (1880), 3 Mad. 95 (female disqualified from being *mujavar* of a *dargah*).

[3] Cf. as to minor being *sajjadanashin* of a *dargah* or shrine. *Piran* v. *Abdul Karim* (1891) 19 Cal. 203, 219-220.

[4] Cf. *Shahoo Banoo* v. *Aga Muhomed Jaffer Bindaneem* (1906) 34 Cal. 118.

[5] Though a female is always *competent*, her sex may make her incapable of performing the duties, hence unfit for the office.

[6] *Shekh Karimodin* v. *Alam Khan* (1889) 10 Bom. 119.

[7] Bail. I. 598-599.

[8] Where it is laid down that if the appoints a minor as sole *mutawalli* without there being an adult joined to him, the Qazi shall appoint some other person to officiate during the minority of the said *mutawallis*, and where an adult and a minor are joint *mutawallis*, the Qazi may either appoint some person to represent the minor who should act with the adult *mutawalli*, or may empower the latter to represent the minor."—*Bahr-ul Raiq* V 224. Cf. also Ameer Ali, I. 347, citing III. 596.

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law therefore provides that in such cases the Kazi should appoint somebody to discharge the duties during the minority of the 'mutawalli,' who should get the office on attaining majority." [1]

Appointment by Court.

In England according to the Trustees Act 1850, s. 22 the Court is empowered "whenever it shall be expedient to appoint a new trustee, or new trustees" to appoint new trustees "in substitution for or in addition to any existing trustee or trustees"; and under this power the Court may appoint a trustee in the place of an infant trustee appointed by will, but the order is to be made without prejudice to an application by the infant on his coming of age to be restored to the trust.[2] Compare the Indian Trustees Act, 1866, s. 17, and the Probate and Administration Act, ss. 32-34.

Competence and qualification.

Competence to be 'mutawalli' must be distinguished from being qualified to discharge its duties satisfactorily. When the question is brought before the Court, there is usually some dispute or competition; and in such cases, of course, the person best qualified is chosen; and though the power to appoint a deputy is specially recognised, a person who can personally discharge the functions has no doubt a qualification which one who must necessarily employ a deputy cannot have. But because a person is not appointed by the Court, it does not follow that he or she is incompetent to be 'mutawalli.'[3]

The position of infant trustees in England is far from clear [4] and it seems that there is a similar doubt in Muhammadan law as applicable in British India.

(*b*) *Appointment and Removal of 'Mutawalli' and his Successor.*

(i) *Failure to Appoint a 'Mutawalli' when 'Waqf' Declared.*

Failure to appoint or nominate 'mutawalli.' Hanafi law.

490. When a 'waqf' is purported to be created but no 'mutawalli' is appointed or nominated [5]—

(1) According to Abu Hanifa and Imam Muhammad under Hanafi law, the 'waqf' fails; according to Abu Yusuf the 'waqf' takes effect and the 'waqif' becomes the 'mutawalli.' [6]

Shiah law.

(2) According to Shiah law the 'waqf' takes effect and the beneficiaries under the 'waqf' are authorised to administer it.[7] *Quaere* whether according a Shiah law where the object of the 'waqf' is not to benefit specified individuals, but to promote works of general utility, and the 'waqif' has not appointed any 'mutawalli,' he himself becomes the 'mutawalli.'

[1] *Piran* v. *Abdul Karim* (1891) 19 Cal. 203, 219, (Ameer Ali J.) cf. "Mahommedan Law" by Ameer Ali, I 347. citing *Raddul Muhtar*, III. 596.

[2] *Re Shelmerdine* (1864) 33 L. J. (N.S) Ch. 474; *Re Brunt* [1883] W. N. 220; *Re Tallatire* [1885] W. N. 191. Cf. *Raikes* v. *Raikes* (1863) 32 Beav. 403.

[3] Cf. *Shahoo Banoo* v. *Aga Mahomed* (1906) 34 Cal. 118.

[4] Cf. *Inman* v. *Inman* (1863) 15 Eq. 260

[5] "If the *wakif* appoints as *mutawalli* a person who is absent, the Kazi has the power of nominating in his place another for the time being, and when the *mutawalli* appointed by the *wakif* arrives, the trust will revert to him."—*Ameer Ali*, I. 348, citing "*Fatawa-'l-Ankariwia* II. 217 from *Asaaf*."

[6] Bail. I. 591. Cf. p. 360 above.

[7] Bail. II. 214.

SECTION 491
Provisions by 'waqif' for appointment of 'mutawalli.'

491. The 'waqif' may provide in the declaration of 'waqf' for the manner in which, the person by whom, the conditions on which, and the period for which, the 'mutawalli,' and his successor may be appointed.[1]

Oral directions

Explanation I—The rules for the appointment of a successor to the 'mutawalli' may be laid down by the 'waqif' orally or in writing; and, in the absence of writing, they may be inferred from the evidence of prevailing usage.[2]

Usage.

Inheritance.

Explanation II—The Muhammadan law is strongly against attaching any right of inheritance to the 'waqf' property; and where a custom is alleged to the effect that the right to be 'mutawalli' devolves by primogeniture, it must be proved not only that each successive 'mutawalli' has been uniformly the eldest son of his predecessor, but also that he succeeded by right of primogeniture and not by right of appointment.[3]

'Sajjada-nashin.'

Explanation III—Where the object of a 'waqf' is a religious institution, and it is essential that the 'mutawalli' or 'sajjada-nashin' should have certain qualifications which succession by descent would not always ensure, it will be presumed that the succession is not to go by descent.[4]

Illustration.

The dedication may validly provide that M should be 'mutawalli' till A arrives, or that M should be 'mutawalli' so long as he remains in Bussorah, or M should be 'mutawalli' till he marries, or that he should be 'mutawalli' for life, and on M's death MA should be 'mutawalli.'[5]

(ii.) *Appointment of Successor to a 'Mutawalli.'*

Persons with power to appoint successor to 'mutawalli:' 1. 'waqif'

492. In the absence of any express provision in the declaration of 'waqf' for the appointment of successive 'mutawallis'—

(1) the 'waqif' is entitled to make the appointment;[5]

[1] Bail. I. 592. (*Khajeh*) *Salimullah* v. *Abdul Khair* (1909) 37 Cal. 263; Cf. *Advocate-General* v. *Fatima Sultani Begum* (1872) Bom. H. C. R. 19. Cf. "If the *wakif* or Kazi makes a condition at the time of appointing a *mutawalli* that he should have the power of transferring the trust to another, and substituting that other in is own place, by a *sanad-i-wakf* or *wasiat*, should necessity arise for it, such a condition would carry with it the power, on the part of the *mutawalli*, to appoint another *mutawalli* during his lifetime, or in death-illness." Ameer Ali, I, 357 citing the *Anfaa-ul-Wasail*,

[2] *Gulam Rahimtulla Sahib* v. *Mohommed Akbar Sahib* (1875) 8 Mad. H. C. R. 63. Cf. *Abdulla Edrus* v. *Zain Sayad Hassan Edrus* (1888) 13 Bom. 555; *Ismail Miya Banemiya* v. *Wahadani Begam* (1911) 14 Bom. L. R. 120. Cf. *Sayad Muhammad* v. *Fatteh Muhammad* (1894) 22 Cal. 324; 22 I.A. 4.

[3] *Abdula Edrus* v. *Zain Sayad Hassan Edrus* (1888) 13 Bom. 555; Macnaghten 343.

[4] *Syedun* v. *Allah Ahmed* [1864] W. R. 327. Cf. *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219-220.

[5] Bail. I. 592 (para. 2).

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2. His executor.
3. Court.

(2) after the death of the 'waqif' the executor, or the survivor of several executors [1] of the 'waqif' is so entitled; [2]

(3) on the death of the said surviving executor it is within the jurisdiction of the Court [4] to appoint a 'mutawalli;' [3]

4. 'Mutawalli.'

(4) Subject to the provisions above referred to,[5] the 'mutawalli' may appoint a successor to himself; and *semble*, in the absence of appointment by competent authority, the executor of the last 'mutawalli,' as his legal representative, may administer the 'waqf' property after his death.[6] *Quaere*, whether a 'mutawalli' unless he is appointed under subsection (1), (2), or (3) or by a person authorized by the declaration of 'waqf' to appoint, is entitled to any remuneration without an order of the Court.[6]

(5) A suit for the appointment of a 'mutawalli' must be instituted in comformity with section 475 (1) above.

Preference to members of family of 'waqif.'

Explanation I—(1) In appointing a 'mutawalli' the Court will prefer a member of the family of the 'waqif' to others,[7] but not necessarily the eldest member;[8]—nor is a stranger disqualified.[9] It has been held [10] that those who are descended from females are not regarded (*semble*, in Sunni law [11]) as members of the family—*sed quaere*.[12] (2) The High Court may on petition

Official Trustee.

appoint the Official Trustee (with his consent, previously obtained) to be sole 'mutawalli' of a 'waqf' which is not for any religious purpose, (*a*) when there is no 'mutawalli' willing to act, or capable of acting in the administration of the 'waqf' property, who is within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court; or (*b*) when all the 'mutawallis' or the surviving or continuing 'mutawalli' and all the persons beneficially interested in the 'waqf' are desirous that the Official Trustee shall be appointed in the room of such 'mutawallis' or 'mutawalli.'[13]

[1] *Advocate-General* v. *Fatima Sultani Begum* (1872) 9 Bom. H. C. R. 19.

[2] See p. 113, *n.* 7.

[3] Bail. I. 533. *Phate Saheb Bibi* v. *Damodar Premji* (1879) 3 Bom. 84. He need not appoint a relative: *Amir Ali* v. *Wazir Hyder* (1905) 9. C. W. N. 876.

[4] See as to Small Causes Court: (Presidency) Act XV. of 1882 s. 19 (*d*) (*g*) (*k*) (Provincial) Act IX. of 1887, second Sched. 4, 11, 18.

[5] Thus the *Fatawa Qazi Khan*, III. 300 expressly mentions that the *waqif* may provide that no *mutawalli* shall have the power to appoint his successor.

[6] Bail. I. 594 (para 2): See comment.

[7] Bail I. 593-594.

[8] *Gulam Rahimtulla* v. *Mohommed Akbar* (1875) 8 Mad. H. C. R. 63; *Abdulla Edrus* v. *Zain Sayed Hassan Edrus* (1888) 13 Bom 555 Cf. also *Ashecrooddeen* v. *Drobo Moyee* (1876) 25 W. R. 557 *Shahoo Banoo* v. *Aga Mahomed* (1906) 34 Cal. 118

[9] Cf. (*Sheikh*) *Amir Ali* v. *Syed Wazir* (1905) 9 C. W. N. 876 (referring to an appointment by the last *mutawalli*).

[10] *Ahmud Hossein* v. *Mohioodeen Ahmud* (1871) 16 W. R. 193.

[11] Shiah law does not prefer agnates over cognates; Cf. law of succession and of guardianship.

[12] Cf. (*Shekh*) *Karimodin* v. *Alam Khan* (1885) 10 Bom. 119.

[13] Official Trustees Act, ss. 9, 13, 8.

(3) The Court may frame a scheme and rules for the appointment of a 'mutawalli,' and his successor.[1]

SECTION 492 Scheme.

Explanation II—The 'mutawalli' may as provided in sub-section (4) appoint a successor to succeed him at his death, but cannot transfer his office on another during his lifetime ;[2] and any appointment or nomination purported to be made during the life-time of the 'mutawalli' is revocable like other testamentary disposition.[3]

himself.

Explanation III—The office of 'mutawalli' when it is attached to the conduct of religious worship and the performance of religious duties is not legally saleable ;[4] and any custom to the contrary is void as being opposed to public policy.[5]

Office not saleable.

The points covered by subs. (4) are not quite clear : The general rule is thus stated in Baillie :—

Nomination by 'mutawalli' of his successor.

(1) "When the superintendent has died, and (*a*) the appropriator is still alive, the appointment of another belongs to him and not the judge ; and (*b*) if the appropriator be dead, his executor is preferred to the judge. But (*c*) if he had died without naming an executor, the appointment of an administrator is with the judge."

This leaves no room for the appointment by the last 'mutawalli' (under subs. (4).) ; but it is said on the next page :

(2) "A superintendent may at death commit his office to another in the same way as an executor may commit his to another . . .

(3) "A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."[6]

Are the two statements numbered (1) and (2) above inconsistent ?—It is submitted that they cannot be reconciled unless the second passage is to be interpreted as meaning that though the 'mutawalli' has no right to appoint a successor to himself after his death any more than a substitute in his life-time; yet just as in his life-time when necessary he may appoint a deputy,[7] so "at death" he may (or rather, 'ex necessitate rei,' he must) commit the administration of the 'waqf' to a successor, which of course cannot affect the power of the proper authorities to appoint his successors—whether such proper authority is the 'waqif' himself, or his executor, or the Court :

[1] As in the case of the Jum'a Masjid, Bombay. Cf. *Advocate General* v. *Abdul Kadar Jitaker* (1894) 18 Bom. 401. Similar risks prevail for many big Mosques, e.g., Jami' Masjid at Delhi.

[2] Bail. I. 594 (para 2) *Wahid* v. *Ali Ashruff Hossain* (1882) 8 Cal. 732 ; 10 C. L. R. 529. See above s. 499.

[3] *Abdulla Edrus* v. *Zain Sayad Hassan Edrus* (1888) 13 Bom 555.

[4] *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (1896) 24 Cal 77, 90-92.

[5] *Ibid*, 93.

[6] Bail. I. 593 (para. 3) ; 594 (para. 2.) Cf. 'With reference to a *mutawalli* appointed in a general manner,' says the *Radd-ul-Mukhtar* the meaning of the term *general* is thus explained in the *Anfaa-ul-Wasail* :—"that the *wakif* appoints a *mutawalli* and places him in his own place, and constitutes him his successor, and authorises him to assign the trust to whomsoever he likes, in such a case the *mutawalli* can transfer the trust either in health or death-illness."—Ameer Ali, I. 358.

[7] Bail. I. 591 (*l*. 5).

SECTION 492 But in the absence of such authorities taking any step to exercise their right of appointment such 'de facto' appointment by the last 'mutawalli' must take effect—the more so as such an appointment far from 'fieri non debuit,' was the last service that the dying 'mutawalli' could perform towards the 'waqf,' and was necessary in order that the 'waqf' property may not remain absolutely unattended to after him, pending an appointment by the proper authorities.

What then does the third passage above referred to mean ?—It is submitted that the "general trust" refers to an executorship: [1] The right of the 'waqif,' and to appoint the 'mutawalli' devolves after his death on his executor (subs. (2).) and the executor may by virtue of such power and as the general representative of the 'waqif' in all matters undertake the duties of the 'mutawalli' himself. In such a case the executor has a general trust imposed on him, he is not specifically appointed 'mutawalli'; but his power of appointing another 'mutawalli' is not forfeited by his purporting expressly or impliedly to appoint himself 'mutawalli.' Hence this point is noted under s. 492 Explanation II above.

Analogy of executor 'de son tort'

If the views expressed above are correct, then a 'mutawalli' purporting to be appointed by the last 'mutawalli' (such appointer being neither the 'waqif' himself nor his executor) is like an executor 'de son tort' or a 'de facto' guardian, who in the words of the Privy Council referred to above [2] "may assume important responsibilities . . . . but cannot clothe himself with legal power over" the 'waqf' property. His position however seems to be somewhat more favourable under Muhammadan law; hence the *semble* to subs. (4) above: Sir Roland Wilson however says, that "an order of the Court is necessary in order to complete the title of the testamentary successor to the emoluments enjoyed by his predecessor."[3]

(iii) *Removal or Resignation of 'Mutawalli.'*

(i) Removal by Court for unfitness.

493. When the 'mutawalli' is unfit for the office, the Court may remove him and appoint another in his place.[4]

(ii) Power of Court cannot be derogated from.

Explanation I—The Court may remove the 'mutawalli' if he is unfit for the office, notwithstanding that the 'waqif' has appointed himself as the 'mutawalli'; and has purported to make the 'mutawalli' incapable of being removed.[4]

(iii) Neglect to repair.

Explanation II—Neglect to repair the 'waqf' property [5] though there is a surplus of the income in his hands may be a cause for the removal of the 'mutawalli.'[5]

[1] The office of *mutawalli* and *wasi* or executor seem to be referred to as being of an analogous nature in the *Fatawa Qazi Khan*, III. 299, 301. It will be noted in the chapter on executors that the executor has the power of nominating his successor. Cf. Ameer Ali, Mahommedan Law" I. 358.

[2] Above p. 204 s. 260; and cf. Succession Act. s. 266.

[3] "Anglo-Muhammadan Law," 356, s. 239.

[4] Bail. I. 592, (para 1); 598 (para. 2); Hed. 329 (col. i. para. 1); Macnaghten, 70, Endowment, case 8. *Hidait-oon-nissa* v. *Afzul Hossein* (1870) 2 N. W. 420, (Shiah parties); cf, *Gulam Hussain Saib* v. *Aji Ajam Tadallah Saib*, and *vice versa* (1868) 4 Mad. H. C. R. 44. *Bhurruck Chundra Sahoo* v. *Golam Shurruff* (1868) 10 W. R. 458. See also *Fatawa Qazi Khan*, III. 299; *Bahr-ur-Raiq* V 245, 253.

[5] See also s. 501 (1) below.

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2. Removal by 'waqif.'

494. According to Imam Muhammad a 'mutawalli' once appointed cannot be removed by the 'waqif' unless in the dedication of 'waqf' he has expressly empowered himself to do so.[1] According to Abu Yusuf the 'waqif' may remove the 'mutawalli' without expressly reserving the power to himself to do so.[1] The 'Fatawa 'Alamgiri' says that the 'fatwa' is in accordance with Imam Muhammad's opinion;[2] and the High Court of Madras has held in the same way.[3] It has also been decided that the Shiah law is to the same effect.[4]

Power to be reserved in that behalf.

3. by mutawalli without leave of Court.

495. The 'mutawalli' cannot discharge himself from his office, without the permission of the 'waqif' or of the Court.[5]

Explanation I—The 'mutawalli' cannot during his lifetime transfer his office to another.[6]

Explanation II—If the 'waqif' or his executor purports to appoint himself the 'mutawalli,' or acts as such, it does not deprive him of the power of transferring the office of 'mutawalli' to another under section 492 above.[7]

"If the person who has been appointed 'mutawalli' says 'I have discharged myself,' then he will not be discharged, but if he tells the 'waqif' or the 'Qazi' then either of them can discharge him. This is in the 'Qunia.'"[8] Cf. the Indian Trusts act, s. 71.

(c) *Remuneration of 'Mutawalli.'*

Right to receive remuneration provision in declaration

496. (1) The declaration of 'waqf'[9] may validly authorise the 'mutawalli' appointed by the 'waqif' and each succeeding 'mutawalli' to receive the remuneration specified therein;[10] provided that, in the absence of anything to show the contrary, the remuneration specified in the instrument of 'waqf' is only payable to the first 'mutawalli,' and the succeeding 'mutawallis' are not entitled thereto without an order of the Court.[9]

(2) The 'mutawalli' may lawfully take from the income of the 'waqf' such remuneration as the 'waqif' may have authorised him

[1] Bail. I. 591; cf. *Bhurruck Chandra Sahoo* v. *Gulam Shurruff* (1868) 10 W.R. 458.

[2] Bail. I. 592: *Fatwa* is explained by Sir R. Wilson as "apparently the practice in India under Aurangzib:" But it means more than that: It means that the famous Qazis have been in the habit of deciding in that manner. "The word *fatwa* is stronger than the word valid."—Bail. I. 518 (para. 3 last line); cf. Bail. I. pp. ix, 7.

[3] *Gulam Hussain Saib* v. *Aji Ajum Tadallah Saib* (1860) 4 Mad. H. C. R. 44.

Hidaitoonnissa v. *Afzul Hossein* (1870) 2 N. W. 420 (no Shiah authorities were cited).

[5] See comment.

[6] Cf. s. 499 below.

[7] Bail. I. 594 (para 2.); See s. 489 above and comment on it.

[8] *Fatawa 'Alamgiri*, *Waqf* ch. 5. This is portion of a passage which has been omitted by Baillie. Its proper place would be Bail. I. 594, para. 3 between the first and second sentences.

[9] Bail. I. 594 (para. 2); 597.

[10] E.g., one-third of the income of the villages, the subject of *waqf*; *Jugatmoni Chowdrani* v. *Romjani Bibee* (1884) 10 Cal. 533.

SECTION 496 to take for administering the 'waqf';[1] provided nevertheless that the 'mutawalli' never acquires such an interest in the 'waqf' property as to make it capable of being attached and sold in execution of a personal decree against him.[2]

Fixed by Court

(3) Where no provision is made in the declaration of 'waqf' for the remuneration of the 'mutawalli,' on an application being made to the Court, it may fix the remuneration, and may authorise the 'mutawalli' to take it.[3]

Official Trustse's remuneration

(4) Where the Official Trustee is appointed 'mutawalli' (*a*) by the declaration of 'waqf' he is entitled to receive by way of remuneration in that behalf such sum or sums only as he is by the deed containing the declaration of 'waqf' declared to be entitled to receive;[4] (*b*) where he is appointed by the High Court he is entitled to receive by way of remuneration the commission referred to in section 11 of the Official Trustees Act.[5]

2. Quantum of remuneration: one-tenth.

497. The rule of Muhammadan law is that the remuneration of a 'mutawalli' should not exceed one-tenth of the income where the 'mutawalli' has no beneficial interest in the subject of the 'waqf';[3] provided that where, after the religious or charitable objects of the 'waqf' are duly maintained, there is a sufficient surplus left, and on a consideration of the nature of the 'waqf' the Court is of opinion that a higher remuneration would be just and proper, (*semble*) the rule stated above does not apply.[3]

(d) Rights Powers and Disabilities of 'Mutawalli.'

General powers.

498. The 'mutawalli' may do all acts which are reasonable and proper for the protection of the 'waqf' property, and for the administration of the 'waqf.'[6]

Cf. Trusts Act s. 36.

Thus to keep the 'waqf' property in repairs is expressly enjoined.[7] But he cannot make or expend the income of the 'waqf' on mere improvements, e. g., the addition of a minaret to a mosque, unless it is necessary for the call to prayers.[8]

[1] Bail. I. 597.

[2] *Bishen Chand* v. *Nadir Hossein* (1887) 15 Cal. 329; 15 I. A. 1; cf. (*Bibee*) *Kuncez Fatima* v. (*Bibee*) *Saheba Jan* (1866) 8 W.R. 313; *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (1868) 10 W. R. (C. R.) 299.

[3] *Mohiuddin* v. *Sayiduddin* (1893) 20 Cal. 810.

[4] Official Trustees Act s. 9.

[5] I.e., a half per cent on capital moneys received by him, and on capital moneys being invested by him; three-fourths per cent on interest or dividends received by him; two and a half per cent on rents collected; but the High Court may allow commission at a higher rate.

[6] *Phate Saheb Bibi* v. *Damodar Premji* (1879) 3 Bom. 84.

[7] See s. 469 above.

[8] Bail. I. 608 (para. 2).

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Employment of agents where necessary or customary.

499. The 'mutawalli' may employ for hire agents for the administration of the 'waqf,' wherever he is empowered to do so by the declaration of 'waqf,'[1] or it is necessary, or in accordance with the usual course of business to do so.[2] The authority of the agent or manager so appointed ceases on the death or removal of the 'mutawalli' so appointing him.[3]

The instance given in the 'Fatawa 'Alamgiri' is that of a person to sweep the 'masjid.' The principle is the same as that which is stated by Lord Watson in the following terms: "Whilst trustees cannot delegate the execution of the trust,[4] they may, as was held by this House in 'Speight *v.* Gaunt,'[5] avail themselves of the services of others wherever such employment is according to the usual course of business."[6] The first concession made in England was, where there was necessity "legal" or "moral" for justifying the employment of agents. "Moral" necessity is from the usage of mankind, if the trustee acts as prudently for the trust, as he would have done for himself, and according to the usage of business referring to bankers, stewards and agents.[7]

The 'mutawalli' is of course not empowered to transfer his office to another during his lifetime: see s. 495.

Borrowing not permission of Court.

500. (1) In the absence of any express provision to that effect, the 'mutawalli' is not authorised to borrow money for any purpose whatever, but the Court may authorise him to borrow money for the payment of taxes.[8]

(2) The Court may authorise the 'mutawalli' to borrow money for purchasing seeds (for the cultivation of 'waqf' lands), but it is doubtful whether the 'mutawalli' may borrow money for the said purpose without being authorised by the Court.[8]

Nor sale or mortgage.

501. (1) In the absence of a provision in the declaration of 'waqf' authorising the 'mutawalli' to sell[9] or mortgage[10] the 'waqf' property, he is not authorised to do so, and where he does so, he is guilty of committing a breach of trust,[8] for which he may be removed;[9] provided first that the Court may order the sale of

[1] As in *Amrutlal* v. *Kalidas* (1887) 11 Bom. 492.

[2] Bail. I. 608, 591, (*l.* 5); *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732; 10 Cal. L. R. 529.

[3] *Mohoooddeen Ahmed* v. *Elahee Buksh* (1866) 6 W. R. 277. Cf. Contract Act s. 201.

[4] Cf. Indian Trusts Act s. 47.

[5] (1883) 9 App. Cas. 1.; (22 Ch. D. 727).

[6] *Learoyd* v. *Whiteley* (1887) 12 App. Cas. 727, 734.

[7] Lord Hardwicke, *Ex p. Belchier* (1754) Amb. 219.

[8] Bail. I. 597. cf. however *Nimai Chand Addya* v. *Golam Hossein* (1909) 37 Cal. 179, and s. 501 below.

[9] Bail. I. 594 (para. 3) *Shama Churn Roy* v. *Abdul Kabeer* (1898) 3 C. W. N. 158 (sale not merely voidable, but void) *Doyal Chand Mullick* v. *Keramut Ali* (1871) 16 W. R. 116. (mutawalli removed for unlawful alienation). Cf. *Bhurruck Chundra Sahoo* v. *Golam Shuruf* (1868) 10 W. R. 458, (plaintiff having no beneficial interest in *waqf*, could not sue to recover property alleged to be improperly sold by the mutawalli: he might have asked for his removal); *Jeewun Doss Sahoo* v. *Shah Kubeerooddeen* (1840) 2 Moo. I. A. 390, 421, (para. 3) 423 (para. 2).

[10] (*Moulvie*) *Abdloolah* v. (*Mussamut*) *Rajesri Dossea* (1846) 7 S. D. A. 268.

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'waqf' land where it becomes unfit for the objects of the 'waqf,'[1] [or may retrospectively confirm a mortgage made by the 'mutawalli' without the sanction of the Court, where such mortgage was for urgent necessity and proper—[2] *sed quaere*;[3]]

(Shiah law) sale when dissensions.

[provided, secondly, that according to Shiah law where dissensions arise amongst the beneficiaries, the 'waqf' property may be sold, (*semble*) without an order of the Court—*sed quaere*.][4]

Sale for improvement not permitted.

Explanation I—The 'mutawalli' is not authorised to sell a part of the 'waqf' land in order to improve the rest, notwithstanding that the part sought to be sold cannot be put to any profitable use;[5] provided that such part of the 'waqf' property as is in ruins or is injurious to the said property as a whole,[6] may be removed.

Purchaser's duty.

Explanation II—Where the 'mutawalli' is authorised to sell, it is not necessary for the purchaser to look further than to the power of sale under the declaration of 'waqf,' nor to see whether the discretion is wisely exercised by the 'mutawalli.'[7]

Procedure for obtaining leave of Court.

(2) *Quaere* whether the 'mutawalli' may obtain the sanction of the Court for the sale or mortgage of 'waqf' property, by an application under the Indian Trustee Act, XXVII. of 1866, as held by the Bombay High Court ;[8] or it is necessary for him to proceed by way of a suit, on originating summons.[9]

Sanction for alienation.

(3) Where any person other than the 'mutawalli' is desirous of obtaining a decree for the sale, mortgage, or exchange of the 'waqf' property, he must proceed as provided in section 475 above.

1. Sale not valid because mansion in ruins.

With reference to the second proviso to subs. (1) it is stated in the 'Shara'ya-ul-Islam' as follows: "(1) If the mansion belonging to a 'wukf' should fall into

[1] Bail. I. 587 *Shama Churn Roy* v. *Abdul Kubeer* (1898) 3 C. W. N. 158. "In the ordinances of Abu Saood, there is an order issued by the 'Sadr-ush-Sharaya' of the time, in the year 951 Hegira, declaring that no sale or exchange of 'wakf' property should take place without an order of the Sultan (or his representative, the Judge)" Ameer Ali, I 342.

[2] *Nimai Chund* v. *Golam Hossein* (1909) 37 Cal. 179. The authorities cited in the case (cf. texts, 2,6,7,9-11) all seem to refer to the necessity of obtaining the Qazi's permission previous to the sale or mortgage.

[3] On unauthorised acts of this nature cf. s 260, pp. 203, 204, above, and *Matadin* v. *Sheikh Ahmed* (1912) 14 Bom. L. R. 192.

[4] Bail. II. 221. See comment.

[5] Bail. I. 595 (para. 2) : Cf. *ib.* 608 (para. 2) : a *minaret* may be erected only if necessary for mosque.

[6] "Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by the shade ; and though it should be injured by the shade, they cannot be sold, if their fruit is more profitable than that of the vines ; but if it be less profitable, the trees may be cut down and sold." Bail. I. 595.

[7] *Golam Ali* v. *Sowlatoonnissa Bibee* [1864] W. R. 242.

[8] *Kahandas Narandas* (1885) 5 Bom. 154, 173 (West J.) : English law (and the Act) applicable in all cases in which peculiarly equitable doctrines have obtained recognition as a means of ameliorating native laws.

[9] *Halima Khatun* (1910) 37 Cal. 870. Pugh J. cf. Trustee Act, s. 39. "The powers and authorities given by the Act shall and may be exercised only in cases to which English law is applicable" s. 3.

ruins, the space would not cease to be 'wukf,' nor would its sale be lawful. (2) But if dissensions should arise among the persons for whom it was appropriated, insomuch as to give room for apprehension that it will be destroyed, its sale would be lawful. (3) But even though there should be no such differences, nor room for such apprehensions, but the sale would be more for the advantage of the parties entrusted (i) some are of opinion that the sale would be lawful, but (ii) it would rather seem that it ought to be forbidden: and if palm trees are rooted out of appropriated ground, (i) the same persons would say that it may be sold on the plea that no benefit can be otherwise derived from it, (ii) but others are of opinion that it cannot lawfully be sold in such circumstances from the possibility of turning it to some use, by letting it on hire; and this opinion seems the more reasonable."[1]

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2. Valid if dissensions arise.
3. *Quære* if more beneficial to c.q. tr. to sell.

It is very doubtful what effect can be given to this passage. In the first place it proceeds on the basis that a 'waqf' can be created for individual beneficiaries. It must, however, be borne in mind that life-interests and limited grants are recognised in Shiah law without being confined to those that were made by way of 'waqf,' hence without any liability to be classified under a religious or charitable endowment as understood in English law. These rules may therefore be applicable to such limited grants under Shiah law. Apart from this difficulty, the 'mutawalli' would probably be wise not to use his powers such as they are under this section without an order of the Court.

The passage may also have a bearing on the application of the 'cy près' doctrine.[2]

Cy près

502. (1) Where the 'waqf' property consists of a house dedicated to the poor or other charitable object, the 'mutawalli may validly grant a lease of it for a year, and where it consists of lands, he may validly grant a lease for three years, and the lease is not determined by his death[3]; provided first that where the 'mutawalli' purports to grant a lease for a longer term than of a year or three years respectively, it is not void but voidable[4]; provided secondly that where it is necessary for the purposes of the 'waqf,' the Court may authorise a lease to be made for any longer term, notwithstanding that the declaration of 'waqf' expressly provides that the lease shall not be made for a longer term than a term therein specified.[3]

Power to [illegible] for a year or three years.

[1] Bail. II. 221 (*fifth*) *Shara'ya-ul-Islam* 239, case 8.

[2] *Salebhai* v. *Bai Safiabu* (1911) 36 Bom. 111; 13 Bom. L. R. 1025—Abdur Rahim "Muhammadan Jurisprudence" 305.

[3] Bail. I. 596 (paras 1, 2). *Fatawa Quzi Khan* III. 303 *Re Woozatunnissa* (1908) 36 Cal. 21, cf. above p. 27 *n.* 2.

[4] Bail. I. 596 (*ll.* 21-23):—"unless it be for the benefit of the *wukf* to sustain them. But this varies with the change of places and times." In *Dalrymple* v. *Khoondkar* a perpetual lease was allowed to be granted on the ground that the property was not all *waqf* but "heritable estate burdened with certain trusts," [1858] S.D.A. 586, (cf. s. 464 above), but in *Soojat Ali* v. *Zumeerooddeen* (1866) 5 W.R. 158 held that "trustees of an endowment cannot create a valid *mirasi* (perpetual and heritable) tenure, at a fixed rent by granting a lease of any portion of a *waqf* property."

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(2) Except as provided in the declaration of 'waqf' no person can be permitted to occupy the 'waqf' property without paying a reasonable rent for it, and if the 'mutawalli' purports to allow any person so to occupy the 'waqf' property, reasonable rent will nevertheless become due and payable by the said person for occupation of the said property.[1]

Erection of buildings.

503. The 'mutawalli' may erect buildings on the 'waqf' property, or cultivate lands appertaining to the 'waqf,' if it is beneficial to the objects of the 'waqf' to do so.[2]

Illustrations.

(1) "When the 'qayyim' (or person in charge) of 'waqf' lands desires to populate a village in it so that the inhabitants may increase therein, that they may protect it, and that the produce of corn may incraese (this being required), then he is permitted to do so. An instance of this rule is when a 'caravanserai' is dedicated by way of 'waqf' for 'faqirs' and it is necessary to have a servant for sweeping and cleaning the 'serai,' and for opening and closing the door; now the 'mutawalli' gives a room to some person for his residence who by way of hire is to do this work, and devote himself to it. This is valid.—This is in the 'Zahir'''[2]

(2) "When the 'waqf' land is adjacent to the houses in a town and people are inclined to rent the houses and the income would be greater by letting out the house than by cultivation, or planting trees then the 'qayyim' may validly build houses and let them out, but the reverse is the case when the land is distant from the buildings of the town, in which case he is not entitled to build houses and let them out. This is in the 'Fatawai Qazi Khan.'''[3]

(2) *Unauthorised Administration of 'Waqf.'*

Where provisions in 'waqf-nama' no more applicable.

504. (1) When the existing conditions[4] relating to the appointment of a successor to the 'mutawalli' or to the administration of the 'waqf' are no more applicable[5] owing to the altered circumstances of the 'waqf' property, or of society, or of the position of the parties; and persons are actually in the administration of the 'waqf' property, by the tacit consent of the beneficiaries; such persons, if acting without dishonesty and without

[1] Bail. I. 597 (para 1.)

[2] *Fatawa 'Alamgiri, Waqf Ch. V.* corresponding to Bail. I. 595. (para. 4).

[3] *Ib.* corresponding to Bail. I. 595, (para. 1).

[4] I.e. they may be either the conditions laid down in the original declaration of *waqf* or such as the Court may have in its general jurisdiction laid down, under a scheme or otherwise.

[5] *Advocate-General* v. *Abdul Kadar Jitaker* (1894) 18 Bom. 401—(*The Jum'a Masjid Case*) it being provided that the Qazi of Bombay should be the *Nazir* and there is no Qazi of Bombay.

improper dealings, with the funds of the 'waqf' property, will not be held responsible for mere errors of judgment in which the beneficiaries have acquiesced; but they are answerable for moneys actually received, and for defalcations which they would have discovered but for their default or neglect.[1] SECTION 504

(2) It is very doubtful whether persons so administering 'waqf' property without being legally authorised to do so, can be justified in assuming the power of purchasing property out of the 'waqf' funds; and when they do so, and the property falls in value, the purchase may (*semble*) be avoided.[2] Unauthorised administrators.

This section is based on the case known as the 'Jum'a Masjid Case' of Bombay. The position of an unauthorised mutawalli may be compared with that of an executor 'de son tort,' or a 'de facto' guardian.[3]

(3) *General Jurisdiction of the Court.*

505. The Court may order the 'mutawalli' to do any of the things mentioned in section 475 above, and in particular may deprive a 'mutawalli' of his remuneration if he has been guilty of malversation in the discharge of his duties, (but not otherwise),[4] or may order a 'mutawalli' who has been guilty of waste to file, at stated intervals, a true and complete account of his income, expenditure, and dealings with the 'waqf' property.[5] Disciplinary jurisdiction.

The section above deals entirely with the disciplinary jurisdiction of the Court; but it has purposely been entitled "general jurisdiction" in order that the various powers of the Court which have been mentioned in their proper places may shortly be referred to under it: Cf. ss. 475, 481, 489, 492, 493, 496, 497, 499-504 above.

§ 6.—Interpretation of the Declaration of 'Waqf.'

(1) *General Rules of Construction.*

506. (1) A declaration of 'waqf' must be construed in accordance with the intention of the 'waqif,' and not according to the strict interpretation of any particular word.[6] Intention to be given effect to.

(2) *Semble*, evidence of prevailing usage may be indicative of the directions of the waqif.[7] Prevailing usage.

[1] *Ibid.* cf. *Abdul Khalek* v. *Poran Bibee* (1876) 25 W. R. 543.
[2] *Ibid.* See comment.
[3] See above p. 204, s. 280.
[4] Bail. I. 598.
[5] *Imdad Hossein* v. *Mahomed Ali Khan* (1874) 23 W.R. 150 (e.g. every six months.)
[6] *Asheerooddeen* alias *Kalla Miah* v. *Drobo Moyee* (1876) 25 W.R. 557; *Advocate-General* v. *Fatima Sultani Begam* (1872) 9 Bom. H.C.R. 19.
[7] See *explanation I* to s. 491 above, for usage as assisting the interpretation on the point of how the appointment of the *mutawalli* is to be made,

SECTION 507 Reference to perpetuity implies perpetuity.

507. Where the declaration of 'waqf' refers to one or two generations of the descendants of a specified person as being entitled to the benefit of the 'waqf,' there the benefit is confined [illegible] generations; but where three generations or more are referred to, there the benefit is for the descendants in perpetuity, so long as they exist.[1]

of relationship how reckoned: law.

508. Where the 'waqf' is dedicated to the nearest relatives of a named person, nearness of relationship is to be reckoned in the following order of priority, each excluding all those below them:

(1) According to Hanafi law [2]—

(*a*) sons and daughters,
(*b*) father and mother,
(*c*) grand-children,
(*d*) grand-parents,
(*e*) great-grand-children,
(*f*) [great-grand-parents, and in the same order,][3]
(*g*) brothers and sisters.[2]

Shiah law.

(2) According to Shiah law [4]—

(*a*) descendants how lowsoever together with the father and mother,
(*b*) grandparents, and brothers (and sisters?)[3] together with the descendants of the brothers (and sisters?)[3] how lowsoever,
(*c*) paternal and maternal uncles (and aunts?)[3] in the order of inheritance.

Feminine when included in masculine.

509. *Semble*, "where a masculine term is used collectively, it includes females." [5]

Illustrations.

(1) When a dedication is made for the benefit of the sons of a person collectively, his daughters share the income equally with the sons, so long as any sons are surviving, and if there are no sons surviving, then the daughters take no benefit under the 'waqf,' [6] [and the whole of the income of the 'waqf' property is for the benefit of poor persons.[7]]

[1] Bail. I. 571, (para. 1 *ll.* 2-6).
[2] Bail. I. 577.
[3] Not expressly mentioned, Bail. I. 577. or II. 217.
[4] Bail. II. 217 (para. 4).
[5] Ameer Ali, I. 270, no authority is cited; but see illustrations to this section.
[6] Bail. 572 (para. 2; cf. Bail. II. 217 (para. 4).
[7] See above s. 469 (4).

(2) A 'waqf' is dedicated for the benefit of A's sons—
(*a*) if A has two sons, or more they take the profits equally ; [1]
(*b*) if A has only one son, he takes half of the profits and the other half is given to the poor ;[1]
(*c*) if A has sons and daughters, they all take equally ; [1]
(*d*) if A has no sons, but daughters, the whole benefit is for the poor ; [1]
(3) A 'waqf' is dedicated for the benefit of A's brothers, and A has brothers and sisters ; they all take.[1]

Terms of able.

510. Unless there is anything in a declaration of 'waqf' to show a contrary intention, where the beneficiaries are referred to or identified by some quality or description which is of a permanent nature,[2] or which cannot be acquired again after it has once been lost or ceased to be applicable,[2] there those persons are alone entitled to benefit under the 'waqf,' who can be identified or described in the manner referred to in the declaration at the time that the said declaration was made ; but where the quality or description is such that it may be lost or cease to be applicable, and thereafter it can again be acquired or become applicable,[3] there all those persons are entitled to take the benefit of the 'waqf' who can be referred to or identified in the said manner when the produce or income accrues.

Illustrations.

(1) A says my land is 'sadaqa'
on my blind or one eyed children, or
on my minor children ; or
on my male children and on the children of my male children ;—
those children are alone entitled who were in existence at the time of the dedication, answering to the description.[4]

(2) A says my land is dedicated by way of 'waqf' for my children
living in Bussorah ;
professing Islam, or
who are married, or
who are poor ;—
then all those who answer the description referred to at the time the income or produce accrues are entitled irrespectively of their doing so or not at the time of the dedication.[5]

[1] Bail. I. 572.
[2] Bail. I. 569: e.g. blindness or belonging to a particular sex.
[3] *Ib.*, e.g. residence in a specified town.
[4] Bail. I 569.
[5] Bail. I 569, 570. The following instances are also given—(*a*) "those who have become poor among my children," means (Imam Muhammad *diss.*) all who are poor at the time the produce accrues (*b*) "all who are in need of my children" means the same. But see above pp. 380-385, 392-397, 401-403, 406-409.

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(2) Meanings of certain Words.

1. "Child"
(a) existing at declaration.
(b) of known paternity.
(c) Not grand-children.

511. (1) In interpreting a dedication of 'waqf,' unless there is anything contained in it to show a contrary intention, by "child of the 'waqif'" is to be understood not only the child actually in existence at the time when the dedication is made, but after born children.[1] Children whose paternity is not known to be in the 'waqif,' but is established in him merely by acknowledgment, are not included.[2] Grand-children and remoter descendants are not included in the description ; provided first that where there is no child living at the time of the dedication, but the child of a son[3] [or other agnatic descendant] is living, there such child

exceptions.

(d) After third generation all take simultaneously.

or descendant, but no person in a lower generation, is included ; [3] provided secondly that there-after if a child is born to the 'waqif,' then such later born child becomes entitled to the produce. Where there is no descendant in the first and second generation, there all those who are in the third or any lower generation, participate together under the description of "child." [3]

Explanation—Where the person to be benefited is referred to as the child of a named person, the rules contained in clause (1) above apply with the necessary alterations.

'Ahfad' includes cognates.

(2) The term 'ahfad' is of the largest and most general signification, including the descendants of females as well as males.[4]

3. 'Aulad' or 'waris' excludes cognates.

(3) The sons of a daughter are not included in the term 'aulad dar aulad' or 'warrasan.'[5]

4. 'Nasab' excludes cognates.

(4) The word 'nasab' and its inflections refer only to agnatic descendants.[6]

5. 'Nasl,' 'zariat' include all descendants.

(5) The words 'nasl' and 'zari'at' include all descendants, male and female, and near or remote,[7] and whether born at the time of the dedication or thereafter.[8]

6. 'Qarabat' refers to collaterals

(6) The expression 'qarabat' (relationship) does not refer to the relationship between a man and his descendants or ascendants ; [9] nor the wife or husband ; provided that where the context shows that it was intended in a wider sense,

[1] Bail. I. 568, (*ll.* 1-4).
[2] Bail. I. 568, (para. 2).
[3] Bail. I. 570, (para. 2); 571, (para. 2). The child of a daughter is not included according to the 'zahir riwayat' and this is correct, *ib Hya-on-nissa* v. *Mofukkir-ol-Islam* (1805) 1 S. D. A (Cal) 106.
[4] *Karmodin* v. *Aalm Khan* (1889) 10 Bom. 119.
[5] *Abdull Ganne Kasam* v. *Hussen Miya Rahimtula* (1873) 10 Bom. H.C.R. 7.
[6] Bail. II. 221.
[7] Bail. I. 572 (para. 4) ; cf. Bail. I. 601 ; II. 217, (para. 4) ; Ameer Ali, I. 270 (para. 4).
[8] Bail. I. 573.
[9] Bail. I. 576-577,

it may be extended so as to include [all blood relations and[1]] relations by affinity.[1] SECTION 511

(7) 'Yatim' (orphan) means an infant child who has no father living, though the mother and grandfather may be alive. The condition of orphanage ceases on the attainment of puberty.[2] 7. 'Yatim'

Illustrations.

(1) A 'waqf' is dedicated in the following terms. "This my land is settled on my children." Then subject to section 480 above, so long as there are any children of the 'waqif,' they, or he, or she, is entitled to the benefit of the whole of the 'waqf' property; after all the children are dead, the grandchildren (the children of his sons) are entitled; after the grand children are exhausted, then those in the third and remoter generations all take, the nearer and the more remote sharing alike.[3]

(2) The dedication is in the following terms; "I have settled it on my children," and the 'waqif' has only one child surviving at the time when the produce accrues, half of it will be for the child and half for the poor. (If it were "for my child" the surviving child would have taken the whole).[4]

(3) The dedication is in the following terms: "'Sadaqa' on my two children S and *D*, and when they fail, then upon the children of both, for ever so long as there are descendants"; and S dies leaving two children SS and S*D*, then, subject to section 480 above, *D* takes half of the produce, and the other half goes to the poor, and the children of the deceased child (SS and S*D*) do not get anything so long as *D* survives. After *D*'s death, the whole of the produce is to be expended upon (*a*) SS (*b*) S*D* (*c*) their children (*d*) the children of *D* and (*e*) the children of *D*'s children.[5]

(4) A 'waqf' is dedicated for the benefit of A's child, and on A's 'nasl.' The 'waqf' is valid, and A's descendants whether male or female, and whether near or remote, and whether agnates or cognates, and whether born at the time of the dedication or thereafter.[6]

(5) A 'waqf' is dedicated to A's "children in being, and the children of their children." A's children and great-grand-children will take, but not his grand-children.[6]

It would be difficult for many of the provisions above referred to be made consistently with s. 480 above, but they may be of application in the case of ancient grants, or 'inams' by the Moghul Emperors (the construction of which is occasionally the subject of litigation,) or in the interpretation of rules or provisions, relating to succession to the office of 'mutawalli' which it would

[1] *Advocate-General* v. *Fatima Sultani Begam* (1872) 9 Bom. H. C. R. 19; *akriba* (scil. *aqriba*, which is a derivative of the same stem word as *qarabat*) does not include the widow. It was apparently assumed that all relations by blood were included in the term: hence the words in [ ] above.

[2] *Verbatim* from Ameer Ali I. 285 (para. 5).

[3] Bail. I. 571, (para. 2).

[4] Bail. I. 571.

[5] Bail. I. 571-572.

[6] Bail. I. 573. This is of course subject to s. 480,

SECTION 511 seem must equally be interpreted on the principles contained in the present and following sections.[1]

(3) Distribution of Benefit amongst those Entitled.

Equal and concurrent shares.

512. (1) Where several objects or beneficiaries are referred to in a declaration of 'waqf,' they take the benefit of the 'waqf' concurrently or simultaneously and in equal shares, unless there is anything to show an intention that they should benefit in a different proportion, or in succession to one another.[2]

Share of one of a class accrues to the rest.

(2) Where the beneficiaries under a 'waqf' consist of a class of persons who are individually identified, they are entitled to the benefit of the 'waqf' equally amongst themselves, and if one of them dies, his share goes to the poor, and the remainder to the survivors.[3]

Benefit taken 'per capita' males and females alike.

(3) Where a 'waqf' is for the benefit of a person's "son and his children, and the children of his children for ever so long as there are descendants,"[4] the benefit according to the 'Fatawa 'Alamgiri' would be taken by them 'per capita,' males and females being on the same footing, and the children of daughters being included.[5]

When share of deceased lapses to poor.

(4) Where a declaration of 'waqf' purports to be in favour of the children of a named person, and in default of them, in favour of the poor, and some of the children die, there the survivors are entitled to the whole of the profits of the 'waqf' property; provided that where the children are individually identified in the declaration, there the share of each child lapses on his death to the poor[6] or other ultimate charity.

(5) Where the declaration of 'waqf' provides that the beneficiaries should take specified shares consisting of fractions of the total income of the 'waqf' property—

Abatement ('aul').

(*a*) If the said fractions added together amount to more than unity, the share of each beneficiary abates proportionately.[7]

[1] A bill has been introduced in the Imperial Legislative Council by Mr. Jinnah, the chief features of which are to permit a *waqf* for the benefit of one's family and descendants.

[2] Bail. I. 570-573. (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai* (1909) 34 Mad. 12, 17 (last 7 lines). See comment.

[3] Bail. I, 599 (para. 2), 600 (para. 2) subs. (2) is a particular instance of the general rule contained in subs. (1).

[4] See above s. 480 *explanation II.*

[5] Bail. I. 572; (para. 3); II. 217 (para. 4).

[6] Bail. I. 574 (para 2) cf. Bail. I. 600 (para 2) below s. 517, I have retained the "poor" as the reversioners: though any other object may take their place: see s. 469 *explanation* above.

[7] Bail. I. 599 as by *increase* in succession; the increase or *'aul* referring to the increase of the common denominator; cf. s. 610 below.

(*b*) If there is any residue left after giving them their specified shares, then such residue is divided amongst each of the beneficiaries in equal shares [1] [*semble* subject to section 471 above, and provided that the intention is shown to give the whole of the income of the 'waqf' property to the said beneficiaries.[2]]

SECTION 512 "Return" of residue.

Illustrations.

(1) Where the beneficiaries under a declaration of, 'waqf' are children of a named person, both males and females take in equal shares.[3]

(2) W makes a declaration of 'waqf' property for the benefit of W's or X's "children," and there is only one child of W or X (as the case may be) surviving, then half of the produce or income of the subject of 'waqf' will be for the benefit of the said child, and the other half will be given to the poor.[4]

(3) A 'waqf' is made for 'Abdulla and Zaid. They take the income equally; after the death of one of them, half of the income, and when both die, the whole of it, goes to the poor.[5]

(4) A 'waqf' is made for the child of 'Abdulla without mentioning the number, then so long as any child of Abdulla lives, he takes the whole income.[6]

(5) The 'waqf-nama' provides:—

(*a*) That half of the income should be given to A, and two-thirds to B; then A takes three-sevenths and B four-seventh;[7]

(*b*) that half should be given to A, and one-third to B, then the one-sixth which is the residue should be divided equally between them.[8]

(*c*) that it should be given to A and B, and that one-third or a hundred 'dirhams' should be given to A, then B takes the residue.[7]

Equality is equity.

The rule of an equal division amongst the beneficiaries prevails also in England on the ground that equality is equity; and on this ground where the trusts declared were (*a*) in favour of A's relations, and (*b*) for such charitable uses and purposes as the trustees should think most proper and convenient, Sir J. Jekyll directed that (*a*) one moiety should go to A's relations; and (*b*) the other moiety to charitable uses. The trust in favour of A's relations purporting to be for such of them as were most deserving, and in such manner as the trustees should think fit, all were directed to come in without distinction.[8]

(4) *Devolution of Rights upon Descendants or Heirs.*

share

513. (1) In the absence of anything showing a contrary intention, the interest of a beneficiary under a 'waqf' lapses

[1] Bail. I. 599 (*ll.* 30-33), 600 (*ll.* 8-11). compare the *return* to the Quranic sharers in inheritance. See. below s. 625.

[2] This is not expressly stated.

[3] Bail. I. 570 (para. 2). II. 217 (para. 4) 220 (*third appendage*).

[4] Bail. I. 569-570—cf. ss. 469-471 above.

[5] Bail. I. 599.

[6] Bail. I. 599 (para. 2). But see p. 49 above.

[7] Bail. I. 599 (*ll.* 30-33), 600 (*ll.* 8-11).

[8] *Doyley* v. *Attorney-General* (1735) 2 Eq. Ca. Ab. 195; cf. *Re Douglas Obert* v. *Barron* (1887) 35 Ch. D. 473, 485.

SECTION 513 on his death and accrues to the benefit of the poor [or the other ultimate charitable object of the 'waqf'].[1]

'Per stirpes' distribution.

(2) Where it is provided, either expressly or impliedly, in a declaration of 'waqf' that the descendants of the beneficiaries thereunder shall succeed to the respective interests of the said beneficiaries, and there is nothing to show a contrary intention, there the said descendants succeed 'per stirpes' and not 'per capita';[2] and males and females take equal shares.[3]

Distribution amongst others than descendants.

(3) *Semble*, where in the circumstances referred to in subsection (2), it is provided that the said interests should devolve not upon the descendants, but upon other relatives of the said beneficiaries, the rules contained in section 507 above will apply with the necessary changes.

Illustrations.

(1) W makes a declaration of 'waqf' in favour of "B, and his offspring, generation after generation;" (*a*) B has a son, Bs, and a daughter B*d*. They will take the benefit of the 'waqf' equally, after the death of B. (*b*) On the death of Bs, his children, if any, will take half of the benefit in equal shares; (*c*) then if Bss, the son of Bs, dies (whether he predeceases Bs, or survives him), the children of Bss will take the share to which Bss was entitled; (*d*) if the descendants of Bs or B*d* become extinct, then his or her share lapses to the descendants of the others (as the description "offspring of B" is general and not specific).[4]

(2) W makes a declaration of 'waqf' providing for "his lineal descendants. He has ten lineal descendants[5] at the time of the declaration." So long as these live, they will each be entitled to an equal share. But if four of them die childless, and two (viz., A and B) die leaving children, then the children of A and B will respectively take an equal share with the four surviving lineal descendants, i.e., the said four will each take $\frac{1}{8}$ of the benefit, and the children of A $\frac{1}{8}$, and the children of B $\frac{1}{8}$, i. e. all the six lineal descendants will benefit equally.[6]

Rule exemplified.

In illustration (2) above the "appropriation" is stated by Macnaghten to be "in favour of his lineal descendants who are ten in number." Sir R. Wilson notes on this: "'Sic' in Macnaghten; but the context seems to show that they all belong to the first or at any rate to the same generation of descendants." It is submitted that it makes no difference whether they belong to the same generation or not, nor even whether some of the ten are children of the rest. The description being "his lineal descendants," it includes the ten persons who are alive at the time, answering that description—and "descendants" includes

[1] See s.511 illustrations and authorities there cited.

[2] Macnaghten 341, case 8, Q. 2. Ameer Ali, I. 270-271, citing *Raddul Muhtar*, III. 672, *Majmaa-ul-Anhar*, Part II. 641.

[3] Macnaghten, 342; Bail. I. 570.

[4] Macnaghten, 341, case 8, Q. 2.

[5] See comment.

[6] Macnaghten, 341, case 8, Q. 2.

sons as well as grandsons : these ten persons take equally in accordance with s. 511 (1) above ; and as the descendants are not individually identified, the shares of the deceased beneficiaries do not lapse, but accrue to the survivors of the ten descendants. This conclusion is based on the fact that the 'waqf' is in favour of his "descendants," which is evidently taken as sufficient to indicate that the provision is not in favour of A, B and the others, individually (s. 512 (1).), but that it is to devolve on the descendants of A, B and the others ; hence on the death of any of the ten, the benefit neither lapses to the ultimate object of the 'waqf,' nor goes to the survivors of the ten, but devolves on the heirs of the deceased beneficiary.

SECTION 513

§ 7.—*Special Rules Relating to Mosques.*

(1) 'Waqf' for Mosque when Completed.

514. (1) Where a person erects or specifies a building for the purpose of dedicating it as a 'masjid,' according to Hanafi law the 'waqf' is not completed, and his ownership of the land and building does not cease, until he divides them off from the rest of his property, and provides a way to go to it, and either permits public prayers to be said therein, or delivers possession of the mosque to a 'mutawalli,' or to the judge, or his deputy.[1]

(Sunni law). Mosque property must be divided off and provid

(2) According to Shiah law the 'waqf' of a mosque is completed by the 'waqif' making a formal declaration of 'waqf,' and permitting prayers to be said in the mosque.[2]

Illustrations.

(1) W purports to build a 'masjid' within his house, or boundaries, and permits the public to enter there, and say their prayers, then it becomes a 'masjid' according to the opinion of all, provided that he gives the public a right of way ; but not otherwise, according to Abu Hanifa ; and even without the right of way, according to the two disciples[3] and the Shiah law, (provided that according to Shiah law a formal declaration of 'waqf' is necessary).[4]

(2) W, a Hanafi, purports to build a 'masjid' and there is a basement underneath it, or on the floor above the 'masjid' is a dwelling place, then though there is an entrance to the 'masjid' from the highway, it does not validly become a 'masjid ;' but if the basement were dedicated to the use of the 'masjid,' it would be valid, as in the case of the 'masjid' at Jerusalem : "[3] the reason being that the 'masjid' in the

[1] Hed. 239 ; Bail. I. 604, 605 (paras. 2,3) *Yakoob Ali* v. *Luchmun Dass* (1874) 6 N.W. 80 (where it is said that two conditions are essentially requisite : (*a*) the site must be publicly appropriated, (*b*) public prayer said) ; *Adam Sheik* v. *Isha Sheik* (1894) 1 C. W. N. 76. Mosque becomes consecrated by delivery to *mutawalli*, or declaration or on performance of prayers).

[2] Bail. II. 220 (para. 1), see comment.

[3] '*Fatawa*' '*Alamgiri*, *Waqf*, ch. XI *init* ; Bail. I. 604, Hed. 239 (col. ii.).

[4] Bail. II. 220 (para. 1).

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first instance is not divided off. That objection would not have applied under Shiah law,[1] provided that a formal declaration of 'waqf' were made.[1]

(3) A man has an open space of building ground, and gives permission to a body of persons to say prayers there publicly ; and the permission is without any condition, and for ever, without restriction of a time limit, then the 'masjid' is consecrated, and the property cannot form part of his estate on his death.[2]

According to Hanafi law "separation is necessary, because without that the 'musjid' is not made special to Almighty God ; and prayer is necessary, because delivery is requisite according to Aboo Hanifa and Moohummud."[3] Whereas the Shiah law is stated in the following terms : If one should appropriate (i. e., purport to make a 'waqf' of a building, for) "a 'musjid' or place of worship, it is valid though only one person should pray in it, . . . but without the formal words of 'waqf' being pronounced," it would not "pass out of the property of the original owner."[4]

Acts of ownership as evidence of possession.

Delivery of possession may be evidenced by the fact that the subject of the 'waqf' is put to the use of the objects of the 'waqf' ; just as in the case of a gift, delivery of possession is proved by acts of ownership exercised on the subject by the donee.[5] The following is given by Syed Ameer Ali as a translation from the 'Raddul Muhtar :' "As delivery of possession in the case of a 'wakf' is deemed necessary though Abu Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example the delivery of a cemetery is by the burial of one person ; of a tank or reservoir by one person drinking there ; a guest house ('mussaffir khânèh,' travellers' house) by one wayfarer, or traveller alighting there. Similarly as the purpose of a mosque is that people should pray there in 'jamâat' it is required that where there is no express dedication, prayers should have been offered there with the 'azân' or 'ikâmat.'"[6]

(2) 'Waqif' cannot Participate in Benefit with Mosque.

Waqif cannot benefit under waqf for mosque.

515. Where the object of a 'waqf' is a mosque, the 'waqif' cannot reserve any benefit to himself under the 'waqf'; and a 'waqf' with any such reservation is void.[7]

This is in accordance with all the schools of law. For (Abu Yusuf's exposition of) the Hanafi law alone permits the 'waqif' to reserve any benefit to himself in a 'waqf' of any kind whatsoever. But even according to that exposition, where a mosque is the object of the 'waqf' the 'waqif' cannot be a beneficiary.

[1] Bail. II. 220 (para. 1).

[2] *Ftaawa 'Alamgiri Waqf*, ch. XI ; Bail. I. 605 (para. 4). II. 220 (para. 1).

[3] See p. 431, *n.* 1.

[4] Bail. II. 219-220.

[5] See above s. 404 p. 311.

[6] *Ameer Ali* "Mahommedan Law" I. 305 citing *Raddul Muhtar*, Vol. III. 572. The present writer has not been able to trace the original in the work referrd to, but the law seems to be laid down similarly in the *Fatawai Qazi Khan*, 296.

[7] Bail. I. 606, (*l.* 10.) It is not quite clear whether the reservation alone is void, or the whole *waqf*. The fault does not seem to be in the translation.

(3) Whether Mosque can be Reserved for a Sect.

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516. It is stated in the 'Fatawa 'Alamgiri' that when a 'masjid' is consecrated, and it is purported to be reserved for the people of a particular locality, the reservation is void, and persons not belonging to that locality are entitled to worship in it ;[1] and it has been said in the course of decisions by the Courts[2] that a mosque cannot be dedicated with a reservation for a particular sect or class of people ; but according to Shafi'i law a 'masjid' may be dedicated with such reservation,[3] and the effect of the rule of law above stated in British India is not free from doubt.

to locality or sect.

The following points were laid down by the Privy Council :[4] (1) Among Sunni Muhammadans the followers of each of the four sects can properly worship with each other; (2) there was not produced any text to show that a follower of Abu Hanifa could do wrong in following a practice recommended by others if the four 'Imams'[5] ; (3) if the 'Imam' (leader at prayer) introduces the loud-toned 'amin' and the 'rafaidin'[6] (*a*) it does not disqualify him for officiating in a mosque where these ceremonies were not previously used, nor (*b*) does it justify a section of the worshippers in setting up another leader at prayer at the same time that the prayer is being conducted by the duly authorized 'Imam ;'[7] (4) there is no rule of law that when public worship has been performed in a certain way for twenty years, there cannot be any variation however slight from that way :[8] the question in each case of dispute must be as to the magnitude and importance of the alleged departure;[9] (5) the Court ought not to declare that the 'imam' or 'mutawalli' of the 'masjid' has authority to eject the dissentients if and when they interfere: the plaintiffs must rely on the prohibitory order which can be enforced according to law if the occasion arises. (6) The remarks of Edge C. J. to the effect that a mosque cannot be consecrated exclusively for the use of any particular sect or denomination of Sunni Muhammadans, that a mosque must be a mosque for all, it must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual, where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience,[10]—were referred to by the Privy Council, but they did not decide the question whether a mosque cannot validly be reserved for the use of followers of a particular sect. The point is perhaps not likely to

' Fazl Karim v. Maula Buksh.'

Can any Mussulman enter any mosque.

[1] Bail. I, 606 (para. 1).

[2] See cases cited in footnotes to ss. 520, 521.

[3] Wilson, "Digest" p. 421, s. 417, citing Van den Berg's *Manuel de Jurisprudence Musulmane* (*Minhaj-at-Talibin*) II. 286.

[4] *Fazl Karim* v. *Maula Buksh* (1891) 18 Cal. 448 ; 18 I.A. 59 reversing the High Court.

[5] *Ib.*; cf. *Muhammad Ibrahim* v. *Gulam Ahmed* (1864) 1 Bom. H.C.R. 236.

[6] I.e. raising the arms at the time of saying *Allah Akbar* in prayers.

[7] this refers to the authorized prayers. *Quaere* if it affects the principle of this section.

[8] *Ata-Ullah* v. *Azimullah* (1889), 12 All. 494, 500. "These observations were not necessary to the decision, the only fact found being that the mosque in question had been exclusively used by Hanafis and there being no suggestion of any restrictive claim in the deed of endowment."—Wilson, "Anglo-Muhammadan Law" s. 371, 349 ; though the P.C. refer to it as a ruling : *Fazl Karim* v. *Maula Buksh* (1891) 18 Cal. 448, 458 ; 18 I.A. 58.

SECTION 516 arise in British India in this exact form. But there are religious communities—'jama'ats' is the term applied to them—which possess property, including places of worship, and though it would be foreign to the ideas of a Mussulman to exclude another Mussulman from entering and offering up his prayers in any place of worship—as a matter of practice no one who is not a member of a particular 'jama'at' ever enters the mosque belonging to it, without being invited to do so or obtaining leave, and though these places of worship are always referred to as 'masjids' they are kept under the control of persons who obey the orders of the heads of their own community. The question would therefore arise most directly in India if the persons in charge of such a mosque, whose position is very different from that of a 'mutawalli,' were proceeded against in a court of law for a breach of trust on the ground that the doors of the mosque were locked up, and not opened except to members of the 'jama'at.' They would be guilty of a breach of trust if the real object of the 'waqf' were to benefit not their own 'jama'at' but all Mussulmans. That question is very different from whether persons habitually coming to a particular mosque can be prevented by the others from praying in their own way, which is dealt with in s. 516.

(4) *Mosque property never applied to other objects.*

Land on which mosque built passes out of private property.

517. The land where a 'masjid' has been erected does not become the property of its original owner, or his heirs. notwithstanding that the 'masjid' has fallen to decay, and is no longer used for prayers, nor can its old materials be used for building or repairing another 'masjid.'[1]

Imam Muhammad was of opinion that the land and old materials of a 'masjid' in ruins reverts to the 'waqif' or his heirs. But this opinion is opposed to that of Abu Yusuf, according to which the 'fatwā' is given.[1]

Provision for poor not necessary with mosque.

518. Where the object of the 'waqf' is a 'masjid,' all the exponents of Hanafi law are agreed that there need not be any ultimate dedication to the poor, and there may be provisions for expenses connected with the use of the 'masjid' as a place of worship.[2]

Illustration.

A 'waqf' may be validly made in the following form: "I dedicate this my land" (specifying its boundaries) "with its rights and advantages as a perpetual 'waqf' during my life and after my death, on this condition, that it may be cultivated, and its produce be applied for the expenses or repairs, of the buildings, and for the salaries of the attendants, and general maintenance, and that the surplus may be expended on the building, of such and such a 'masjid,' and for the supply of its oil and all similar purposes, for the benefit and advantage of the 'masjid,' with liberty to the 'mutawalli' to expend thereout in accordance with his

[1] Hed. 240; Bail. I. 606 (para. 2): II. 221 (*fourth*). Bail. I. 607. See illust

discretion, and when the said 'masjid' is not in need of these expenses, then the said produce should be applied to the poor." [1]

This section seems almost ludicrous in the light of the form that the law of 'waqf' has taken in British India. It brings out, however, the point on which Abu Yusuf disagreed from Imam Muhammad and Abu Hanifa, viz., whether it is necessary to make express mention of the poor as beneficiaries under a 'waqf.'

(5) Endowment of Existing Mosque.

Provisions for poor engrafted on endowment mosque.

519. Property may be dedicated by way of 'waqf' for supplying an existing 'masjid' with its necessary expenses, and with a provision that (1) in case the said 'masjid' is not in need of the said expenses, then the income of the 'waqf' property should be expended on the poor,[2] or (2) with provisions for the benefit of objects which must in time cease, and the lapse of which will leave the whole benefit available for the benefit of the 'masjid.' [3]

Illustration.

By a 'sanad' a gift is made of the income of certain villages, providing that one-third of it is for the defrayal of expenses of the servants of a mosque, and 'farsh' and light, etc., one-third for the expenses of a 'madrassa,' and the remaining one-third for the allowance of the 'mutawalli'; *held*, that the gift complied with the four essential conditions necessary to create a valid 'waqf.' [4]

(6) Legal Proceedings Relating to Mosque.

(a) Civil Proceedings.

Person in case of breach of trust, &c.

520. Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager, or superintendent of such mosque, temple or religious establishment, or the member of any committee appointed under the Religious Endowments Act, for any misfeasance, breach of trust, or

[1] *Fatawa 'Alamgiri*, *Waqf*, ch. XI. *fasl* ii. *init.* Bail. I. 607 (para. 1) does not bring out the fact that the object of the *waqf* in this illustration is to benefit another *masjid* which does not form part of the *waqf* property; and that the point is that the object of a *waqf* may be to provide oil, &c., for an existing *masjid*, with the reversion in favour of the poor.

[2] Bail. I, 607, see s, 517 *ill.* s, 480, *ill.* 6; cf, *Asoobai* v. *Noorbai* (1905) 8 Bom. L. R. 245, 246.

[3] *Muzhurool Huq* v. *Pohraj Dutarey Mohaputtur* (1870) 13 W.R. 235; provisions to defray expenses of a mosque, alms to mendicants, and surplus for expenses of marriages, burials and circumcision of members of the family of the *mutawalli*.

[4] *Jugatmoni Chowdrani* v. *Romjani Bibee* (1884) 10 Cal.

SECTION 520

Powers of the Civil Court
(a) specific performance.
(b) Damages.
(c) Removal of trustee, &c.

neglect of duty, committed by such trustee, manager, superintendent, or member of such committee, in respect of the trusts vested in, or confided to them respectively; and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, superintendent, or member of a committee.[1]

(b) Criminal Proceedings.

Disturbance in mosque.

521. When any person makes any demonstration [2] in any mosque, oral or otherwise, or does not say his prayers in accordance with the ritual of his sect in good faith, but with the intention of maliciously disturbing others in their devotions, he is in British India guilty of committing a criminal offence.[3]

Illustrations.

(1) Members of the 'Muhammadi' or 'Wahabi' sect are Mussulmans, and are therefore entitled to perform their devotions in a mosque, though they may differ from the majority of the Sunni Mussulmans on particular points.[4]

(2) S, a Shafi'i may pronounce the word 'amīn' loud in saying his prayers in a mosque, where the majority of worshippers are of the Hanafi sect, who pronounce it in a low tone, provided that S does it 'bona fide,' in accordance with his own rituals, and not for the purpose of disturbing the others, and notwithstanding that he may cause annoyance to them.[4]

[1] Religious Endowments Act XX. of 1863 s. 14.

[2] E.g. by bawling out the word *amin* in a noisy and disorderly fashion, causing a disturbance, Straight J. in *Ataullah* v. *Azimullah* (1889), 12 All. 294 (F.B.) explaining *Q.-E.* v. *Ramzan* (1885) 7 All. 461.

[3] *Ib.* (Per Mahmood J.) *Gangu* v. *Ahmadullah* (1889) 13 All. 419; see also. Cf. *Abdus Subhan* v. *Korban Ali* (1908) 53 Cal. 294; *Fazl Karim* v. *Maula Buksh* (1891) 18 Cal. 448, 18 I. A. 59 *Adam Sheik* v. *Isha Sheik* (1894) 1 C.W.N 76.

[4] See footnotes to s. 516.

CHAPTER XI.

PRE-EMPTION.

§ 1.—Preliminary.

522. (1) Where a person [1] has the right to have any property transferred to himself on his paying the consideration for which the owner of the said property has agreed to sell it [2] to another, such right is called the "right of pre-emption;"[3] the person having or claiming to have the said right is called "the pre-emptor," and the said property is called the "subject of pre-emption." [3]

Right of pre-emption.

Pre-emptor.

Subject of pre-emption.

(2) In this chapter unless there is anything in the subject or context showing a contrary intention—

(*a*) The subject of pre-emption is referred to as "the land;" its owner as "the seller;" the person to whom it was originally intended to be transferred as "the buyer;" the agreement for its transfer as "the sale," or the "ground for pre-emption;" its consideration as the "purchase money;" and the right of pre-emption is referred to as "arising from" the sale or from the ground of pre-emption.

"The land."

"The seller."

"The purchaser."

"The sale."

(*b*) Where two or more persons are simultaneously entitled to pre-empt the same property, they are referred to as being on the same footing as regards the priority of their claims to pre-emption, or as being "equal in degree" or as "joint pre-emptors." In the illustrations and footnotes to this chapter the letters S, SA, etc., refer to the sellers or vendors; B, BA, etc. to the buyers or purchasers or vendees; and P, PA, etc. to the pre-emptors. Italic letters refer to females.

emptors.

[1] Words importing the masculine gender include females, and words in the singular include the plural, and *vice versa*.

[2] The texts expressly refer both to a sale and to exchange, but for brevity only sale is referred to throughout and that expression must be taken to include exchange or barter.

[3] Bail. I. 471. Pre-emption is called *shuf'a* in Arabic; and the pre-emptor *shafi*.

SECTION 522
Priority in the right to pre-empt.

(*c*) Where the right of one person to pre-empt arises only in the absence or on the disqualification of another, or on that other waiving his right to pre-empt, the latter is said to have "priority in the right to pre-empt" over the former.

Persons governed by law of pre-emption.

(*d*) Where the personal law by which any person is governed includes the law of pre-emption, he is referred to as being "governed by the law of pre-emption."[1]

'Talab-i-muathibat' (or assertion.)
'Talab-i-ishhad' (or demand.)
'Talab-i-tamlik' (or enforcement.)

(*e*) The 'talab-i-muathibat,' 'talab-i-ish had,' and 'talab-i-tamlik,' as defined or explained in section 528 below, are in this chapter referred to as the "assertion,"[2] "demand" and "enforcement" of the claim to pre-emption respectively;[3] and the pre-emptor is referred to as asserting, demanding and enforcing his claim.

'Wajib-ul 'arz' or record of tenures, &c.

(*f*) A 'wajib-ul-'arz' means a record of the information in regard to landed tenures, to the rights, interests, and privileges of various classes of the agricultural community, and to the local usages connected with landed tenures, obtained by the Settlement Officer, originally under Regulation VII. of 1822, and subsequently under other enactments and Government orders.[4]

Procedure.

The procedure on a suit for pre-emption is given with some fulness in Baillie I. 485-487, (Book VII. chapter 3). It gives in a compendious form all the various matters and constituents for establishing the claim, and may be referred to with advantage. Pre-emption is defined in the 'Shara' ya-ul-Islam' as follows: "Shoofâ is the legal title of one partner in joint property to the share of another partner in consequence of its transfer by sale."[5] Mahmood J. defined it as "a right which

Definitions of pre-emption.

[1] Persons governed in India by the law of pre-emption are (*a*) all Mussulmans (except in Madras); (*b*) those who have adopted it by custom, or (*c*) by contract.

[2] "The first formality technically called the 'immediate demand'"—per Ameer Ali J. delivering the judgment of P. C. (1912) 14 Bom. L. R. 436, 444. The judgment was reported after this chapter had been written.

[3] These terms cannot be adhered to when the words of other authors are quoted, in which cases, or when otherwise necessary, the Arabic equivalents are given, or they are qualified as the first, second, and third (claim), respectively.

[4] See below pp. 443-444. *Chowdhree Brij Lal* v. *Raja Goor Sahai* (1867) Agra F. B.(N. W. P., F. B. RULINGS July-Dec. 1867), 95, where the origin and effect of the *wajib-ul-'arz* are explained in great detail. See also *Sadhu Sahu* v. *Raja Ram* (1893) 16 All. 40 (F.B.): *Returaji Dubani* v. *Pahlwan Bhagat* (1910) 33 All. 196, 204, 206. (F.B.): "*Wajib-ul-'arz*, lit. fit for, or worthy of, representation—a petition, a written statement or representation, a written agreement: in the North-West Provinces it designates what is considered to be the most important of the documents relating to the village administration, describing the established mode of paying the government revenue, the actual shares or holdings, whether held in severalty or in common, and how separation or re-allotment takes place, the powers and privileges of the *Lambardars*, and how elected, what extra items of collection are recognised, the rules regarding fruit and timber trees on the estate, and how irrigation is maintained: the appropriation of waste lands, the village servants and their fees, and the pay of the village watchmen: it should be, in fact, a complete view of the organization of the village, and is to be attested by the signatures of all the *Lambardars* and as many of the shareholders as choose to sign, and by the signatures of the *Patwari* and *Kanungo*: it should be read aloud in open court in the hearing of the subscribing parties and the settlement officer, and be approved and signed also by him. The term seems to have been superseded of late years by *Khewat*."—Wilson's Glossary (1855).

[5] Bail. II. 175: "According to the Hanifites not only a partner in the property but also in its rights and a neighbour have a legal claim to pre-emption," *ibid. n.* 1, citing Bail. I. 476.

the owner of certain immovable property possesses as such for the quiet enjoyment of immovable property to obtain in substitution for the buyer, proprietory possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person."[1] See also the definitions in the Punjab and Oudh Laws Acts, 1872 and 1876 respectively: below s. 557. Shafi'i is reported to have stated that the right of pre-emption is "repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the law."[2] The right is justified, however, by the Hanafis on the grounds (*a*) that so far as a joint owner is concerned, it is injurious to him to have a stranger as participator in the property to which he must be attached through associations, but which he may perhaps abandon, and that it would be a greater hardship on him than on the stranger, the more so as the stranger is compensated; (*b*) that inconveniences attend the division of property.[2] The 'Sharaya'-ul-Islam' refers to division occasioning loss or damage as a cause why the right is given[3] and the 'Hidaya,' to pre-emption "being a disseising another of his property merely in order to prevent apprehended inconveniences"; and again it is explained that "the grand principle of 'shaffa' is the conjunction of property and its object . . . to prevent the vexation arising from a disagreeable neighbour."[4]

SECTION 522

Reason for recognising pre-emption.

The pre-emptor's position is distinguishable from that of an ordinary purchaser as regards the compensation payable to the purchaser if he erects buildings or plants trees, and it turns out that the vendor was not the owner of the land: the ordinary purchaser has a right to compensation for the improvements from the true owner; but the pre-emptor cannot recover it either from the seller or the purchaser or the true owner; for "[the ordinary purchaser] is deceived by the seller, and is empowered by him to take the ground,—whereas the Shafee is not deceived by the purchaser, nor can he be said to be empowered by him to take the ground, since the purchaser himself is compelled—the Shafee taking possession of the ground without his consent."[5]

Pre-emptor distinguished from ordinary purchaser.

§ 2.—Operation of the Law of Pre-emption.

(1). Persons governed by it: Choice of Law as Affected by Status of Parties.

523. (1) The law of pre-emption is enforced in British India in accordance with section 5 above.[6]

Application in India.

(2) The Sunni or Shiah law of pre-emption respectively governs persons belonging to the said sects.[7]

Sl of pre-emption

[1] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775, 799, adding, "I could easily support every word of this definition by original Arabic texts of the Muhammadan law itself."

[2] Hed. 548. Shafi'i therefore does not admit it in favour of a neighbour.

[3] Bail. II. 176 (para. 3).

[4] Hed. 550 (col. i, para. 4), 558 (col. ii. paras. 1, 2).

[5] Hed. 557 (col. ii.).

[6] See comment.

[7] Cf. *Qurban Husain* v. *Chote* (1899) 22 All. 102.

SECTION 523
Pre-emption by custom.

(3) The right of pre-emption is recognised as prevailing by custom in Behar,[1] Gujarat,[2] and Malabar,[3] and is there enforceable irrespective of the religious persuasion of the parties concerned.[4]

Presumptions: Muslims alone governed by it.

Muhammadan law adopted.

Existence of custom.

(4) In the absence of proof to the contrary it will be presumed (*a*) that Muslims are governed by the law of pre-emption, and that non-Muslims are not governed by it,[5] (*b*) that where the law of pre-emption is adopted by custom [or contract [6]] it is the Muhammadan law in accordance with the Hanafi exposition thereof,[7] (*c*) where it arises under a 'wajib-ul-'arz' and it is not apparent either from the language itself or from other evidence that the pre-emption clause contained in it, is merely the record of a new contract, the presumption is that it is the record of a pre-existing custom,[8] (*d*) subject to section 557 below [9] the law of pre-emption is not territorial but personal; and where the

[1] *Jadu Lal Sahu* v. *Maharani Janki Koer* (1912) 14 Bom. L. R. 436 (P.C.): *Joy Koer* v. *Suroop Narain Thakoor* [1864] W. R. 259 *Kasi Chunder Surma, ib.* 189. *Fakir Rawot* v. *Sheikh Emambaksh*, Ben. L.R. (Supp. Vol.) 35; W.R. (SP. NO.) 143 (F.B.); *Ramdulal Misser* v. *Jhumack Lal Misser*. (1872) 8 Ben. L. R. 455; 17 W. R. 265, *Ramgutty Surma* v. *Sheojuttun Roy* v. *Anwar Ali* (1870) 13 W. R. 189; *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575; whether he is a native of Behar or domiciled there; cf. *Parsasth Nath* v. *Dhanai* (1905) 32 Cal. 988; but a NATIVE OF LOWER BENGAL seeking his fortune in Behar is not necessarily bound by it: *Bujnath Pershad* v. *Kopilmon Singh* (1875) 24 W.R. 95; nor a person who is a co-sharer in property in Behar, but is not domiciled there, *Parsasth Nath* v. *Dhanai* (1905) 32 Cal. 988; nor a CHRISTIAN IN BHAGALPORE, *Moheshee Lal* v. *Christian* (1866) 6 W.R. 250. As to HINDUS IN CHITTAGONG see *Inder Narain Chowdhry* v. (*Mahomed*) *Naziroodeen* (1864) 1 W. R. 234, S. C. on review, *vice versa*, (1866) 5 W. R. 237; three decisions of subordinate courts holding that it existed, and one to the contrary. H. Ct. held custom not proved. Hindus in PURNEAH not proved to be governed by it: *Kantee Ram* v. *Walee Saho* (1869) 11 W. R. 251. HINDUS IN JESSORE not governed by law of pre-emption: *Madhub Chunder Nath Biswas* v. *Tamer Bewah* (1866) 5 W.R. 279. TIPPERAH: *Dewan Munwar Ali* v. *Azhuroodeen Mahomed* (1866) 5 W. R. 270. *Held*, not to prevail in MADRAS, *Ibrahim Saib* v. *Muni Mir Udin Saib* (1870) 6 Mad. H. C. R. 26 (see above s. 5, p 33, *n.* 6). SYLHET, *Jameelah Khatoon* v. *Pugul Ram* (1864) 1 W. R. 251. It prevails in MUZAFFARNAGAR (in *Muhalla* Abupura), *Zamir Husain* v. *Daulat Ram* (1882) 5 All. 110.

[2] *Gordhandas Gudharbai* v. *Prankor* (1869) 6 Bom. H.C.R. (A.C.) 263.

[3] *Krishna Menon* v. *Kesavan* (1897) 20 Mad. 305. The law of pre-emption is generally not enforced in Madras; see s. 5., p. 32, above.

[4] In other cases, of course, the custom, where it is alleged must be proved, see above pp.43-45, and one or two solitary instances will not suffice: *Benarsee Doss* v. *Phool Chund* (1866) 1 Agra 243. *Sheraj Ali Chowdhry* v. *Ramjan Bibee* (1867) 8 W. R. 204: 2 Ind. Jur. (N. S.) 249. *Hubeerul Hossein* v. *Lalla Dhoki Nundun*. [1864] W. R. 75

[5] *Fakir Rawot* v. *Emam Baksh* (1863) Ben. L. R. (SUPP. VOL.) 35: 35 W. R. Sp. No., 143 (F.B.); cf. 14 Bom. L. R. 436, (P.C.)

[6] In *Muhammad Usman* v. *Muhammad Abdul Ghafur* (1912) 34 All. 1; when it arises under a contract, the contract can affect the general law only during its subsistence: after it the general law revives. It would seem that on points not covered by the contract also the general law would prevail.

[7] *Ganeshi Lall* v. *Luchman Dass* (1873) 5 N. W. 31; cf. *Arjun Singh* v. *Sarfaraz Singh* (1888) 10 All. 182; *Ram Prashad* v. *Abdul Karim* (1887) 9 All. 513; *Jog Deb Singh* v. *Mahomed Afzal* (1905) 32 Cal. 982; *Jadu Lal* v. *Janki Koer* (1912) 14 All. 436, 442, (P.C.)

[8] *Bhim Sen* v. *Motiram* (1910) 33 All. 85. (F.B.) following *Majidan Bibi* v. *Sheikh Hayatan* [1897] All. W. N. 3 (F.B.) ON CUSTOM; *Hazari Lal* v. *Durga Prasad* (1909) 32 All. 187 ON CONTRACT; *Kanchan Singh* v. *Mani Ram* (1910) *ib.* 201; *Tasadduq Hussain Khan* v. *Ali Khan* [1908] W. N.; 121 *Pran Sukh* v. *Salig Ram* (1910) 32 All. 261. Cf. *Ganga Singh* v. *Ghedi Lal* (1911) 33 All. 605.

[9] I.e, Oudh and Punjab Laws Acts.

inhabitants of any locality have adopted it by custom,[1] it will not necessarily be presumed that a person not being a native of or domiciled in the said locality is governed by it, notwithstanding that he may be the owner of land within the said locality.[2] SECTION 523

The following extract from the judgment in 'Chowdhree Brij Lall *v.* Raja Goor Sahai'[3] is of interest: "There are three grounds on which claims to pre-emption may be put forward: they may be claimed as founded on law, or on general usage, or on special contract. Act XIV of 1859, (Limitation). . . . distinctly recognises these three grounds of claim. (1) As founded on law, 'pre-emption' may be claimed in this country under the provisions of the Mahomedan law or the special enactments with regard to . . . auction sales of 'puttudaree' estates . . . (2) As regards general usage, it was declared by the late Sudder Court of these Provinces[4] that pre-emptive rights do not obtain as an universal custom among Hindus. To this statement we assent, with this addition that in some parts of India the custom has been found to prevail accompanied with all the conditions attaching to pre-emptive rights under the Mahomedan law. (3) As based on contract, we hold it beyond question that in this country persons who are in the position of proprietors, may by contract attach to their property such conditions as may be mutually agreed upon between the contracting parties, provided that such conditions are not contrary to law; and we further hold that in the case of co-parcenary estates, in respect of which such contracts are most frequently made, stipulations for mutual rights of pre-emption are not forbidden either by positive enactments, or general usage having the force of law."

I. PRE-EMPTION may be put forward as founded on
1. LAW.
(*a*) Acts.
(*b*) Muhammadan law.
II. CUSTOM.
III. CONTRACT.

Sir R. Wilson (s. 350 p. 375) after referring to the view of Mahmood J. and Spankie J. that the law of pre-emption is enforceable amongst Muslims as a religious usage or institution, says that this proves too much, for in that case the whole of Muhammadan 'Shari'at' should be enforced, including the law of property, and contract. As a matter of fact the law on these points is enforced, unless it is ousted by any legislative enactment (cf. s. 4 p. 32 above.) Sir Roland suggests that "some portions are more firmly rooted in the sentiments of the Moslem community than other portions, and that the judges may possibly have had good reasons for believing this to be the case with pre-emption." It is submitted that the proper way of looking at the question is that the whole of Muhammadan law would be enforced if not as a religious usage or institution, then on the ground of equity, etc., except such portions (1) as are repealed by Acts of the Legislature, (2) as have fallen into desuetude, which seems to be the case with those rules of Muhammadan law (if any) relating to contract, or the law of property which are not covered by the law of British India on the point.

I. MUHAMMADAN LAW of pre-emption enforced as religious usage or equity, etc.

The question whether the claim to pre-emption should, in any particular case be considered to arise out of custom or contract, and in either case whether

II. PRESUMPTIONS.

[1] I.e. being either non-Muslims, or inhabitants of Madras; for the law of pre-emption applies to all Muslims outside Madras not by custom but by religion or equity.

[2] *Bynath Pershad* v. *Kopilmon Singh* (1875) 24 W. R. 95. (Hindu resident of Calcutta registered as pleader at Arrah in Behar, owns and sells land there: no pre-emption); *Parashth Nath Tewari* v. *Dhanai Ojha* (1905) 32 Cal. 988.

[3] [1867] N. W. P., F.B. *Rulings* July-Dec., p. 95. The figures and letters in ( ) are mine. This judgment is reproduced in Abbasi's "Law of Pre-emption" from which work it is cited here.

[4] 2 Sel. Rep. 477. *Sic.* Cf. Morl. Dig. I. 535, 536.

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it should be presumed to be in accordance with the Muhammadan law of pre-emption unless the contrary is proved, does not seem to be entirely free from doubt. (1) Sir B. Peacock, C.J., (Calcutta) said " a right or custom of pre-emption is recognised as prevailing among Hindoos in Behar . . . ; in districts where its existence has not been judicially noticed, the custom will be matter to be proved, that such custom where it exists must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject unless the contrary be shown ; that the Court may, as between Hindoos, administer a modification of that law as to the circumstances under which the right may be claimed when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption ; but that the assertion of the right must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record.[1] In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable, theerfore, to encompass it with certain rules and limits, lest the right should be exercised vexatiously." [2] Similarly Mahmood J. expressed a strong view that pre-emption, as it prevails in India, owes its origin entirely to Muhammadan law, and that there was no foundation for it in Hindu law. " My idea is," he said,[3] " that the administration of law by Kazis during the Muhammadan period gave wide currency to 'haq-i-shufa' and its advantage became so apparent to the Hindus, that they attempted to naturalize it . . . by an interpolation in the Tantra in question," i.e., in the ' Maha Nirvana.' (2) On the other hand, in 'Chowdhree Brij Lall's' case, after the passage which has been cited at the beginning of this comment, the judges say : " We further hold (*a*) that except in those cases in which a claim to pre-emption is put forward under the Mahomedan law (i) it is not to be assumed that a claimant to pre-emption must necessarily prove that he has complied with the peculiar conditions which under the Mahomedan law are essential to give validity to such a claim. (ii) By the special enactments relating to . . . 'putteedaree' estates . . . the claimant is bound to comply with the provisions expressed in those enactments, and with those provisions only. (*b*) In cases in which pre-emption is claimed . . . on general usage or custom. . . it may be (as found to be in the instances which came before the High Court at Calcutta) that the incidents of Mahomedan pre-emption attach to the exercise of the right, and attach to it as part of the custom; but, also (ii) it is conceivable that there may be districts in which the

Calcutta view—that custom is co-extensive with Muhammadan law.

Preliminary forms.

Mahmood J. pre-emption originates from Muhammadan law.

2 Earlier Allahabad view—that pre-emption based on custom or contract is independent of Muhammadan law.

3 Forms—where claim under—

4 Muhammadan law.

[1] This passage thus far is quoted with approval by the P. C., in *Jadu Lal* v. (*Maharani*) *Janki Koer* (1912) 14 Bom. L. R. 436, 443.

[2] *Fakir Rawot* v. *Sheikh Eman Bukhsh* (1863) W. R., Sp. No., 143 ; Ben. L. R., Supp. Vol. 35. They add : " It may be noted as a significant fact that every term employed in connection with this right, including the name of the right itself, *shoofa*, is borrowed from the Arabic, and that the special appellants" pleader, himself a Hindoo, could not, when questioned by the Court, refer to any term of Hindoo origin connected with the subject ; and in reference to this particular case no separate Hindoo custom was ever pleaded nor was the applicability of Mahomedan law ever disputed by the defendant until the point was orally taken up at the hearing of the special appeal.

[3] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775 (F.B.) *Deokinandan* v. *Sri Ram* (1889) 12 All. 234. 269 (F.B.). Cf. *Ram Pershad* v. *Abdul Karim* (1887) 9 All. 513, (where the *wajib-ul-arz* gave a right of *shufa* according to the usage of the country. *Jadu Lal* v. *Janki Koer* (1912) 14 Bom. L. R. 436, (where this view seems to be adopted by P. C., per Syed Ameer Ali).

right of pre-emption obtains by general usage, unfettered by any or accompanied by only some of the restrictions of the Mahomedan law. If the existence of such a custom, so unfettered, were proved, it would be the duty of the Court to give effect to it, without adding to its incidents which are not proved to form part of the custom. (*c*) Again, when parties competent to contract enter into pre-emptive agreements they are at liberty, if they so please, to make the exercise of the right depend on the performance of certain conditions which may or may not be identical with the requirements of the Mahomedan law. In construing such contracts it will be the duty of the Court to consider the intention of the parties as expressed in the terms of the contract, and if those terms are clear, to give effect to them without alteration or addition." [1]

In a later case the same opinion seems to be expressed: "Inasmuch as it was deemed conducive to the welfare and tranquillity of village communities that some such provision [i.e for pre-emption] should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record of rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer, when transferring his share, to give the first refusal of it to one of his own family or to the other co-sharers in the 'patti' or 'mahal.' The stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan 'haqq-i-shufa' they also differ from that right in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contracts, are enforced with the same rigour as contracts." [2]

III. WAJIB-UL-'ARZ.

The origin and character of the 'wajib-ul-'arz' is examined in detail in 'Brij Lall's' case above referred to.[3] It is pointed out that it had its origin in Regulation VII. of 1822 and then the Court proceeds:—

Originating from Settlement Officer's efforts to bring about ment as tenures.

"We have seen that the Settlement Officers were instructed to induce the co-parceners, whose property they were engaged in settling, to come to an agreement on all subjects on which disputes were likely to arise; and probably on no point were disputes more likely to arise than on questions relating to the transfer of tenure. As in the case of the undivided family no member could alienate his share of the common inheritance without the consent of the other members, so in the village community, which often had its origin in an undivided family, nothing could be more opposed to the feelings of the community than the transfer of any interest in the estate to one who was not a member of the village community. Hence at settlement it was not unfrequently admitted as an established usage, or agreed, that no alienation should be made by any co-parcener to a stranger, without the consent of the whole body of co-parceners. The settlement 'misl' published under the authority of Government in 1847, as a supplement to the directions of Settlement Officers, contains a form of such a stipulation.

amongst Hindus traced to inalienability of joint family property unless consent of all co-parceners obtained.

Stipulation for pre-emption modifies this

"But a stipulation of this nature practically operated to prevent a co-parcener from obtaining the full value of his share, because it limits the market, i.e., the

alienation without such consent but with prior option.

[1] Then the Court proceeded to apply these principles to a *wajib-ul-'arz*. Extracts are given from this part of the judgment in the next following paragraph of the comment.

[2] *Raja Ram* v. *Bansi* (1876) 1. All. 207 The law of pre-emption arising under a contract does not fall within the scope of a book on Muhammadan law. It has, however, been referred to wherever its close connection with Muhammadan law renders it necessary.

[3] (*Chowdhree*) *Brij Lall* v. (*Raja*) *Goor Sahai* (1867) N. W. P. Full Bench rulings, July-Dec. 1867, p. 95.

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number of persons to whom he could without such permission sell. Consequently a modified provision was more generally adopted whereby the co-parcener was not restricted from selling for the best price he could obtain in the open market; but it was made incumbent upon him to give the opportunity of purchasing at that price to the other co-parceners commencing with those, who, being co-parceners, were first nearest to him in family, and next co-sharers in the same 'thoke' or 'puttee.' Such a stipulation, a form of which is likewise given at page 195 of the settlement 'misl,' it can easily be seen, was entirely in accordance with the spirit of Hindoo law and custom; it obtained still greater importance, when the default of a single shareholder in contributing his portion of the Revenue, rendered the whole of the village or 'puttee' liable to sale.

"It seems reasonable to conclude that it was with a view to compass these ends, that is to say, to prevent the intrusion of a stranger into the estate of the family or community and to exclude any person whose want of thought or skill might augment the burdens of the other members of the co-parcenary community, rather than from any desire to borrow an institution from their Mahomedan neighbours, that the Hindoo communities caused stipulations for pre-emption to be inserted in the 'wajib-ool-urz.' In corroboration of this view, we may point to the fact that few cases are to be found in the reported decisions in which pre-emption as a local custom has been claimed, and fewer still where it has been proved to obtain among Hindoo communities in these Provinces; again, it is worthy of observation that the Mahomedan pre-emption is by no means identical in its incidents with the right, as it is ordinarily recorded, in the 'wajib-ool-urz.'

Distinctive features of pre-emption under 'wajib-ul-'arz.'

"Differing from pre-emption under the Mahomedan law, pre-emption, under a 'wajib-ool-urz,' is most frequently stipulated to arise on occasions of temporary alienations by way of mortgage, as well as on occasions of absolute alienation, or sale.

1. **It arises even on temporary alienations like mortgages.**

"Under the ordinary 'wajib-ool-urz' the parties admit that by agreement or otherwise they have no right to aliene to a stranger, unless an offer has before alienation been made by the co-parceners desirous of aliening, to the other co-parceners, which they have refused to accept. Under the Mahomedan law,

2. **Offer to co-parcener necessary before sale to outsider.**

the right does not accrue, until the sale has been actually made; according to some authorities, too, pre-emption under the Mahomedan law is confined to property in towns, such as houses and gardens or small walled enclosures, and to such property only; while the 'wajib-ool-urz' deals principally with the holding of the agricultural community.

3. **Exercise of right facilitated.**

"The conditions necessary to give validity to a claim of pre-emption under the Mahomedan law seem purposely designed to make the exercise of the right difficult and unfrequent; the object proposed by the parties to the 'wajib-ool-urz,' if the origin be such as is above suggested, would be on the other hand to make the exercise of the pre-emptive right easy and general.

Such a right of pre-emption no hardship on seller.

"Nor can it be said that such a right of pre-emption as is most frequently accorded is any great hardship to the vendor; it does not preclude him from procuring the best price he can for his property; it only requires that, having ascertained the fair market value, he shall dispose of it at a price equal to that value, to his co-parceners; it may entail some delay and prevent him from making a speedy sale, but it does not deprive him of an adequate consideration for his property.

SECTION 523 Act 'putteedari' estates.

It is moreover worthy of notice that this same right of pre-emption, the legislature of this country have by two separate enactments thought fit to secure to co-sharers in 'putteedaree' estates, on the occasion of the sale of the 'puttee' for default of revenue, or of any share in any 'puttee' in execution of a decree. That these enactments are both passed on the same policy which led to the insertion of the pre-emptive condition in the 'wajib-ool-urz' it is almost impossible to doubt.

Conclusion: Muhammadan law does not affect rights under 'wajib-ul-'arz'—

"In view of the foregoing considerations, we hold that the pre-emptive conditions which are found in the 'wajib-ool-urz' paper, are to be regarded generally on a distinct basis from that of the 'huq shoofa,' under the Mahomedan law, and that two of the earliest decisions [1] of the late Sudder Court in which this dictum was pronounced, are worthy of acceptance; [2] in support of this ruling we may also refer to the 194th paragraph of directions for Collectors of Land Revenue, where the origin of the right, as created generally by stipulation at the time of settlement, and as independent of the Mahomedan 'shoofa,' is affirmed.

Unless expressly incorporated.

"We do not mean to lay it down, that a pre-emptive condition in a 'wajib-ool-urz,' may not be so expressed, as to indicate that the Mahomedan custom of pre-emption prevails, and in such case, it will be undoubtedly the duty of the Court, if called on to decide on the validity of a claim preferred under such a condition, to decide upon its validity, with reference to the special provisions of the Mahomedan law, but if no clear expression is found that the parties intended that the Mahomedan right of pre-emption should be recorded as prevailing, and if on the contrary, the words indicate a course differing from the requirements of the Mahomedan law to be pursued by the vendor and the would-be purchaser, then the stipulation of the 'wajib-ool-urz,' and those stipulations alone, are to be regarded, and the Court must pass its decree with reference to the proof afforded, that those stipulations have or have not been performed. In our view, if the 'wajib-ool-urz' is to be regarded as a contract, the same laws of interpretation are to be applied, as to other contracts; if on the other hand it is to be regarded as a record of usage or custom, the custom (if the term of the instrument be clear) may be assumed to be recorded with all the incidents which are admitted to attach to it, and no new incidents not mentioned in the record ought to be imported into it, unless it be the manifest intention of the parties that they should be so imported."

Necessity of forms of Muhammadan law when claim under 'wajib-ul-'arz.'

With reference to the preliminary forms of Muhammadan law they say—

"We have been able to find two cases only among the earlier reported decisions, in which one incident of the Mahomedan law, immediate demand, has been held necessary to the validity of a claim of pre-emption under a 'wajib-ool-urz'. . . . In reference to this precedent,[3] we observe that the suit was brought after a lapse of ten years from the date of the transaction, which it sought to impugn, and in holding, as we do, that a prompt assertion of the nature required by the Mahomedan law is not necessarily essential to the validity of a claim under a provision in the 'wajib-ool-urz,' we do not wish to be understood as ruling, that a person entitled to such a claim, may not by his conduct debar himself from obtaining relief, although he may sue within the limitation period prescribed by law.

[1] No. 105 of 1846, II. Dec. N. W. P., p. 166.
[2] No. 727 of 1850, Reports of 1851, p. 214.
[3] No. 191 of 1862 [1863] I. Dec. N. W. P., p. 437.

SECTION 523
Loss of right standing

"If, being entitled to a prior offer, or if, his consent being necessary to give validity to a sale, he stands by for a considerable period, with full knowledge that a sale is being made, and, without giving any intimation that he dissents, allows persons to enter into contracts and occupy under those contracts, he may have lost his legal right of relief, though a breach of contract may be shown."

'Wajib-ul-'arz' a contract or official record of rights.

In concluding, the Court says: "In fine, we answer the question proposed to us as follows: The 'wajib-ool-urz' is to be regarded as a contract, or rather as an official record of admitted usages or agreements. In construing it, the Court should apply the same rules which would guide them in the interpretation of any other record, the terms of which may be assumed to have been accepted by the persons who can be proved to have assented to them, or who may derive title from persons who have so assented.

When Muhammadan law to be regarded, and when not.

"If it appears from the terms of the record, that the Mahomedan custom was recorded as prevailing, then the precepts of the Mahomedan law, although not expressly mentioned, must be regarded in determining the rights of the parties. If it appears from the terms of the instrument that some particular local custom of pre-emption was recorded as prevailing, then the Courts must determine the rights of parties with reference to the peculiar incidents which may be proved to have formed part of the custom in the particular district at the time the record was made, and which may or may not be identical with the precepts of the Mahomedan law. If on the other hand it appears from the terms of the records (and this we believe will be generally the case) that the condition of pre-emption was introduced, not as a recorded custom, but as an agreement either entirely new in its origin, or based upon, but superseding, a former custom, or prescribing and defining the conditions of the custom, then we hold that it is practically a supersession of the agreement made by the parties to import into it conditions which were not only not contemplated by the parties, but are repugnant to the end they had in view."

The judgment above referred to was that of Morgan C. J., Pearson, Turner and Spankie JJ.; Robertson J., dissenting, held that the preliminary forms of Muhammadan law must always be adhered to, agreeing with the view of the Calcutta Judges in 'Fakir Rawot's' case.[1]

(2) *Conflict of Laws—Parties of Different Religions.*

The Personal

524. (1) *Quaere*, whether the claim to pre-emption can be enforced only in accordance with the personal law by which the pre-emptor is governed.[2]

2. the s

(2) The claim to pre-emption cannot be enforced when the seller is not governed by the law of pre-emption.[3]

[1] (1863) W. R. F. B. 142; Ben. L. R. SUPP. VOL. 35.

[2] See *ill.* (1).

[3] "The right of pre-emption arises from a rule of law by which the owner of land is bound, and it exists no longer if there ceases to be an owner who is bound by the law either as a Mahomedan or by custom." *Poornoo Singh* v. *Huru Charn Surmah* (1872) 10 Ben. L. R. 117, 18 W. R. 440, followed in *Bijnath Pershad* v. *Kopilmon Singh* (1875) 24 W. R. 95; *Dwarka Das* v. *Husain Bakhsh* (1878) 1 All. 564. CONTRA *Chundo* v. *Alimoodeen* (1873) 6 N. W. 28 etc., (see comment). Cf. *ill.* (1).

SECTION 524
3. the buyer.

(3) The personal law of the buyer does not, according to the Allahabad High Court,[1] affect the enforceability of a claim to pre-emption; the Calcutta High Court has held that rights of pre-emption do not arise unless the buyer is also governed by the law of pre-emption.[2]

Seller and pre-emptor must both be governd by law of pre-emption.

Explanation—(1) There can be no pre-emption unless the pre-emptor and the seller are Mussulmans, or have by custom or contract adopted the law of pre-emption or are governed by it by operation of a legislative enactment. (2) *Quaere*, whether where the laws of pre-emption, by which the pre-emptor and the seller are respectively governed, are not the same, the claim to pre-emption will be enforced only in cases where it is reciprocally enforceable, i.e., where it would have been enforceable also by the personal law of the pre-emptor, had he been the seller.[3] (3) According to the Calcutta High Court the claim to pre-emption is not enforceable unless the seller, buyer, and pre-emptor are all governed by the law of pre-emption.

Buyer, *quaere*.

Illustrations.

(1) *The personal law of the pre-emptor:* A Shiah cannot enforce pre-emption on the ground of vicinage even though both the vendor and vendee are Sunnis.[4]

(2) *The personal law of the seller:* S, a Hindu, sells land: pre-emption under Muhammadan law is not enforceable.[5]

(3) *Personal law of the buyer*: S and P are Musulman neighbours, and S sells his share to B a Hindu: *held* in Calcutta (by Peacock C.J., Kemp and Mitter JJ.) that no right of pre-emption arises: (Norman and Macpherson JJ. dissenting).[6] (*b*) S, a Mussulman, sells land to B, who is not a Mussulman; P, a Mussulman, may, according to the Allahabad High Court, enforce pre-emption against B.[7]

[1] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775 (F.B.).

[2] *Kudratulla* v. *Mahini Mohun* (1870) 13 W. R. (F.B.) 21; 4 Ben. L. R. (F.B.) 144. However in *Jog Dil Singh* v. *Mahomed Afzal* (1905) 32 Cal. 982, the seller was Sunni, buyer Hindu, and the pre-emptor Shiah, but the point does not seem to have been taken, that the right is not enforceable, unless the buyer is a Hindu. All that was argued was that (*a*) the pre-emptor's law, (i.e., the Shiah law, and not the Sunni law) prevailed; (*b*) that the preliminary ceremonies were not duly performed.

[3] This seems to follow from *ill.* (1) as far as the Allahabad High Court is concerned. Cf. per Mahmood J. in *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775: "The rights and obligations created by that (viz, Muhammadan) law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal." On the other hand, in *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982, where the seller was a Shiah and the pre-emptor a Sunni, the Sunni law was applied—this accords no doubt with the view taken in Calcutta that the personal law of the vendor is immaterial, the right being of repurchase from the buyer. See comment.

[4] *Qurban Husain* v. *Chote* (1890) 22 All. 102.

[5] *Dwarka Doss* v. *Husain Baksh* (1878) 1 All. 564 (F.B.) Stuart C. J. and Pearson J. dissenting.

[6] *Kudratalla* v. *Mahini Mohn Shaha* (1869) 4 Ben. L. R. (F.B.) 134; 13 W. R., (F.B.) 21. Cf. also *Hira* v. *Kallu* (1885) 7 All. 916.

[7] *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775 (F.B.)

SECTION 524
Conflict of laws.

According to Shiah law the right of pre-emption cannot arise in favour of a non-Muslim when the purchaser is a Muslim:[1] "The 'shuffii' is every partner of a share in joint and undivided property, who is able to pay the price at which it has been sold. It is, however, a condition that he be a 'Mooslim,' when the purchaser is of that religion."[2] According to Sunni law the religion of the pre-emptor does not affect his rights.[3] But of course these rules of law have no force in British India. The question, as pointed out by Mahmood J. in 'Gobind Dayal's' case, turns on whether the right of pre-emption depends upon a defect of title on the part of a Muhammadan co-parcener to sell, except subject to the right of pre-emption,[4] or whether "it is a mere right of repurchase, not from the vendor, but from the vendee," the former view being put forward by Mahmood J., and adopted by his colleagues Petheram, C.J., Oldfield, Broadhurst, and Duthoit, JJ. and the latter by Peacock, C.J., Kemp, and Mitter, JJ. (Norman and Macpherson JJ. dissenting). One main ground on which Mitter J. (with whose elaborate judgment the majority of Calcutta Judges agreed) proceeded, was that "there is nothing whatever in the Muhammadan law which imposes upon anyone the obligation of making the first offer to his neighbour," whereas in the later case Mahmood J. cited authorities[5] stating that "it is not lawful for anyone to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share." As to the point that it was merely a right of repurchase from the vendee, Mahmood J. argues that it can only be a "right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject . . . the right being necessarily antecedent to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident." He also intimated that in his opinion the right of pre-emption could not in British India be defeated by the devices (characterised by Mitter J. as "tricks and artifices") to which the Muslim texts refer.

Whether the religion of the buyer affects the operation of the law of pre-emption.

It was held[6] in Allahabad, previous to the judgment in 'Gobind Dayal,' that the right of pre-emption could not be enforced when the buyer is a Hindu (viz., not governed by the law of pre-emption) and that it could be enforced though the seller is a Hindu. This view must follow from the reasoning that only the buyer and the pre-emptor are concerned in the transaction, the seller "being not in the least degree interested in the matter . . . and need not be considered."[7] But this is no more

[1] Bail. II. 179 (para. 1), 180 (para. 3).

[2] Bail. II. 179 (para. 1).

[3] Bail. I. 473 (para. 2). Hed. 556 (col. i. para. 2), 557 (col. ii. para. 4).

[4] "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," as expressed by Mitter J. in *Kudratulla's* case, 4 Ben. L. R. (F. B.) 139, 140.

[5] *'Ain Sharh-Kanz*, II. 237; *Muslim*, VI. 32; *Nawawi Sharh Muslim*, II. 32.

[6] *Moti Chand* v. *Mahomed Hossein* (1875) 7 N. W. 147; *Chundo* v. (*Hakeem*) *Alimoodeen* [1874] Agra F. B. 305, 6 N. W. 28.

[7] *Ibid.* per Pearson J.

[8] *Dwarka Doss* v. *Husain Baksh* (1878) 1 All. 564 (Stuart C. J. and Pearson J. dissenting), over-ruling *Chundo* v. *Alimoodeen* (1874) 6 N. W. 28; *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775 (F.B.).

§ 3.—Pre-emption, how Established and Enforced.

SECTION 525

(1) Sale or Ground of Pre-emption.

Arises only on transfer for consideration.

525. The right of pre-emption arises under Muhammadan law only where there is an exchange of property for property;[1] it does not arise where the land is transferred without consideration or by operation of law.[2]

Explanation—In order to give rise to the right of pre-emption it is not necessary that the land sold should be actually separated or defined.[3]

Illustrations.

(1) (*a*) A 'hiba ba shart ul 'iwaz' is a transfer for consideration,[2] provided that it is completed by possession being transferred of the subjects of the gift, and the return, to the donee and the donor, respectively ;[4] but (*b*) a 'hiba bil 'iwaz' is not a transfer for consideration;[4] nor (*c*) is a partition of property amongst partners ;[5] nor (*d*) a transfer of property in lieu of dower;[6] provided that (i) according to Shafi'i law, where a share in land is transferred to the wife by way of dower, or in consideration for a 'khul'' it is subject to pre-emption by the other co-owners ;[7] (ii) according to Hanafi law where a marriage has been contracted without any dower having been agreed upon, and land is then sold to a third person or to the wife herself[8] in exchange for her proper dower, it becomes subject to pre-emption;[6] (iii) where 'mahr' has already become due to the wife, and the land does not form the subject of the 'mahr,' but is transferred to the wife in consideration for her releasing her right to the 'mahr' agreed upon, such transfer becomes subject to pre-emption;[8] (*e*) the courts have taken different views as to whether a sale in execution of a decree is such a transfer as can give rise to rights of pre-emption.[9]

(2) B claims to have certain rights against S, who compounds B's claim by transferring to him a mansion ; such a transfer is a transfer for consideration notwithstanding that S denied B's claims.[10]

[1] I.e., either a sale or barter. Cf. *Hiamat Ali* v. *Asmal Bibi* (1885) 7 All. 626, where plots were exchanged. In *Lachmi Narain* v. *Manog Dat* [1889] 5 All. W. N. 47 a suit was compromised.

[2] Bail. I. 472, e.g., if one should emancipate a slave in exchange for a mansion there is no right of pre-emption, Bail. I. 471 : gift, charity, inheritance and bequest are given as illustrations of transfer without consideration : Bail. II. 177 (para. 4). See also *ill.* (1). *Ameer Ali* v. *Pearun* [1864] W. R. 239; *Har Narain Pande* v. *Ram Prasad Misr* (1891) 14 All. 333; *Nuzmoodeen* v. *Kanye Jha* (1863) Marsh 555; 2 Hay. 651. If what purports to be a gift is really a sale pre-emption will arise : *Angan Lall* v. *Muhammad Husain* (1891) 13 All. 409. Cf. *Fida Ali* v. *Muzaffer Ali* (1882) 5 All. 65.

[3] *Gobind Chunder Goopto* v. *Raj Kishore Sein* (1870) 14 W. R. 365.

[4] Bail. I. 472.

[5] Hed. 560 (col. ii. para. 5) ; Bail. I. 475 (para. 2).

[6] Hed. 559 (col. i. paras. 1, 2, 3, *ll* 19 *et seq.*), 475 (para. 1). Cf. 483 (*ll.* 7-11), II. 177 (para. 3).

[7] Hed. 559 (col. i. para. 1).

[8] *Fida Ali* v. *Muzaffar Ali* (1882) 5 All. 65 ; but see comment.

[9] In the negative *Nuzmoodeen* v. *Kanye Jha* (1863): March 555 ; 2 Hay 651 ; *Abdool Juleel* v. *Khellat Chunder Ghose* (1868) 5 W. R. 165. In the affirmative *Imamooddeen Sowdagur* v. *Abdool Sobhan* (1866) 5 W. R. 169 ; *Ajudhia* v. *Jewboodh* (1873) 6 N. W. 46.

[10] Hed. 559 (col. ii. para. 2 ; col. i. para. 4); Bail. I. 472 (*ll.* 5-12). In the second illustration

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(3) S claims to be the owner of a house; B compounds the claim by paying to S Rs. 1,000; the house may be the subject of pre-emption if B admitted, but not if B denied S's claim.[1]

(4) S on his deathbed purports to sell his share (valued at Rs. 1,000) in the land to one of his heirs, by 'muhabat,' viz., for Rs. 500. This sale will in so far as it is valid be a ground for pre-emption.[2]

Transfer by way of 'mahr and in lieu of 'mahr.'

When property is assigned as dower to the wife, the question whether rights of pre-emption arise or not is in the 'Fatawa 'Alamgiri' and 'Hidaya' made to depend upon the question whether the subject of transfer is itself the 'mahr,' or is in exchange or in consideration for 'mahr.' 'Mahr' arises in law without consideration;[3] but having arisen, it gives the wife a right, the extinction of which may form the consideration for a transfer of property. This seems anomalous, no doubt, but it explains the statement that if the husband "gives the house as dower, there is no pre-emption; but if he gives it in exchange for dower, there is pre-emption."[4] The anomalous character of the right to 'mahr' has been referred to before.[5] The Prophet was extremely anxious that the 'mahr' should not under any circumstances be permitted to lend weight to the argument that the wife was purchased by the husband, or sold by her guardian or parent, or that marriage could arise except by the consent of the bride when she is competent to give it: he strove hard, though it seems fruitlessly, on the one hand to prevent there being brought any pecuniary element as an inducement for the consent, and on the other he wished to convert the wonted "price" for the sale of the woman into a "token of respect."[6] So explained, the rule, it is submitted, though technical in operation, is grounded on principle.

Fida Ali *v.* Muzaffar Ali

Syed Ameer Ali, in his learned work,[7] says that "the decision in 'Fida Ali *v.* Muzaffar Ali'[8] does not seem to be correct," because "if a property is conveyed to a wife in discharge of the dower debt, in this case also there is no right of pre-emption. . . . The reason of these rules is self-evident. The wife conveying to the husband and 'vice versa' do not thereby introduce a stranger among co-sharers or neighbours."[7] The reason given applies, no doubt, where the husband and wife are living together on the subject of pre-emption, but it does not seem to be taken in any of the texts, and no authority is cited by the learned author.

the person who becomes the owner of the property accepts it in consideration of his claim; in the third illustration, if the claim is denied by B, he remains the owner of the house which he claimed before, and there is no *transfer* to him for consideration, Hed. 559.

[1] See last footnote.

[2] Bail. II. 192; to validate it the consent of the other heirs is necessary, (*a*) according to Sunni law as to the whole, (*b*) and according to the prevailing view of Shiah law in so far as it exceeds the bequeathable third. (*c*) whereas another Shiah view is that it is valid without such consent, as to the whole, not ranking as a bequest at all.

[3] See above s. 92 comment p. 109.

[4] Bail. I. 475 (*ll.* 2-4).

[5] See above pp. 109, 158, 119 (lien for dower), 285, 339 (gifts).

[6] Bail. I. 91.

[7] "Mahommedan Law," I. 197.

[8] (1882) 5 All. 65.

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526. The right of pre-emption does not arise unless the land is completely transferred [1] by the seller to the buyer, so that the seller's interest in it ceases.[2] According to the Allahabad High Court the sale must be complete in accordance with Muhammadan law [3] and not with the law of British India: [4] hence non-execution of the sale-deed, and want of registration, does not prevent the right of pre-emption from arising, but the fact that the price is not ascertained, and possession not transferred under the sale, does prevent it.[5]

Right arises only when land completely transferred.

Explanation I—(1) Where there is an option to the seller to dissolve the sale, the right of pre-emption does not arise until after the expiration of the option.[1] (2) The right of pre-emption arises notwithstanding that there is an option to the buyer to annul the sale.[6]

Seller's option postpones it—not buyer's.

Explanation II—(1) A mortgage, unless and until it is finally foreclosed, is not such a transfer of the land as can give rise to a claim to pre-emption.[6] (2) A lease is not such a transfer of the land as can give rise to a right of pre-emption, notwithstanding that it is a 'mourusi' lease,[7] or is in perpetuity (like a 'mukarrari'), and however small the rent reserved might be,[8] provided that the pre-emptive clause of a 'wajib-ul-'arz' may be wide enough to include a perpetual [9] or a shorter [10] lease.

Mortgage gives rise to pre-emption when foreclosed.

Lease.

[1] Hed. 559 (col. ii. para. 4), 560 (col. i. para. 1) ; Bail. I. 472. 482 (*ll.* 5-11); II. 182 ; *Gurdial Mander* v. *Teknarayan Singh* (1865) Ben. L. R. (SUPP. VOL.) 166 ; 2 W. R. 215 (a mortgage in the form of a conditional sale); much less can it arise when the sale is repudiated by either the seller or buyer, (*Musammat*) *Ojheoonissa Begum* v. (*Sheikh*) *Rustom Ali* [1864] W. R. 219. Some Shiah authorities hold that the option to the seller does not prevent the right from arising immediately.

[2] *Ludun* v. *Bhyro Ram* (1867) 8 W. R. 255 : *Soonder Kooer* v. *Lalla Rughoobee Dyal* (1868) 10 W. R. 246 ; *Buksha Ali* v. *Tofee Ali* (1872) 20 W. R. 216 ; *Mohno Bibee* v. *Juggurnath Chowdhry* (1865) 2 W. R. 78.

[3] As to which see *Fida Ali* v. *Muzaffar Ali* (1882) 5 All. 65. Cf. *Amjad Ali Mushtaq Ahmad* (1895) 17 All. 454 ; see also 17 All. W. N. 121.

[4] See *ill.* (1) ; *Begam* v. *Muhammad Yakub* (1894) 16 All. 344. (F.B.) (Banerji J. dissenting on this point, but concurring in decree on other grounds.) ; *Jadu Lal Sahu* v. *Janki Koer* (1908) 35 Cal. 575, 599. Accordingly in *Najmunnissa* v. *Ajaib Ali Khan* (1900) 22 All. 343, the Muhammadan law of sale was carefully examined.

[5] *Najmunnissa* v. *Ajaib Ali Khan* (1900) 22 All. 343.

[6] *Gurdial Mundar* v. *Teknarayan Singh* (1865) Ben. L. R. (SUP. VOL.) 166 ; 2 W. R. 215 (F.B.) (Bayley J. dissenting), *Bhowanee Pershad* v. *Purshunno Singh* (1869) 11 W. R. 282. But if there has been foreclosure, pre-emption may be enforced (cf. *Batul Begum* v. *Mansur Ali* (1901) 24 All. 17) after the year of grace has expired, notwithstanding that a decree for possession has not been obtained, *Tara Kunwar* v. *Mangri Meeah*, 6 Ben. L. R. (APPX.) 114.

[7] *Dewanutulla* v. *Kazem Molla* (1887) 15 Cal. 184.

[8] *Dewanutulla* v. *Kazem Molla* (1887) 15 Cal. 184 ; *Ram Golam Singh* v. *Nursing Sahoy* (1875) 25 W. R. 43 ; *Moorooly Ram* v. *Huree Ram* (1867) 8 W. R. 106 (rent of one rupee per year).

[9] *Lalji Misr* v. *Jaggu Tiwari* (1910) 33 All. 104.

[10] *Ahmed Ali Khan* v. *Ahmed* [1866] 1 Agra H. C. R 101 (a lease for 8 years—pre-emption would hardly be a proper term for it : Spankie and Turnbull JJ. refer to its as a preferential claim).

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Illustrations.

(1) S[1] sells his joint interest in a village for Rs. 300 paid to him by B, who obtains possession, but no transfer under the Transfer of Property Act is executed or registered. *Held* (Mahmood J. dissenting), that (*a*) the right of pre-emption arises: (i) by Petheram C.J., because the claim being based on a 'wajib-ul-'arz,' which refers to a transfer of a share "wholly or in part, by sale or mortgage, and . . . obviously means . . . that if any co-sharer transfers his rights wholly or partly, the right of pre-emption is to arise;" [2] (ii) by Straight J. because the parties intend a sale but deliberately omit to observe the necessary legal formality of a registered instrument to defeat the pre-emptive right, and a court of equity would hesitate before permitting a defence based on the defendant's own intentional evasion of the law;[3] (iii) by Oldfield J. because the transaction amounts to a sale in fact, and failure of the parties to comply with the requirements of the Act do not alter its nature; (iv) by Broadhurst J. because the share is transferred, though, with the object of defeating pre-emption (under the said 'wajib-ul-'arz'), a deed of sale is not executed. (*b*) *Held* by Mahmood J. that the pre-emptive right does not arise because: (i) it cannot under Muhammadan law be enforced upon a sale which is invalid, and can take no effect, and when the owner has not been divested of the proprietary title, and the purchaser invested with it, (ii) that the answer to that question is the turning point in the decision of such cases, (iii) that the said words of the 'wajib-ul-'arz' do not refer to transfers of all kinds, but only to sales and mortgages; they do not include a transfer (not of the whole of the incidents constituting ownership, but) of some of the incidents only, (iv) that nothing that can be called a sale under it has taken place, (v) that if the transaction is taken to be a mere agreement to sell, assuming that it can be specifically enforced, the suit is premature.[1]

(2) S sells a dwelling house as a house to be inhabited as it stands, with the same right of occupation as S, but without the ownership of the site *Held*, that the right of pre-emption attaches to the sale.[4]

(3) S enters into a contract for sale of the land; *held*, that P is not bound to defer the enforcement of his right of pre-emption till the bill of sale has been delivered or registered and payment made [5]—*sed quaere*.[6]

(4) As soon as a contract for sale is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.[7]

[1] *Janki* v. *Girjadat* (1885) 7 All. 482 (F.B.)

[2] See p. 451, *nn.* 10, 11.

[3] He added that the seller could not succeed in a suit for possession of the share against the buyer on the ground that there was no registered document, because consideration having been paid and possession obtained the buyer would have a good defence.

[4] *Zahur* v. *Nur Ali* (1865) 2 All. 99.

[5] *Luchmee Narain* v. *Bheemul Doss* (1867) 8 W. R. 500; cf. *Girdharee Lall* v. *Deanutali* (1874) 1 W. R 311.

[6] See *Najmunnissa* v. *Ajaib* (1900) 22 All. 343.

[7] *Nubee Buksh* alias *Golam Nubee* v. *Kaloo Luskher* (1874) 22 W. R. 4.

As to a sale on credit, see below, s. 554. On the main point in the section, the arguments are analysed in *ill.* (1) and need not be repeated, except that it may be pointed out that Petheram C.J., seems to have proceeded on the construction of the 'wajib-ul-'arz.' SECTION 52

527. The Calcutta High Court has held that the right of pre-emption does not arise where the buyer is a co-sharer with the seller in the land, nor unless the claimant to pre-emption has priority over the buyer under section 545 below.[1] The Allahabad High Court has recently dissented from the said rulings, and held that where the buyer of the land is one who (if the land is sold to a stranger) can himself claim to pre-empt, —in that case other persons whose claims to pre-emption are equal in degree to the rights of the said buyer, have the same rights of pre-emption that they would have had if the sale had been to a stranger.[2] **of pre-empt arises when** **equal in degree.**

Illustration.

S, B, and P are co sharers in the land; S sells his share to B. According to the Calcutta High Court[3] P has no right to pre-empt. According to the Allahabad High Court,[4] P can pre-empt half of S's share. The same results follow where B and P are 'khalits' of S, participating in a right of way.[4]

In any view, when the buyer is a co-sharer who has associated a stranger with himself in the purchase of a share, then another co-sharer is entitled to pre-empt;[5] and it has been held that he may pre-empt at his option either the whole of the share sold, or the portion sold to the stranger,[5] the joint owner being considered to have forfeited his right as sharer by joining an outsider as a purchaser.[6] And it was held to be so even though the portions or interests respectively purchased by the co-sharer and the stranger are specified severally in the sale deed.[7] On this last point, however, the said decisions were dissented from[8] and overruled[9] in Allahabad. The right is similarly held to be forfeited **Right forfeited by pre-emption as a co-purchaser.**

[1] *Baboo Moheshee Lal* v. *Christian* (1866) 6 W. R. 250: *Teeka Dharee Singh* v. *Mohur Singh*; (1866) 7 W. R. 269; *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1878) 4 Cal. 831, (F. B.) 2 C. L. R. 319: on the ground that the reason for allowing pre-emption is to prevent the introduction of disagreeable strangers as cosharers or neighbours, and the reason ceases to arise when the buyer is already a co-parcener.

[2] *Amir Hasan* v. *Rahim Bakhsh* (1897) 19 All. 466 (per Banerji and Aikman JJ. Karamat Husain (J.) was the counsel for the appellant and the Court decided the case on the authorities cited by him, viz. *Bahr-ur-Raik*, Bk. on Pre-emption, Part II., Egyptian Ed. 143, 161; *Radd-ul-Mukhtar*, v. 163, 152: *Fatawa 'Alamgiri*, IV, 15, 16 (ch, 6); *Inayah*, and *Durr-ul-Mukhtar*; *Abdullah* v. *Amanatullah* (1899) 21 All. 292.

[3] *Lalla Nowbut Lall* v. *Lalla Jevan Lall* (1878) 4 Cal. 831.

[4] *Amir Hasan* v. *Rahim Baksh* (1897) 16 All. 466, *Abdullah* v. *Amanatullah* (1899) 21 All. 292.

[5] *Harjas* v. *Kanhya* (1884) 7 All. 118.

[6] *Saligram Singh* v. *Raghubardyal* (1887) 15 Cal. 224.

[7] *Guneshee Lall* v. *Zaraut Ali* (1878) 2 N. W. 343 *Munna Singh* v. *Ramadhin Singh* (1881) 4 All. 252.

[8] *Shevbharos Rai* v. *Jiaet Rai* (1886) 8 All. 462, 464 (Mahmood J. explaining *Sheodyal Ram* v. *Bhyro Ram* [1860] S. D. A. (N.P.W.) 53).

[9] *Ram Nath* v. *Badri Narain* (1896) 19 All. 148 (three Judges).

SECTION 527 if the pre-emptor having priority (P,) is made a party to a suit for pre-emption brought by another pre-emptor (PA,) whose rights are postponed to P's.[1] But the right of P is not affected by a decree obtained by PA in a suit to which P was not a party.[2]

(2) *Formalities for establishing claim to Pre-emption.*

Talab-i-Muathibat: Talab-i Ish had; Talab-i-Taqrir.

The three talabs':

528. (1) Except as provided in this section, the right of pre-emption is not established unless the pre-emptor takes each of the steps mentioned in clauses (*a*) (*b*) and (*c*) below,[3] (the first two of which are referred to as "preliminary ceremonies") namely,—

(*a*) Immediate assertion 'talab-i-muathibat.'

(*a*) that he asserts his claim[4] immediately on getting information of the sale;[5] such assertion is technically called 'talab-i-muathibat;'[6]

(*b*) Confirmatory demand 'talab-i-ish had' before—

(*b*) that he confirms as soon as practicable[7] the assertion above referred to, by making a (second) demand[8] for pre-emption, including a declaration of his having already asserted his claim;[9] the said demand (including the said declaration) must be made in the presence—

(i) witnesses,

(i) of witnesses[10] expressly called upon to bear witness to it,[9] and in the presence

[1] *Abdur Razzaq* v. *Mumtaz Husain* (1903) 25 All. 334.

[2] *Raj Narain Rai* v. *Dunia Pande* (1910) 32 All. 840.

[3] See s. 529 below.

[4] As to the form see *ill.* (1). He must make a statement not merely that the right exists but that he claims pre-emption; hence, saying that he is the *shafi'* [without other circumstances] is not enough: Bail. I. 482, (*ll.* 3, 4) cf. *ill.* (1). See per Karamat Husain J. (reversed in appeal) 34 All. 53; and *Chakauri Devi* v. *Sundari Devi* (1905) 28 All. 590.

[5] Hed. 550; Bail. I. 481-483, II. 183 (para. 4), 195 (para. 2); see s. 529 below. It is of course invalid if purported to be made before the sale is completed: Ameer Ali, I. 606 (para. 2); cf. s. 533 below.

[6] *Talab* means requisition; and *muathibat* means lit. "jumping up." See p. 460 below.

[7] *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575. *Nuraddin Mahomed* v. *Asgar Ali* (312) 12 C. L. R. 312; *Jamilan* v. *Latif Hossein* (1871) 8 Ben. L. R. 160; 16 W. R. (F B.) 13, *Mahomed Waris* v. *Hazee Emamooddeen* (1866) 6 W. R. 178; (*Sheikh*) *Imamuddin* v. (*Mussamat*) *Shah Jan Bibi* (1870) 6 Ben. L. R. 167 *n.*

[8] Right lost if demand *talab-i-ish had* not made in due form as to which see *ill.* (3); cf. *ill.* (5). It is a separate overt act essentially necessary *Jhotu Singh* v. *Komul Roy* (1868) 10 W. R. 119; *Razeevoddeen* v. *Zeenut Bibee* (1867) 8 W. R. 463. Cf. *Ganga Prasad* v. *Ajudhia Prasad* (1905) 28 All. 24.

[9] See *ill.* (3).

[10] "The invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof." Bail. I. 483 (para. 2) Hed. 551, (col. i. para. 4); but see Hed. 561, (col. i. para. 3); hence in British India no witnesses ought to be required; cf. Evidence Act. s. 134. But it has been held otherwise: *Prokas Singh* v. *Jogeswar Singh* (1868) 2 Ben. L. R. (A.C.) 12; *Jadu Singh* v. *Raj Kumar* (1870) 13 W. R. 177; 4 Ben. L. R. (A.C.) 171; *Dayamoollah* v. *Kirtee Chunder Surmah* (1872) 18 W. R. 530: *Golakram Deb* v. *Brindaban Deb*, (1870) 6 Ben. L. R. 165; 14 W. R. 265 and see *ill.* 5. Servants of the pre-emptor are competent witnesses and all persons who are not menials and have not been convicted of slander: *Muhammad Yunus Khan* v. *Muhammad Yusuf* (1897) 19 All. 334.

(ii) either of the seller,[1] or of the purchaser, [2] or on the land ;[3]

such a demand is technically called 'talab-i-ish had' or 'talab-i-taqrir' ;[4]

(ii) Seller, or purchaser or land.

(c) that he enforces[5] the demand above referred to, by filing a suit—

(c) Enforcement 'talab-i-tamlik.'

(i) within a year of the purchaser taking possession of the land ;[6] or

(ii) where the subject of pre-emption does not admit of physical possession, within a year of the instrument of sale being registered.[7]

such enforcement is technically called 'talab-i-tamlik,' [8] or 'talab-i-khusumat' ;[8]

'Talab-i-muathibat when unnecessary.

(2) The right of pre-emption may be established notwithstanding that the assertion of the claim (referred to in clause (*a*) above) has not been made, provided that the demand for it is made in the manner referred to, in clause (*b*) above, and at the time when the assertion should be made, i.e., immediately on the pre-emptor being informed of the sale.[9]

[1] *Golakram Deb* v. *Bundaban Deb* (1870) 6 Ben. L. R. 165 ; 14 W. R. 265 ; and see *ill.* 5 where seller refuses. Cf. *Sham Lall Sahoo* v. *Asfuroonissa* (1874) 22 W. R. 184.

[2] Hed. 551, 561, (col. i. para. 3); Bail. I. 483-484. There is difference of opinion whether after the buyer has taken possession of the land (*a*) demand of the claim *may* be made in the presence of the seller : or (*b*) it *must* be made either in the presence of the purchaser or on the premises. Opinion (*a*) is stated to be expressed by Imam Muhammad in the *Jama Kabir*, "on a liberal construction, though not on analogy." Only (*b*) is mentioned in Hed. 551 (col. i. para. 1); Cf. *Jangir Mahomed* v. *Mahomed Ariad* (1879) 5 Cal. 509 : 5 C. L. R. 320 (in the presence of the buyer though he had not taken possession. *Chamrao Pasban* v. *Puhlwan Roy* (1871) 16 W. R. 3 ; *held*, that it must be in the presence of the person who is in possession. But this seems incorrect if it means that it cannot be made in the presence of the buyer unless he is in possession, and it was explained away in *Ali Muhammad Khan* v. *Muhammad Said Husaid* (1896) 18 All. 309. *Mahomed Waris* v. *Hazee Emamooddeen* (1866) 6 W. R. 173.

[3] *Kulsum Bibi* v. *Faqir Muhammad Khan* (1896) 18 All. 298 : where an undivided two-anna share in a Zamindari is sold, the demand may be made on any part of the whole Zamindari ; but if the pre-emptor purposely goes to an uninhabited and distant part to avoid its coming to the ear of the buyer, it might be held not to be *bona fide* and good demand. *Muhammad Usman* v. *Muhammad Abdul Ghafur* (1911) 34 All. 1 : demand from pre-emptor's own *chabutra*, which was held to form part of land sold, there being only "imperfect partition," so the demand held valid. But where *talab-i-ish had* is made neither in presence of buyer nor seller, nor on the land, it is invalid as such. *Jadunundun Singh* v *Dulput Singh* (1884) 10 Cal. 1008 ; *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra* (1890) 17 Cal. 543 (F.B.).

[4] *Taqrir* means affirmation ; *ish had*, testimony.

[5] Bail. I. 484-485 : Hed. 550-551 ; cf. *ill.* (4), (6).

[6] Limitation Act X. of 1908, art. 10.

[7] *Ibid.* Where there is no instrument of sale (and the subject of pre-emption does not admit of physical possession), art. 120 will apply and not art. 10, i.e. there will be six years for limitation : *Batul Begum* v. *Mansur Ali* (1901) 24 All. 17 ; *Kaunsilia* v. *Gopal* [1906] 26 All. W. N. 73.

[8] As to *tamlik* see above p. 261. *Khusumat* means contest.

[9] Bail. I. 484 (para. 2); *Koromali* v. *Amir Ali* (1878) 3 C. L. R. 166 ; *Muhammad Usman* v. *Muhammad Abdul Ghafur* (1911) 34 All. 1. Cf. *ill.* (5) and *Nundoo Pershad* v. *Gopal Thakur* (1884) 10 Cal. 1008.

SECTION 528 (Shiah law.) 'talab i-muathibat.'

(3) *Quaere*, whether according to the Shiah law any immediate assertion 'talab-i-muathibat' is necessary so long as the demand is made without unreasonable delay.[1]

Sale on credit.

(4) According to Abu Yusuf, when the sale is on credit, the pre-emptor need not assert his claim until the time arrives at which the price is to be paid.[2]

Knowledge of price.

(5) According to Shiah law the pre-emptor must know the price at which the land is sold before he can validly claim to pre-empt.[3]

Special custom or contract

(6) Where the right of pre-emption is based on custom or contract, the formalities (if any)[4] with which it must be asserted, demanded, and enforced, must be determined by an interpretation of the said custom or contract.[5]

Price: (a) not to be tendered at time of asserting.

Explanation I—(*a*) It is not incumbent on the pre-emptor to tender the purchase money of the land, at the time of asserting or demanding pre-emption.[6] (*b*) Subject to subsection (5) above, he may pray to the Court to determine the sum which has been actually agreed upon as the purchase money between the buyer and seller,[7] and to enforce his claim to pre-emption contingently on his paying the sum so determined;[8] provided that in such a case the burden is on the pre-emptor to show that the real amount of the purchase money is less than the stated

(*b*) prayer to court to determine price.

[1] Cf. Bail. II. 195 (para. 2), where it is said that even being present at the time of the sale and congratulating the purchaser does not extinguish the claim. Bail. II. 184 (para 2): cf. *Jai Kuar* v. *Heera Lal* (1874) 7 N. W. 1: (no assertion necessary).

[2] Hed. 556 (col. i). See s. 554 below.

[3] Bail. II. 188 (*second*). (*a*) *Semble* this saves the pre-emptor's claims so long as he is not informed of the price (*b*). *Quaere*, whether it gives him a right to be informed of the price. (*c*) On deception or misinformation his waiver or non-prosecution of his claim does not affect its existence. Cf. *Abadi Begam* v. *Inam Begam* (1877) 1 All. 521 (not Shiah case).

[4] In *Fakir Rawot* v. *Emambaksh* [1863] W R. (F B.) 143; Ben. L. R. SUPP. VOL. 35, approved in *Jadu Lal* v. *Janki Koer* (1912) 14 Bom. L. R. 436 (P. C.), it was said that enforcement (by suit) must always be preceded by observance of forms prescribed in Muhammadan law; cf. *Sheojuttun Roy* v. *Anwar Ali* (1870) 13 W. R. 265; *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575, 585, and *n.* 3 below.

[5] *Jai Kuar* v. *Heera Lal* (1874) 7 N. W. 1 (assertion unnecessary by custom of Hindus of Muhalla Abupura in the town of Muzaffarnagar); *Zamir Husain* v. *Daulat Ram* (1882) 5 All. 110; cf. *Ram Prasad* v. *Abdul Karim* (1887) 9 All. 513.

[6] *Khoffeh Jan Bebee* v. *Mohomed Mehdee*, (1868) 10 W. R. 211; *Karim Bakhsh* v. *Khuda Bakhsh* (1894) 16 All. 247; *Nundo Pershad Thakur* v. *Gopal Thakur* (1884) 10 Cal. 1008, 1018; *Lajja Prasad* v. *Debi Prasad* (1881) 3 All. 236; *Heera Lall* v. *Moorut Lall* 1869) 11 W.R. 275; *Bulbood Singh* v. *Mahadeo Dutt* (1865) 2 W. R. 10; *Nubee Buksh*, alias *Golam Nubee* v. *Kaloo Lushker* (1874) 22 W. R. 4;

[7] *Lajja Prasad* v. *Debi Prasad* (1881) 3 All. 236, referring to *Eshri Das* v. *Binda Prasad* [1861] S. D. A. (N.W.P.) 1, Part II. 892. Cf. *Abadi Begam* v. *Inam Begam* (1877), 1 All. 521; *Bhairon Singh* v. *Lalman* (1884) 7 All. 23.

[8] But he must offer to pay the same price and to take the land on the same terms as the buyer. *Achurbur Panday* v. *Buckshee Ram* (1864) 2 W. R. 38; *Khudara* v. *Khuman Singh* [1866] 1 Agra H. C. R. 265; *Durga Prasad* v. *Nawazish Ali* (1878) 1 All. 591 (omission to aver in plaint willingness to pay actual amount of purchase-money not allowed to be remedied by amendment at last stage); *Naubat Singh* v. *Kishen Singh* (1881) 3 All 753 (last cited case distinguished).

price.[1] (*c*) Where the Court decrees a claim to pre-emption specifying a day on or before which the purchase-money shall be paid, the pre-emptor's right to appeal from the said decree is not affected by his not paying the said money on or before the said day.[2]

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lant.

Explanation II—According to Shiah law the pre-emptor need not assert his claim (by the 'talab-i-muathibat') unless information of the sale reaches him through trustworthy sources; but in Hanafi law (according to Abu Yusuf and Imam Muhammad whose exposition is said to be the most correct), the claim must be asserted by the pre-emptor, as soon as he is informed of the sale, and notwithstanding that he does not believe the information to be true.[1] Abu Hanifa's exposition agrees with the Shiah law.[3]

Information of sale to pre-emptor.

Explanation III—It may be unnecessary to file a suit for the enforcement of pre-emption, as when its subject is voluntarily transferred to the pre-emptor on his claiming it.

Voluntary transfer.

Illustrations.

(1) '*Talab-i muathibat*' *or assertion of claim* may be made in the following form: "I have demanded or do demand pre-emption;"[4] but the assertion of the claim need not be in any particular form;[5] and even where the words uttered are ambiguous, it may be inferred that the claim is made from the circumstances under which they are uttered, and from the acts of the parties immediately following such utterance.[6]

(2) If P receives the information of the sale by letter and the information is contained in the beginning or middle of the letter, and he reads it on to the end without assertion of his claim, the right (according to some exponents of Hanafi law) is lost,[7] but according to others and according to Shiah law the right is not lost so long as the pre-emptor uses all proper diligence so far as is customary—so that he need not hurry on a journey, nor interrupt nor delay his prayers or any religious duties for making the assertion.[8]

[1] But the presumption would be very light, by reason of the Evidence Act, s. 106: "When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him." *Abdul Majid* v. *Amolak* (1907) 29 All. 618; *Bhagwan Singh* v. *Mahabir Singh* (1882) 5 All. 185; and see *ill* (7), (8).

[2] *Kodai Singh* v. *Jaisri Singh* (1890) 13 All. 376; *Wazir Khan* v. *Kale Khan* (1893) 16 All. 126.

[3] Hed. 551; Bail. I. 482-483; II, 195 (para. 3); cf, s. 531 *ill.* (3),

[4] Bail I. 482.

[5] *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982; Ameer Ali, I. 606, citing no authority but cited in 34 All. 53, 56 with the remark, "he cites abundant authority for this proposition."

[6] *Muhammad Nazir Khan* v. *Makhdum Bakhsh* (1911) 34 All. 53.

[7] Hed. 550 (col. ii. para. 3); Bail I. 481, citing *Hidaya* IV., 922. Cf. *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 383.

[8] Bail, II. 184 (para. 2).

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(3) *'Talab-i-ish had' or demand of the claim* may[1] be made in this form; "B has purchased this mansion, and I have demanded the pre-emption, and now do demand it: bear ye witness to this."[2]

(4) *'Talab-i-khusumat' or 'talab-i-tamlik' or enforcement* of the claim may be obtained by a prayer in the following terms: "B has purchased a mansion" (describing its situation and boundaries) "and I am the 'shufee' by reason of a mansion belonging to me" (the boundaries of which he should also explain). "Order him, therefore, to deliver it up to me."[3]

(5) P made the 'talab-i-muathibat' in the presence of witnesses, but in doing so was neither at the land, nor in the presence of the seller or buyer; the lower Appellate Court found that this could not operate as a valid 'talab-i-ish had' on the ground that there was no evidence of a demand with invocation of witnesses having been made, and the High Court upheld this decision in second appeal[4]

(6) P claims to purchase a specific quantity of land at a specific price; this is not a proper claim of pre-emption, which must be made with an offer to pay the real price whatever it be.[5]

(7) P claims to pre-empt at the real price, alleging that the stated price (viz., Rs. 1,200) is fictitious, and that the real purchase money was Rs. 250; the first court held that the real or market value of the land was Rs. 250; this is sufficient to show that the alleged price of Rs 1,200 is fictitious.[6]

(8) P claims pre-emption, alleging that though the stated price is Rs. 775, the real purchase money was Rs. 75; the buyer, B (a stranger) put in evidence of the sale-deed; and P gave evidence that a share in the neighbouring 'mahal' was sold for Rs. 75; there was no other evidence, neither the seller nor the buyer being called. Edge C. J. and Broadhurst J. held that there was no evidence on which the lower Court could have found the price to be Rs. 475, and remanded the case for further evidence being taken (*a*) as to the real contract price, or (*b*) as to the market value; intimating that where neither is proved in future there may be no

[1] Not necessarily in any particular form: *Jog Deb* v. *Mahomed* (1905) 32Cal. 982; *Ramdular Misser*, v. *Jhumack Lal Misser* (1872) 8 Ben. L. R. 455; 17 W. R. 265. But a declaration should be made before witnesses in substance to this effect that the first assertion had been made: *Girdharee Singh* v. *Rojun Singh* (1875) 24 W. R. 462. It was held in that *Nundo Pershad Thakur* v. *Gopal Thakur* (1884) 10 Cal. 1008, by Garth C. J. and Beverley J., that when the first assertion is made in the presence of witnesses, and the same witnesses are present when the demand (*ish had*) is made, it is unnecessary for the pre-emptor to make on the second occasion the declaration that he had already asserted his claim by the *talab-i-muathibat*. But that decision was overruled in *Rujjub Ali Chopedar* v. *Chandi Churn Bhadra* (1890) 17 Cal. 543 (F. B.), and in *Akbar Husain* v. *Abdul Jalil* (1894) 16 All. 383, *Abbasi Begum* v. *Afzal Husen* (1898) 20 All. 457, and *Mubarak Husain* v. *Kaniz Bano* (1904) 27 All. 163, the principle was reaffirmed that the pre-emptor in the demand must distinctly state that he had prior thereto made the assertion (*talab-i-muathibat*): and notwithstanding that the same witnesses were present when the assertion was made: *Abid Husen* v. *Bashir Ahmed* (1898) 20 All. 499.

[2] Bail I. 483. Hed. 551. Cf. *Ganga Prasad* v. *Ajudhia* (1905) 28 All. 24 on necessity for specific invocation of witnesses.

[3] Bail. I. 485.

[4] *Jadunundun Singh* v. *Dulput Singh* (1884) 10 Cal. 581. (Mitter and Maclean JJ.)

[5] *Achurbur Panday* v. *Buckshee Ram* (1864) 2. W. R. 38.

[6] *Sevparyash* v. *Dhanraj Dube* (1887) 9 All. 225.

remand, as it is necessarily a part of the plaintiff's case to prove either (*a*) or (*b*), in order to show that the stated price was fictitious.[1]

(9) P, a 'pardanashin' lady, on being informed by her nephew and agent PA of the sale of the land to B, said: "I am the 'shafi' of the property, how has he purchased it? Go to him and tell him to give me the property." PA took witnesses to B, and said, "Meri mumani kahti hai ki main is ahate ki shafi hun," (i.e. "my aunt says that she is the 'shafi' of this land") and then told the persons present that he had told B what his aunt ('mumani') had said; *held*, that the demand ('talab-i-ish-had') was not defective on the ground that no reference was made to the first assertion. Had the demand been made by P in person, Aikman J. said he would have had no difficulty in holding it defective: but looking to the fact that it was made by an agent on behalf of an absent pre-emptor who was a 'pardanashin' lady, he was of opinion that the words used by the agent were equivalent to the statement that P had asserted and was asserting her right of pre-emption.[2]

(10) S sells the land to B, BA, BB, BC, and BD; in making the demand of pre-emption, P says in the presence of BB and BC, "Whereas B and others have purchased the land and I asserted my right of pre-emption," etc., and proclaims this also at the empty doors of the rest of the buyers: *held* the demand is valid.[3]

Basis of right to pre-emption.

"The right of pre-emption is founded on contract and neighbourhood, is confirmed ty 'tulub' or demand, and 'ish had' or invocation; and is perfected by taking possession."[4]

PRELIMINARY FORMS: SUMMARY OF LAW.

1. The first assertion, 'talab-i-muathibat'

(*a*) as soon as possible.

(1) The first assertion of the claim (called 'talab-i-muathibat') must be made (*a*) as soon as possible; it is a question of fact, on which it could hardly be expected that the various dicta as they appear in the reports should be absolutely consistent or reconcilable, even if it could be assumed that the reported words accurately represent the reasoning of the judges where they have to deal with a mass of evidence that is barely alluded to in the judgments; but to this difficulty is added the fact that the Courts have often a strong leaning against decreeing pre-emption and seize any technical objection to be able to refuse it. It has been pointed out in s. 528 (3) and in illustration (2) to it that the Shiah law differs in that it does not require such extreme promptness in asserting the claim—and it is doubtful whether it requires the first assertion at all. But there does not seem to be any case decided on this point in accordance with Shiah law. (*b*) No special form seems to be insisted upon with reference to the first assertion, so long as a desire to pre-empt—not merely the fact that he has a right to pre-empt—is asserted—and the surrounding circumstances may be referred to for deciding whether the desire or intention to claim was asserted or not. (2) As regards the (second) demand

(*b*) no form necessary.

2. Second demand, 'ish-had'

(*a*) Witnesses.

[1] *Agar Singh* v. *Raghuraj Singh* (1887) 9 All. 471.

[2] *Ahmad Shah Khan* v. *Abadi Begam* [1897] 17 All. W. N. 23 (the judgment relies on *Rajjab-Ali* v. *Chandi* (1890) 17 Cal. 543, and *Akbar Husain* v. *Abdul Jalil* [1894] all W. N. 122.

[3] *Joy Deb* v. *Mahomed* (1905) 32 Cal. 982.

[4] Bail. I. 481 cf. 485-487.

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(*b*) presence of land, buyer, or seller.

(*c*) form of second demand.

or the 'talab-i-ish had' it seems to be settled, (*a*) that witnesses are necessary in British India, though strictly in accordance with the texts it may not be so (*b*). It must be made either (i) on the land or (ii) in the presence of the buyer ; or (iii) (so long as the land is in the possession of the seller) in the presence of the seller ; but (iv) it is doubtful whether it may validly be made in the presence of the seller if the buyer has taken possession of the land. (*c*) It need not be made in any particular form, but three things are essential : (i) invocation of the witnesses (ii) declaration that he has already made the first assertion ('talab-i-muathibat') ; (iii) adherence to his desire to pre-empt. Sir R. Wilson makes the following suggestive comment on the necessity of the assertion ('talab-i-muathibat') being made immediately on hearing of the sale : "The same noun ['muathibat'] is used of a poet plunging 'in medias res,' but here the idea is rather of a person jumping from his seat, as though startled by the news of the sale [1] . . . This particular requirement is traced to an alleged saying of the Prophet, 'the right of shaffa is established in him who prefers his claim without delay.' Its underlying principle is identical with that of the Roman rule barring the 'actio injuriarum' where no resentment appeared to have been displayed by the sufferer at the time of receiving the blow or insult (Inst. iv. 4, 12). Here the ground of the claim is the annoyance generally to be apprehended from the intrusion of a stranger among a body of long-established neighbours, who would usually be kinsmen ; and it is supposed that this annoyance can in fact have had no existence in the particular case, and that the subsequent claim of pre-emption must be attributed to other and less legitimate motives, if the announcement of such intrusion as imminent, provoked no immediate protest." [2] Cf. 'Baijnath *v.* Ramdhari.' [3]

Strict proof.

529 The assertion (or 'talab-i-muathibat,') [4] and the demand (or 'talab-i-ish had,' or 'talab-i-taqrir') [5] for pre-emption must be strictly proved [6] to have been made in proper form, [7] and without undue [8] delay. [9]

Evidence of pre-emptor alone.

As regards the 'talab-i-muathibat'—

(1) On the question whether the evidence of the pre-emptor alone is enough to prove its having been made, see 'Abdool Hossein Khan *v.* Gobind Chandra Shaha.' [10]

[1] Wilson, "Anglo-Muhammadan Law" 393 *n.* citing Prof. J. de Nauphal's *Cours de droit Musulman, La Propriété* (1886) I. 72.

[2] "Anglo-Muhammadan Law," 394. s. 375.

[3] (1908) 35 Cal. 402 ; 35 I. A. 60.

[4] *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 383 ; *Jhotee Singh* v. *Komul Roy* (1868) 10 W. R. 119; *Abdul Hossein Khan* v. *Gobind Chandra Shaha* (1869) 11 W. R. 404.

[5] *Narbhase Singh* v. *Luchmee Narain Pooree* (1869) 11 W. R. 307 ; *Razeeooddeen* v. *Zeenut Bibee* (1867) 8 W. R. 463 ; *Bhowanee Dutt* v. *Lokhoo Singh* [1864] W. R. 60.

[6] *Hosseini Khanum* v. *Lallun* (1864) W. R. 117 ; *Issur Chunder Shaha* v. *Nissar Hossein, ib.* 351 ; *Jadu Singh* v. *Rajkumar* (1870) 4 Ben. L. R. (A.C.) 171 ; *Prokas Singh* v. *Jogeshwar Singh*, 2 Ben. L. R. (A.C.) 12 ; *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 288 ; *Surdharee Lall* v. *Laboo Moodee*.

[7] See s. 528, *ill.* (1), (3).

[8] See comment.

[9] *Baijnath* v. *Ramdhari* (1908) 35 Cal. 402 ; 35 I. A. 60 ; *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 383 ; *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 283 ; *Nazir Khan* v. *Inayatulla* (1893) 12 All. W. N. 24 ; *Ram Charun* v. *Narbin Mahton* (1870) 4 Ben. L. R. (A.C.) 216 ; 13 W. R. 259. *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1888) 11 All. 108 *Ajoodhja Pooree* v. *Sohun Lall*, 7 W. R. 428 ; *Elahee Buksh* v. *Mohan*, 25 W.R. 9 ; *Gholam Hossein* v. *Abdool Kadir* (1873) 5 N. W. 11 : as to delay in making the DEMAND (ISH HAD), cf. p. 454 *nn.* 4, 5, 7.

[10] (1869) 11 W. R. 404.

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What is undue delay.

(2) A lapse of twelve hours,[1] or of the night,[2] before the assertion is made avoids the claim; the delay caused by the pre-emptor going either to the land,[3] (the subject of pre-emption) and making the 'talab-i-muathibat' there or going to his own house to get the purchase money prior to asserting it[4] is fatal to the claim; still stronger is a case where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, and took out Rs. 47-4," and then asserted his claim, and it was held to be such unnecessary delay as avoided the claim.[5] On the other hand it has been held that rising from the seat[6] before making the claim is not undue delay, and that taking a short time for ascertaining the correctness of the information is not undue delay; and even that a short time for reflection before making the first assertion is allowed.[7]

As to delay in making the demand ('talab-i-ish had'), see p. 454 *n.* 7.

The Shiah law is different See s. 528 *ill* (2).

Agent manager or guardian making the preliminary ceremonies.

530. The assertion and demand for pre-emption may be made either by the pre-emptor, or his duly authorized agent,[8] or manager,[9] or guardian;[10] and any person competent to own property, is competent to make them.[11]

Where the claim to pre-emption arises in favour of a minor or person of unsound mind, and his guardian exercises or refuses to exercise it on his behalf according to Shiah law, and if the act or omission of the guardian is not for the benefit of the minor, then the pre-emption may be avoided, or enforced on the minor attaining majority or the said person recovering reason. The Hanafi authorities are doubtful on the point.[10] It is difficult to think that the Shiah law would be given effect to in British India except in so far as it may affect the rights between the guardian and his ward, or where the disability of the pre-emptor has not been long in duration and the interests of third parties are not affected. Apart from these general considerations the bearing of the Limitation Act X of 1908, s. 8, and Act XV. of 1877, s. 6 and s. 7 (para. 5) may have to be considered[12]

Restriction in 'wajib-ul-'arz against minor.

In 'Raja Ram *v.* Bansi'[13] the 'wajib-ul-'arz' restricted the right in favour of persons competent to contract and the plaintiff, who was a minor at the time of the sale and unrepresented by a guardian, was held not to be entitled to enforce pre-emption by a suit filed on his attaining majority four years later.

[1] *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 283.

[2] *Nazir Khan* v. *Inayatalla* (1893) 12 All. W. N. 24.

[3] *Ram Charun* v. *Narbin Mahton* (1870) 1 Ben. L. R. (A.C.) 216; 13 W. R. 259.

[4] *Mona Singh* v. *Mosrad Singh.* (1866) 5 W. R. 203.

[5] *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 383.

[6] *Maharaj Singh* v. *Lalla Bhanchook Lall* (1864) W. R. 294.

[7] *Amjad Hussein* v. *Kharag Sen Saha* (1870) 4 Ben. L.R. (A.C.) 203; 13 W. R. 299.

[8] *Munna Khan* v. *Cheddu Singh* (1906) 28 All. 691; *Ali Muhammad Khan* v. *Muhammad Said Husain* (1896) 18 All. 309; *Harirar Dat* v. *Sheo Prashad* (1884) 7 All. 41 (laying down rule in general terms); *Abadi Begam* v. *Inam Begam* (1877) 1 All. 521 (husband for wife). *Ojheoonissa Begam* v. *Rustam Ali* [1864] W.R. 219. (*Syed*) *Wajid Ali Khan* v. *Lala Hanuman Prasad* (186) 1 Ben. L. R. (A.C.) 139; 12 W. R. (F.B.) 484.

[9] *Sri Kishan* v. *Bachcha Pande* (1911) 32 All. 637 (notice by member of joint Hindu family to accrue for benefit of all). *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575 (manager under Court of Wards), affirmed (1912) 14 Bom. L.R. 436 (P.C.)

[10] Hed. 564-565; Bail. II. 189; see s. 271, p. 214 above. See comment.

[11] Bail. I. 473 (para 2): "neither are manhood, puberty, and justice or respectability of character, conditions of its exercise."

[12] Cf. *Nanoo* v. *Tirkha* [1876] S.D.A. (N. W. P.) 97.

[13] (1876) 1 All. 207.

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§ 4.—Loss of Right of Pre-emption.

(1) Omission to Claim: Acquiescence.

Loss of right of pre-emption by omission to claim or by acquiescence.

531. The right of pre-emption cannot be established where the pre-emptor omits duly to assert demand or enforce his claim,[1] or acquiesces in the sale of the land,[2] or any part thereof;[3] and by such acquiescence it is avoided notwithstanding that it may have been already asserted and demanded.[4]

Explanation—Associating in a suit to enforce pre-emption a co-plaintiff who has no claim to it is a waiver of part of the claim,[3] and extinguishes the whole of it.[5]

Illustrations.

(1) S sells land to B. and P, who has a right to pre-emption, on receiving information[6] of the sale. (*a*) omits without sufficient cause to ascertain immediately his right[7] or (*b*) makes an offer for the house to B[7] or (*c*) asks him if he will give it up to him,[7] or (*d*) takes a lease of it,[7] or (*e*) agrees to cultivate it in 'muzariat' or jointly with B,[7] or (*f*) on the day of the sale P obtains a written agreement from B to sell to P the land any time within a year, and then P pays the price and purchases it for himself,[8] or (*g*) P acts as the agent of S in the sale[9] —in each of these cases P will be taken to have acquiesced in the sale,[10] and has no right to pre-empt the land. If (*h*) P. acts as the agent of B, his right is not extinguished[9] nor (*i*) where an agreement similar to that in (*f*) is entered into while P contines to asstre his pre-emptive right, and on the strength of that right, and in his character as pre-emptor, offers, in order to avoid litigation, to take the land from B for the sale price:[11] The distinction between (*g*) and (*h*) being stated to be that in P must annul the sale which was completed by him in order to pre-empt, whereas in (*h*) he must enforce the sale to B through whom he claims.[9]

(2) Property is sold in execution of P's decree,[12] or in execution of a decree at a public auction when P has the same opportunity to bid for

[1] See ss. 528 and 540.

[2] Bail. I. 743.

[3] Omitting to sue for part of the subject is in effect a waiver as to part; the object of this right is to pervent the intrusion of a stranger, not to give the pre-emption the "capricious choice" ousting a stranger from so much of the land as he may choose to pre-empt (Mahmood J.) *Durga Prasad* v. *Munsi* (1884) 6 All. 423.

[4] Bail. I. 499. See ill.

[5] *Bhawani Prasad* v. *Damru* (1882) 5 All. 197. *Bhupal Singh* v. *Mohan Singh* (1897) 19 All. 324 (such misjoinder not allowed to be rectified by amendment of plaint). cf. *Bhawani Kuar* v. *Narain Singh* [1887] 7 All. W. N. 247.

[6] The more so when the *wajib-ul-'arz* requires S to give notice, and S does so but P takes no action within a reasonable time; *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1888) 11 All 108.

[7] Bail. I. 499.

[8] *Habibunnissa* v. *Barkat Ali* (1886) 8 All. 275.

[9] Hed. 562 (cal. i, para 4.)

[10] *Baijnath* v. *Raindhari* (1908) 35 Cal. 402; 35 I. A. 60.

[11] *Muhummad Yunus Khan* v. *Muhammad Yusuf* (1897) 19 All. 334; *Muhammad Nasiruddin* v. *Abdul Hasan* (1894) 16 All. 300.

[12] *Nuzmoodeen* v. *Kanye Jha* (1863) Marsh 555; 2 Hay. 651. But see s. 525 *ill.* (l) (*e*).

the property as other persons, P cannot afterwards exercise his right of pre-emption.[1]

(3) P sues for pre-emption, alleging that the true consideration for the sale was less than that stated in the sale deed. P had made no communication to S, the seller, after he became aware that the sale was negotiated, nor did P make it known to S that while he claimed to pre-empt, he declined to pay the ostensible price. *Held*, that P ought to have communicated with S, and not having done so, he must be taken to have countenanced the completion of the sale, and waived his right of pre-emption.[2]

(4) PA and PAA obtained decrees for pre-empting one-fourteenth and thirteen-fourteenth shares of the land on the 29th November and 23rd December 1907 respectively; a suit was brought on the 17th December 1907 by P, whose claim as pre-emptor was prior to that of PA, and PAA. *Held*, that P was entitled to pre-empt, not having been a party to the suits by PA and PAA, and his right was not affected by the said decrees in favour of PA and]

(2) *Death of Pre-emptor before Enforcement.*

532 (1) According to Hanafi law the right of pre-emption abates by the death of the pre-emptor previous to its being enforced.[4] According to Shiah and Shafi'i law on the death of the pre-emptor it devolves upon his heirs,[5] in the proportion of their rights of inheritance.[6]

Shafi'i law: devolution.

(2) Where the pre-emptor, being a Hanafi Mussulman, dies pending a suit for pre-emption, the right does not, under section 89 of the Probate and Administration Act survive to his heirs and representatives who are neither executors nor administrators within the clear definitions of the terms in the said Act.[7] *Quaere*, whether the said right survives to such executors or administrators.[7]

Effect of Probate Act.

The reason given for the right abating, according to Hanafi law, is that the death of the pre-emptor extinguishes his ownership of his property (see s. 541 below) which is necessary to give rise to the claim, and so it cannot continue in the dead man; as for his heirs, their right in the property devolves upon them after his death, i.e., after the sale; and thus they were not owners at the time of the sale.[8]

Reason for abatement.

[1] *Abdul Jabel* v. *Khelat Chandra Ghose* (1868) 1 Ben. L. R. (A. C.) 105; 10 W. R. 165.

[2] *Bahairon Singh* v. *Lalman* (1884) 7 All. 23.

[3] *Raj Narain Rai* v. *Dunia Pande* (1910) 32 All. 340. Cf. comment to s. 527 above.

[4] Hed. 561 (col. ii. para. 2); Bail. I. 500; *Muhammad Husain* v. *Niamat-un-nissa* (1897) 20 All. 88.

[5] Hed. *ibid* Bail. II. 190, 191; the *Shaikh*. (i.e. Muhammad-al-Hasan ibn 'Ali Abu Jafar-al-Tusi) author of the *Mabsut*, holds that the right abates.

[6] Bail. II. 191 (*third*).

[7] *Sayyad Jiaul Hussain* v. *Sitaram Bhau* (1911) 36 Bom. 144; 13 Bom. L. R. 1340. See comment.

[8] Hed. 562 (col. i. para. 1).

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Effect of maxim about act is personalis and Probate Act.

The head-notes of both reports[1] of 'Sayyad Jiaul Hussain's' case are inaccurate: Beaman J. (Hayward J. acquiescing) adjourned the hearing of " appeal on the question of the right surviving to an administrator; though he said, "we cannot doubt but that the intention of the legislature in the enactment was to make large innovations upon the personal law . . . as expressed in the old maxim 'actio personalis moritur cum persona.' Since that in our opinion is unmistakably the effect of s. 89 of the Probate and Administration Act, we think that its operation must be strictly confined to the persons named in it." Compare with this, the remark of Lord Macnaghten[2] that the application of the doctrine of 'actio personalis moritur cum persona' is limited to actions in which remedy is sought for a tort or for something which involves at any rate a wrong-doing,—this was recently cited by Chandavarkar J. in deciding that the maxim does not apply where compensation is claimed to property on the strength of express or implied contract.[3] It is difficult to say whether the right of pre-emption as understood by the Hanafi lawyers falls within the one or other category. It arises in many cases from a contract, but its origin is to safeguard the pre-emptor from annoyance which may be considered as not very far removed from wrong-doing. See comment to s. 528 p. 460 above

B) Waiver.

Waiver.

533. The right of pre-emption may be waived expressly or impliedly, provided it has arisen and has not been enfoced.[4]

Illustration.

S makes an offer of sale to P, who refuses to avail himself of it, and consents to a sale to B; P cannot afterwards claim to pre-empt,[5] but where there is neither sufficient proof of the refusal, nor evidence of consent to the sale to B, the right is not lost;[6] nor where there is no absolute surrender but the refusal has been made simply in consequence of a dispute as to the actual price of the land.[7] *Quaere*, whether a mere refusal to purchase is proof of consent to the sale to B.[8]

Conditional or contingent waiver.

534. The right of pre-emption cannot, according to Hanafi law, be waived conditionally or contingently, on the happening of some future event; where the preemptor purports so to waive his claim the authorities are divided whether the waiver is operative

[1] See p. 463 *n.* 7.

[2] *The United Collieries Ld.* v. *Simpson* [1909] A. C. 391.

[3] *Chunilal* v. *Secretary of State* (1910) 12 Bom. L.R. 769, 776.

[4] Bail. I. 500 (para. 2); II. 195 (para. 2); though some Shiah authorities express a doubt as to waiver by implication.

[5] *Braja Kishor Surma* v. *Kirti Chandra Surma* (1871) 7 Ben. L. R. 19; 15 W. R. 247.

[6] *Jehangeer Buksh* v. *Lalla Bikhurce Lall* (1868) 11 W. R 480, 7 Ben. L. R. 24 *n.*

[7] *Abadi Begam* v. *Inam Begam* (1877) 1 All. 521; *Kanhai Lall* v. *Kalka Prasad* (1905) 27 All 670 Cf. *Shri Kishan Singh* v. *Bachcha Pande* (1911) 33 all 637.

[8] *Toral Komhar* v. *Anchhi* (1872) 9 Ben. L. R. 253; 18 W. R. 401. *Sheo Tuhul Singh* v. *Ram Kooer* [1864] W. R. 311 *Kooldeep Singh* v. *Ram Deen Singh* (1875) 24 W.R. 198.

absolutely (the condition or contingency being ineffectual), or whether the waiver itself is also of no effect.[1] SECTION 534

535. Where the right of pre-emption is purported to be waived, and the waiver is based on misinformation as to the amount or nature of the consideration for the sale, or the identity of the purchaser, the waiver will not affect the right in so far as it is made by reason of the said misinformation.[2] Waiver on misinformation inoperative.

Explanation—Refusal to purchase the land at a price which the pre-emptor believes in good faith not to be real but fictitious, does not amount to a waiver or affect his rights.[3] Refusal to purchase the land.

Illustration.

P purports to waive his right of pre-emption on being misinformed—

(*a*) That the land was sold for Rs. 1,000,—if the real consideration was Rs. 500, the right is not waived; but if it is Rs. 2,000 or Rs. 999, the waiver is valid.[4]

(*b*) That the purchaser was B,—if the real purchaser was BA the waiver is invalid.[4]

(*c*) That the purchaser was B,—if the real purchasers were B and BA jointly, the waiver is valid as to B's share in it, but not as to BA's.[4]

(*d*) That the whole land had been sold,—and only half of the land is really sold; the right is extinguished according to Hanafi law, but not 'vice versa,'[4]—but see *ill.* (*f*) below.

(*e*) That the land was exchanged for one commodity,—and it was really exchanged for another commodity, the waiver is inoperative.[4]

(*f*) That half the land was sold for Rs. 100,—and in fact a fourth was sold for 50, or 'vice versa,'—[5]

(*g*) That B and BA purchased—it and only B had in fact purchased it, or 'vice versa,'—[5]

(*h*) That A purchased it for himself,—and in fact he purchased it for B, or 'vice versa,'—[5]

the right is not extinguished in any of the cases (*f*) (*g*) (*h*).

(4) *Forfeiture of Right.*

536. Where the right of pre-emption is purported to be released for consideration to be paid by the pre-emptor to the seller, the right is extinguished, but according to Sunni law the pre-emptor 1. Release of right of pre-

[1] Hed. 561; Bail. I. 502; but see Bail. I. 500 (para. 3), where it is said that it may be suspended on a condition. The translator points out (I. 502, *n.* 2) that the condition referred to had already occurred in the one case and was executory in the latter.

[2] Bail. I. 501 (para. 2), II. 184.

[3] *Sri Kishan Singh* v. *Bachcha Pande* (1911) 33 All. 637.

[4] Bail. I. 501; Hed. 562 (col. ii. para. 2), 563.

[5] Bail. II. 187-188, (*first*, *fourth*).

SECTION 536 cannot claim payment of the consideration from the releasee; but the pre-emptor may validly agree to take only part of the land for a like or other part of the price.[2]

2. Transfer of subject of pre-emption.

537. Where the pre-emptor (before enforcing his right) purports to dispose of the subject of pre-emption to a stranger his right is extinguished.[3]

Explanation—After the decree is obtained the pre-emptor may sell or alienate its subject, though he has not executed the decree.[4]

A mortgage of the pre-emptor's own share or property prior to the sale does not affect his right to pre-empt;[5] but when the 'wajib-ul-'arz gives not only a right of pre-emption in case of a sale, but also a right to obtain a mortgage in priority to others, and a co-sharer entitled to such prior right, in anticipation of exercising it himself, encumbers the mortgaged share, he thereby forfeits his prior right.[6]

S. 536 refers to a release of the right to the seller; s. 537, to what is practically a transfer of it to an outsider.[7]

3. Contract avoided or impossible of fulfilment.

538. Where the contract of sale is avoided, or it is impossible for the pre-emptor to carry it out, his right of pre-emption is extinguished.[8]

DEVICES FOR DEFEATING PRE-EMPTION.

The devices are mentioned in a later part of the chapter; cf. s. 557.

§ 5.—The Subject of Pre-emption.

Subject of pre-emption. Land alone.

539. ''Aqar' or land[9] alone can validly be the subject of pre-emption;[10] provided first that where the subject of pre-emption consists of a share in a village or a large estate, neither a

[1] Hed. 561; Bail. I. 502, II. 192 (*sixth*): it would seem that according to Shiah law the payment of the consideration may be enforced.

[2] I.e. whether the part of the price paid is proportionate to the part of the land taken by the pre-emptor, or not; e.g. he may take half the land for a third of the price—Bail. I. 502 (*ll.* 18-22)—in which case he may be considered to release part of his right for part of the purchase money.

[3] *Rajjo* v. *Lalman* (1882) 5 All. 180. The object of the right being to prevent the intrusion of strangers, not to benefit the co-sharers pecuniarily cf. *Durga Prasad* v. *Munsi* (1884) 6 All. 423, 425, 426 (per Mahmood J.).

[4] *Ram Sahai* v. *Gaya* (1884) 7 All. 107.

[5] See below s. 22.

[6] *Rajjo* v. *Lalman* (1882) 5 All. 180.

[7] Cf. *Sheo Narain* v. *Hira* (1885) 7 All. 535; *Lachmi Marain* v. *Manog Dat* (1885) 7 All. 291.

[8] Hed. 560 (col. i. para. 2); Bail. II. 179, (para. 2, inability to pay price), 196 (para. 2; e.g. when the price cannot be determined, or the subject of consideration has perished, if the transfer was to be by way of exchange). Cf. 187, para. 3 *Najmunnissa* v. *Ajaib Ali Khan* (1900) 22 All. 343; *Ojheoonissa Begum* v. *Rustom Ali* [1864] W. R. 219. Cf. *Busunt Koomaree* v. *Kali Persad Singh* (1862) Marsh 11; 1 Hay 32 (pre-emption upon re-sale after first sale has fallen through, with respect to which no claim made.)

[9] E.g. Agricultural estate: (*Shaikh*) *Karim Buksh* v. *Kamrudeen Ahmad* (1874) 6 N. W. 377.

[10] Bail. I. 472; 473 (para. 4), 474; II. 175. See comment.

neighbour who is not a co-sharer,[1] nor a participator in appendages[2] can claim it on the ground merely of vicinage;[3] and secondly that according to Shafi'i law property which is incapable of division cannot be subject of pre-emption.[4] SECTION 53

Illustrations.

Movables cannot validly be the subject of pre-emption,[5] but trees or buildings when transferred with the land on which they stand, or a dwelling house sold for occupation, without the ownership of the site,[6] may be the subject of pre-emption.

Meaning of 'aqar.

"The strict meaning of the word ('aqar') is 'space covered with buildings'" so that properly speaking the term is not applicable to 'zuyut.' ('Fatawa 'Alamgiri,' III. 605. But according to the Kifayah, IV. 940, and the 'Inayah,' IV. 263, 'akar' in the sense in which it is liable to pre-emption includes a 'zuyut.' According to Freytag 'zuyut' is a field whether arable or pasture."[7] "The Prophet has said that there is no 'shoofa' except in a 'ruba' or mansion, and a 'hait' or garden ('Hidaya' and 'Kifayah,' IV. 940).

Of hait.'

"'Hait' means properly a wall or that which surrounds, though applied elliptically to the enclosure (Freytag) . . . . It would seem that the right of 'shoofa' is strictly speaking applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole 'mouza' or village. S. D. A. Calcutta Reports, Vol. III. p. 85."[8]

Shiah law pre-emption in regard to &c.

(1) The 'Shara'ya-ul-Islam' mentions that some authorities hold that pre-emption may be established in regard to movables, such as wearing apparel, household utensils, shipping animals and the like to obivate the inconvenience of division. (2) Doubt is also expressed regarding rivulets, ways, baths, and other property the division of which would occasion loss or damage; and (3) as to apparatus of a well, such as wheels and buckets made use of in drawing water, which though strictly movable are by custom never removed from the well. But the correct opinion is stated to be that pre-emption is restricted to lands.[9]

Sale of house apart from ite.

As to the sale of a house apart from the site on which it stands, it has been held in (*a*) Allahabad that such a sale can be the subject of pre-emption where

[1] But a co-sharer in any land, large or small can pre-empt: *Jehangeer Buksh* v. *Bhickaree Lall* (1868) 11 W. R. 71: 6 Ben. L. R. 42 *n.*; S. C. affirmed on review, *Re Petition* of *Jehangir Baksh*, 7 Ben. L. R. 24; 11 W. R. 480; *Mahatab Singh* v. *Ramtahal Misser* 6 Ben. L. R. 43 *n.*; 10 W. R. 314.

[2] Such as in (*Shaikh*) *Karim Buksh* v. *Kamruddeen Ahmad* (1874) 6 N. W. 377.

[3] *Munna Lal* v. *Hajira Jan* (1910) 33 All. 28 (where the cases are collected) *Re Petition* of *Chatternath Jha* alias *Jhingha Jha*, (*Sheikh*) *Mahomed Hossein* v. *Mohsin Ali* (1870) 6 Ben. L. R. 41; 14 W. R. (F.B.) 1 (where Couch C. J. and Mitter J. refer to all the authorities), *Ejnash Kooer* v. *Amjud Ally* (1868) 2 W. R. 261; *Chowdhry Joogul Kishore Singh* v. *Poocha Singh* (1867) 8 W. R. 413; *Abdul Azim* v. *Khondhar Hamed Ali* (1868) 2 Ben. L. R. (A.C.) 63; 10 W. R. 356; *Abdul Rahim* v. *Kharag Singh* (1892) 15 All. 104; (*Sheikh*) *Mahomed Hossein* v. (*Sheikh*) *Mohsun Ali* (1870) 14 W. R. 266; (*Sheikh*) *Karim Buksh* v. *Kamrudeen Ahmad* (1874) 6 N. W. 377. The Shiah law does not give neighbours the right of pre-emption in any case; cf. s. 541 (3).

[4] Hed. 555 (col. ii. para. 1). See comment.

[5] Bail. I. 475 (para. 3), II. 176 (para. 1).

[6] *Zahur* v. *Nur Ali* (1879) 2 All. 99.

[7] Bail. I. 472 *n.* 2.

[8] Bail. I. 474 *n.* 1.

[9] Bail. II. 175-177.

SECTION 539 the buyer means to occupy it and does not intend to remove the building as old materials (see *ill.*), but (*b*) that the owner of the land on which it stands is not entitled to pre-empt, "where his property in the land is wholly separate and distinct from the property in the house, which belongs to another person, with whom the owner has nothing in common."[1] (i) It appears from the reports that in case (*a*) the pre-emptor claimed as a neighbour, but (ii) it does not appear how his vicinage arose—whether he was the owner of adjoining land (or house) or of the site on which the house sold was standing; nor (iii) whether the claimant in case (*b*) omitted to claim as a neighbour or (iv) was held not to be even a neighbour.[2] The pre-emptor in case (*b*) may have been a Shiah and then there would be no difficulty in understanding it.

Pre-emption cannot be claimed as to part only of the land.

540. The claim for pre-emption must have reference to the whole of the property sold [3] notwithstanding that the claimant is one of several joint pre-emptors,[4] provided that where the right of any pre-emptor arises with reference to a part only of the subject of sale,[5] pre-emption may be claimed with respect to such part alone [6] on payment of a proportionate [7] part of the consideration for the sale.[8]

One of several lands sold by same contract may be pre-empted.

Explanation—Where two or more distinct properties are sold by the same contract, one or more of them may be pre-empted without the other, notwithstanding that the pre-emptor is the same in respect of each of them.[9]

Illustrations.

(1) S sells land, over which P and PA have rights of pre-emption, and (P being absent) PA asserts his claim to half the land by pre-emption; or (both being present,) they each assert a claim to half of it. In either case the assertion of the claim is void.[10]

[1] *Pershadi Lal* v. *Irshad Ali* (1870) 2 N. W. 100.

[2] Cf. the case of owners of the upper and lower stories of a house who are held to be neighbours and no more: s. 545, *ill.* (7).

[3] Of course, where the property is described in the plaint by an error to be of less area than it is in reality, the plaint may be amended by leave of Court, *Barkat Unnesa* v. *Muhammad Asad Ali* (1895) 17 All. 288.

[4] Bail. I 482 (*ll.* 15-22), 492 (para. 2), II. 182 (para. 2): *Durga Prasad* v. *Munsi* (1884) 6 All. 423: *Cazee Ali* v. *Museeutoollah* (1882) 2 W. R. 285. Cf. *Hulasi* v. *Sheo Prasad* (1865) 6 All. 455. *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All. 182.

[5] As for instance if shares in two tenements are sold, and the pre-emptor is co-sharer in only one of them—*Saligram* v. *Debi Pershad* (1874) 7 N. W. 38.

[6] Bail. I. 492 (para. 1), II. 177 (para. 3), 883 (para. 2): *Abdullah* v. *Amanatullah* (1899) 21 All. 292: *Rowshun Koer* v. *Ram Dihal Ray* (1883) 13 C.L.R. 45. In such a case the buyer has, according to Muhammadan law, no option to rescind the sale of the part which is not pre-empted, because the claim of *shoofa* is supervenient on what is his own property." Bail. II. 183.

[7] Of course when the several parts of the land vary in price, they may have to be separately valued, e.g., in *Saligram* v. *Debi Prasad* (1874) 7 N. W. 38.

[8] Cf. *Muhammad Latif* v. *Gobind Singh* (1883) 5 All 382.

[9] Bail. II. 187 (para 2) *Izzatulla* v. *Bhikari Molla* (1870) 6 Ben. L. R. 386; 14 W. R. 469; *Raghunandan Singh* v. *Majbuth Singh* (1868) 10 W. R. 379; 6 Ben. L. R. 387 *n*.

[10] Bail, I, 482 (para. 1).

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(2) S sells several houses in a street where there is no thoroughfare, and P desires to pre-empt one of them; if P's right of pre-emption is based on partnership in the way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity: but if his right be based on neighbourhood and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.[1]

(3) A, as the agent of B and BA, purchases plots of land from S and SA respectively: P cannot pre-empt one of the plots without the other (provided he has a right to pre-empt both).[2]

(4) A and AA are both agents of B, and purchase plots of land from S. P may pre-empt either plot without the other.[2]

(5) S purported to sell his own share, and that of SA, a minor, in certain property to B, with a covenant to compensate B if SA did not ratify the sale on coming of age. P sued for pre-emption. On the lower appellate court holding that P could not enforce his claim in respect of SA's share, at its suggestion the plaint was amended so as to refer only to S's share. *Held*, that P was bound to claim his right against all the shares, and could not enforce it in respect of some only.[3]

(6) P has a right to pre-empt the whole subject of sale consisting of (i) a share in a village and (ii) a plot of land in a city, but omits to make a prompt assertion of his claim. *Held*, that he cannot pre-empt even (i) notwithstanding that he is willing to pay for it the consideration for both (i) and (ii), and to leave (ii) (as to which his right to pre-empt is not established) in the buyer's hands.[4]

Distinction purchasers.

Abu Hanifa held that when a person has the right to pre-empt any portion of the subject of the sale, he has the option of pre-empting the whole; but Imam Muhummad and the Shiah authorities[5] and the decisions in British India[6] are opposed to this view. It is stated in Hanafi texts[7] (*a*) that where several sellers jointly sell the land to one purchaser, the right of pre-emption can only be exercised as to the whole of the land sold: on the other hand (*b*) when several purchasers buy land from one seller, the portion of land agreed to be sold to each seller may by itself form the subject of pre-emption: the reason that is assigned being that in the case (*a*) it would "occasion a discrimination in the bargain to the purchaser and be productive of very great inconvenience to him, whereas in the . . case (*b*) the 'shafee' being merely the substitute of one of the (five) purchasers, no discrimination in the bargain is occasioned,"[8] so that it would seem that the real rule is that the bargain should not be split up, irrespective of the number of sellers or purchasers.

[1] Bail. I. 492 (para. 1).

[2] Bail. I. 493 (para. 1; *ll.* 4, 5 of para. 2).

[3] *Abdul Gufoor* v. *Nurbanu* 10 W. R. 111; 1 Ben. L. R. (A. C.) 78. *Sed quaere*: (*a*) the sale of SA's share might be considered (i) as unauthorised (see above ss. 260, 272 (3), pp. 203, 214); (ii) as a sale subject to an option in SA (see s. 526 *expl. 1.*); (*b*) it may be held for some other reason that P had no right of pre-emption against SA's share. In cases (i) & (*b*) P could pre-empt S's share by itself.

[4] *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1811) 11 All. 101. followed in *Mujib Ullah* v. *Umed Bibi* (1898) 21 All. 119.

[5] Bail. I. 493 (para. 2); Bail. II. 177 (para. 3); Abu Hanifa also seems to have held the same opinion at one time.

[6] *Surdharee Lall* v. *Laboo Moodee* (1876) 25 W. R. 499, 500.

[7] Bail. I. 492; Hed. 564.

[8] Hed. 564. The reason given in Bail. I. 492 for rule (*b*) is that the "bargain has been separate from the beginning"

SECTION 541

§ 6.—*The Pre-emptor.*

(*1*) *Persons Entitled to Pre-empt.*

Who may be pre-emptor.

541. (1) According to Hanafi law the right of pre-emption arises in favour of the following persons,[1] and of no others,—[2]

1. Co-sharer of seller.

(*a*) the 'sharik' or co-sharer, i.e., owner of an undivided[3] share in the property[4] of which the subject of pre-emption forms a part or share,[5] or

2. Participator in appendages.

(*b*) the 'khalit' or participator in appendages,[6] i.e., owner of property to which is annexed, or on which is imposed a private[7] right of way or of water [or other easement or appendage] such right being also annexed to, or imposed upon the subject of pre-emption, or[1]

3. Neighbour.

(*c*) the 'jar' or neighbour,[8] i.e., owner of property adjoining the subject of pre-emption.[1]

Right must 'inhere' at time of sale.

Explanation I—The co-sharer or participator or neighbour above referred to, must be the owner of the said share or property at the time of the sale,[9] and until the filing of the suit to enforce partition,[10] and, *semble*, also until the decree for pre-emption is passed;[11] the right of pre-emption does not arise in favour of one who has[12] an interest less than full ownership therein; and[13] possession is neither necessary[14] nor a substitute for such ownership,[15] nor is such ownership affected by the share or property being mortgaged.[16]

[1] Hed. 548 ; Bail. I. 473-474.

[2] Cf. *Pershadi Lal* v. *Irshad Ali* (1870) 2 N. W. 100.

[3] See *ill.* (5.)

[4] As a share in a zamindari : *Akhoy Ram Shahajee* v. *Ram Kant Roy* (1871) 15 W. R. 223.

[5] Under Sunni law the right of pre-emption may be exercised by one or more of a plurality of co-sharers: *Nundi Pershad Thakur* v. *Gopal Thakur* (1884) 10 Cal. 1008.

[6] (*Sheikh*) *Karim Buksh* v. *Kumruddin Ahmad* (1874) 6 N. W. 377. Contra *Karim* v. *Priyo Lal Bose* (1905) 28 All. 127.

[7] Not a thoroughfare. *Karim Baksh* v. *Khuda Baksh* (1894) 16 All. 240.

[8] See s. 539 above (as to large estates).

[9] See *ill.* (7); so of course his having mortgaged it on a previous occasion does not affect his right. *Ujagar Lal* v. *Jia Lal* (1896) 18 All. 382. *Gokul Chand* v. *Ram Prasad*, 9 All. W. N. 127.

[10] *Janki Prasad* v. *Ishar Dass* (1899) 21 All. 347.

[11] *Ram Gopal* v. *Piari Lal* (1899) 17 All. 347, but see *ill.* (7) and *Narain Singh* v. *Parbar Singh* (1901) 23 All. 247 : but not necessarily at the execution of the decree for pre-emption *Ram Sahai* v. *Gaya* (1884) 7 All. 107.

[12] So that if he sells the property (or his share in it) his right is extinguished. Hed. 562 (col. i. para. 3) ; *Janki Prasad* v. *Ishar Dass* (1899) 21 All. 374. But see *ill.* (6).

[13] E.g. a tenant cannot pre-empt, *Gooman Singh* v. *Tripool Singh* (1867) 8 W. R. 427. Cf. *Bhajan* v. *Mushtak Ahmad* (1883) 5 All. 324. PA sells his property to P in 1870 on condition that PA has an option to repurchase it at any time during 13 years. P is the owner of the property and not PA until the option is exercised.

[14] See *ill.* (6.)

[15] *Beharee Ram* v. *Shubhudra* (1868) 9 W. R. 455.

[16] *Ujagar Lal* v. *Jia Lal* (1896) 18 All. 382; *Gokul Chand* v. *Ram Prasad*, 9 All. W. N. 129; *Ali Ahmad* v. *Rahmat Ullah* (1892) 14 All. 195.

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Explanation II—A secret 'benami' purchaser of a share in the land is not constituted a co-sharer under clause (*a*) above,[1] nor is the presumptive heir of a living Mussulman a co-sharer in his property with him during his life-time.[2]

'Benami' purchaser or presumptive heir not co-sharer.

Explanation III—It is not necessary that the property referred to in clause (*b*) and the subject of pre-emption should mutually be dominant and servient heritages;[3] if the owners participate in the beneficial enjoyment of the appendages referred to, each becomes the 'khalit' of the other;[4] and when the appendage consists of an easement, it is not necessary that it should have become absolute[5] by having been peaceably enjoyed during the period of prescription.[6]

'Khalit' is not necessarily owner of heritage dominant or servient to land.

(2) According to Shafi'i law it arises only in favour of co-sharers, and not of participators in appendages, nor of neighbours.[7]

Shafi'i law: amongst co-sharers alone

(3) According to Shiah law, it arises only where two persons are co-sharers in undivided property, and one of them sells his share; and it does not arise in favour of any other person,[8] nor if there are more than two co-sharers.[9]

Shiah law: only two co-sharers

Illustrations.

(1) (*a*) The wife of a Mussulman is not (for claiming pre-emption) a co-sharer with him in his property during his lifetime,[10] nor (*b*) is a Hindu widow who is in possession of property for her life—
(i) by virtue of a compromise with the brother of her deceased husband, the agreement containing strict provisions against her alienating it,[11] or
(ii) in possession of the property of her husband in lieu of maintenance, even though under a decree of Court;[12] but if—
(iii) she has inherited it from her husband, she is the owner of it.[13]

[1] *Beni Shanker Shelhat* v. *Mahpal Bahadur Singh* (1887) 9 All. 480.

[2] See above s. 285 (11) p 221; *Fida Ali* v. *Musaffer Ali* (1882) 5 All. 65.

[3] In *Ranchoddass* v. *Jugaldas* (1898) 24 Bom. 414 the subject of pre-emption was the servient heritage (right of way); in *Chand Khan* v. *Naimat Khan* (1869) 3 Ben., L. R. (A. C.) 296, 12 W. R. it was the dominant heritage (irrigation).

[4] (*Sheik*) *Karim Baksh* v. *Kamruddeen Ahmad* (1874) 6 N. W. 377 (a common appurtenance in the shape of an undivided plot of land, a few trees and tanks attached); *Mahatab Singh* v. *Ramtahal Misser* (1868) 10 W. R. 314; 6 Ben L. R. (F.B.) 43 *n.* (fishing rights).

[5] *Baldeo* v. *Badri Nath* (1909) 31 All. 519.

[6] Cf. Easements Act. s. 15.

[7] Hed. 548, 549.

[8] Syed Ameer Ali says that a *khalit* has a right of pre-emption under Shiah law, but does not cite any authority for the proposition, "Mahommedan Law," I. 615.

[9] Bail. II. 179: *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229: neighbours have no right. There is some doubt whether where there are more than two joint owners of land they have no right, and in *Daim* v. *Ashooha Bebee* (1870) 2 N. W. 360 it was said that the Shiah authorities being doubtful on the point, and the practice of the Court being not to defeat a claim on this ground, the claim should be allowed. See also *Tafazzal Husain* v. *Hadi Hasan* [1879] 6 All. W. N. 139. Both these decisions were dissented from in *Abbas Ali's* case. 12 All. 229.

[10] *Fida Ali* v. *Muzaffar Ali* (1882) 5 All. 65; cf. *Amajd Ali* v. *Mushtaq Ahmad* and *vice versa* (1895) 17 All. 454; 15 All. W. N. 95; [1897] 17 All. W. N. 121.

[11] *Imamuddin* v. *Surjaiti* [1894] 15 All. W. N. 15.

[12] *Dilakuari* v. *Jagarnath Kuari* (1887) 6 All. 17; *Karan Singh* v. *Muhammad Ismail Khan* (1885) 7 All. 860.

[13] *Phulman Rai* v. *Dani Kaur* (1877) 1 All. 452.

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(2) S makes a gift of his mansion to R in 1900. In 1901 an adjacent mansion is sold, and then S revokes the gift he had made. He does not get any right of pre-emption,[1] because S was not owner of the mansion at the time when the ground for the claim of pre-emption arose.

(3) Part of a land is 'waqf,' and the other part belongs to S, who sells it to B. Neither the 'mutawalli' of the 'waqf' nor the beneficiary under it, "not even if he be a single individual," can pre-empt.[2]

(4) The pre-emptor sells his own share of the land before he is informed of the ground for pre-emption; the right of pre-emption is lost.[3]

(5) S sells land to B, reserving an option to himself to dissolve the sale; then the adjoining house is sold; S can pre-empt the house under Hanafi law (being the neighbour). But if the option to dissolve the sale had been reserved by B (and not S), B would have had the right to pre-empt the adjoining land. Now if P has the right of pre-empting the *land* he can exercise it, but he does not acquire the right of pre-empting the adjoining *house*, because he was not owner of the land at the time when the right of pre-empting the house arose.[4]

(6) Where there is a complete[5] partition the community of interest ceases;[6] and it is not continued by an inconsiderable part of the estate being left out of division by oversight; but when an integral portion of property, as a wall, is left purposely joint and undivided, the community of interest continues.[7]

(7) P institutes a suit to enforce her right of pre-emption, which is resisted and dismissed on the ground that she has no interest in possession in the land; eight days after she files an appeal, her share in the land is sold in execution of a decree in another suit; *held*, that (*a*) want of possession does not affect the right of joint owners to pre-empt; (*b*) that sale of the share pending the suit cannot prejudice her rights which existed at the time when the suit is filed[8]

(8) On the 20th of June 1907, P purchased a share in a zamindari at an auction sale in execution of a decree. The sale is confirmed on the 24th. On the 23rd, S sells his share in the same zamindari to B. *Held*, that under the Civil Procedure Code, 1882, s. 316, P acquired the

[1] Bail. I. 126 (para. 3).

[2] Bail. II. 178, I. 473 (6th).

[3] Bail. II. 191. (*fourth.*) The *Shaikh* holds otherwise.

[4] Hed. 560 (col. i. para. 3).

[5] Not an imperfect one; *Muhammad Usman* v. *Muhammad Abdul Ghafur* (1911) 34 All. 1.

[6] *Munna Lal* v. *Hajira Jan* (1910) 33 All 28; see *ill.* (9) below. *Buj Nath Singh* v. *Dooly Mahtoon* (1869) 11 W. R. 215: *Mahadeo Singh* v. (*Mussamat*) *Zeenatunnissa* (1869) 11 W. R. 169; 7 Ben. L. R. 45 *n.* Cf. s. 545 *ill.* (4) (*Chowdhry*) *Joogul Keshore Singh* v. *Poocha Singh* (1867) 8 W. R. 418: separate agreements with a zamindar by co-sharers in a talukh to pay rent (each being liable for his own share of rent only) subject to which arrangement the lands continue *ijmali*, do not affect right of pre-emption. *Wajib-ul-'arz*: presumption that after partition no claim. *Dalganjan Singh* v. *Kalka Singh* (1899) 22 All. 1 (F.B).

[7] *Lala Prag Dutt* v. *Bandi Hossein* (1871) 7 Ben. L. R. 42; S. C. *Lalla Puriag Dutt* v. *Budeh Hossein*, 15 W. R. 225; and on review *Bundey Hossein* v *Lalla Puriag Dutt* (1871) 16 W. R. 110.

[8] *Sakina Bibi* v. *Amiran* (1888) 10 All. 472 (Mahmood J.). But *semble* where the sale is voluntary it may amount to waiver of right of pre-emption; and see *Ram Gopal* v. *Piari Lal* (1899) 21 All. 374.

share on the 24th, and so cannot pre-empt. But that the effect would be different under the Civil Procedure Code V. of 1908, s. 65, under which the property is vested in the auction purchaser from the date of the sale, and not from the time when the sale becomes absolute.[1]

(9) Neither the fact (*a*) that P irrigates his field in one 'mahal' from a well situated in another 'mahal' belonging to S;[2] nor (*b*) that P and S have the same burial ground and 'chaupal' (i.e. village meeting place)[3] make P the 'khalit' of S.

(10) P brings a suit for pre-emption; pending the suit, a decree for partition is made on the 1st of July under an application originally commenced by P, but from which P has withdrawn. On the 9th of July the Court dismisses P's suit for pre-emption on the ground that by reason of the partition he is no more a co-sharer in the property; and this is upheld in first and second appeal.[4]

(11) S takes a building lease of a land from P, and erects a house on it; *held*, that P has no right to claim pre-emption as he is neither a co-sharer nor a participator in the appendages of the house, nor the owner of neighbouring land[5]—*sed quaere.*

Stranger and one having community of interest.

See 'Fida Ali *v.* Muzaffar Ali'[6] on the meaning of the term "stranger" in the Muhammadan law of pre-emption. It was held in 'Lala Prag Dutt's' case[7] that the word 'khalit' is not improperly used in a plaint for pre-emption to designate a 'sharik' or partner in the substance of a thing; and if it is not clear whether the plaintiff claims as 'sharik' or 'khalit' it may be shown by express words, or inferred from the written statement. In another case it was that 'sharik' may refer to persons occupying other houses in the same mansion.[8] On the other hand a claim as 'khalit' was not allowed to be amended into a claim as a neighbour.[9]

Co-parcener purchasing.

On the question whether one co-parcener can claim pre-emption when another co-parcener is the buyer, see above, s. 527.

Competence to contract.

542. Any person who is competent to hold property is competent to pre-empt;[10] provided that where the right arises under a contract or custom, it may be restricted to persons competent to contract.[11]

(Shia) Guardian pre-empting ward's property.

543. According to Shiah law the father or grandfather may pre-empt the share of his minor child or grandchild in property which belongs to them jointly;[12] *sed quaere* in British India.

[1] *Hasan Ali* v. *Mian Jan Khan* (1910) 33 All. 45.

[2] *Munna Lal* v. *Hajira Jan* (1910) 33 All. 21, 33.

[3] *Abdul Rahim Khan* v. *Kharag Singh* (1893) 15 All. 104: The right to the burial ground and *chaupal* being common to all the inhabitants of the place, could hardly be referred to as being appurtenances to the ownership of land.

[4] *Tafazzul Husain* v. *Than Singh* (1910) 32 All. 567.

[5] *Pershadi Lal* v. *Irshad Ali* (1870) 2 N. W. 100.

[6] (1882) 5 All. 65. Cf. *Baldeo* v. *Badri Nath* (1909) 31 All. 519.

[7] *Ill.* (6); 15 W. R. 255 16 W. R. 110.

[8] *Gureeboollah Khan* v. *Kebul Lall Mitter* (1870) 13 W. R. 124.

[9] *Govind Row* v. *Girdharee Sahoo* (1875) 24 W. R. 355.

[10] Bail. I. 473; II. 110 (para. 2); *Punna* v. *Juggar Nath* (1866) 1 Agra 236; *Ram Khelawan Rai* v. *Shiva Dass* (1867) 2 Agra 76.

[11] *Raja Ram* v. *Bansi* (1876) 1 All. 207.

[12] Bail. II. 180 (para. 4.)

SECTION 543 The doubt as to the operation of this rule of Shiah law is based on the fact that the father and grandfather are the legal guardians of the property of their minor child or grandchild ; and it is explained that their pre-empting the minor's share is tantamount to purchasing it (which is permitted according to Shiah law).[1] In British India a purchase by the guardian of his ward's property would not be permitted.[2]

xecutor. Doubt is expressed on the point whether an executor can pre-empt ; as regards Shiah law the question is answered in the ' Shara'ya-ul Islam ' in the affirmative.[1]

Pre-emption by guardian on behalf of ward.

544. (1) The right of pre-emption may be enforced on behalf of [one who is absent, or] a minor or person of unsound mind by his guardians, provided that it is for the benefit of the ward to enforce it.[3]

Avoiding such pre-emption.

(2) Where the right of pre-emption is enforced by a guardian, and it is not for the benefit of the ward, he may avoid it on attaining majority, or becoming of sound mind.[3]

(2) *Priorities amongst Pre-emptors.*

Priority in claim of pre-emption.

545. Co-sharers of the land have priority in the right of pre-emption over participators in appendages,[4] and the latter have priority over neighbours,[5] and *quaere*, whether generally those whose interest in the land is closer have priority over those whose interests are less close,[6] provided that a 'khalit' who is also a neighbour does not have any priority over another who is not a neighbour [7] nor does a co-sharer who is a neighbour [or' khalit '] have priority over co-sharer who is not a neighbour [or 'khalit'].[8]

[1] Bail. II. 110 (para. 4.)

[2] Cf. the Guardians and Wards Act. s. 20. See above s. 272, p. 214.

[3] Cf. s. 271, p. 214 above; Bail. II. 110 (para. 2) ; it is difficult to say what the reference to an absent person imports. The manager of an estate appointed by the Court of Wards may perform the ceremonies and claim pre emption for his ward; *Jadu Lal* v. (*Maharani*) *Janki Koer* (1912) 14 Bom. L. R. 436 P. C. on appeal from Calcutta.

[4] Hed. 548, 549. Bail. I. 476. See comment. *Ranchoddas* v. *Jagalads* (1199) 24 Bom. 414 ; *Golam Ali Khan* v. *Agurjeet Roy* (1872) 17 W. R. 343 ; *Hur Dyal Singh* v. *Heera Lall* (1871) 16 W. R 107 ; *Gopal Sahi* v. *Ojoodhea Pershad* (1865) 2 W. R. 47.

[5] *Karim* v. *Priyo Lal Bose* (1905) 28 All. 127 ; *Chand Khan* v. *Niamt Khan* (1864) 3 Ben. L.R. (A. C.) 296.

[6] This seems to be implied, Bail. I. 476, (last line) "because they are more specially intermixed with it." In deciding that in large estates neighbours had no right of pre-emption but co-sharers had, Mitter J. referred to the "very sound principle, viz., that the right should be co-extensive with the inconvenience which it is intended to avoid," (*Sheik*) *Muhommed Hossein* v. (*Sheik*) *Mohsun Ali* (1870) 14 W. R. (F.B.) 1; 6 Ben. L. R. 41 (penultimate sentence per Mitter J.) ; and Syed Amir Ali says that if P has a right of way over the land, and PA has the right to discharge the water of his house on the land, or if P is a nearer neighbour than PA, then in either case P has priority over PA. ("Mahommedan Law," I 602, no authority is cited) Cf. on the construction of the *wajib ul 'arz*, *Lakhan Singh* v. *Bishan Nath* (1910) 33 All. 299 ; *Jasoda Nand* v. *Kandhaiya Lal* (provision in *wajib ul'arz* that co-sharer of same family to have precedence over stranger).

[7] See *ill.* (3) *Karim Bakhsh* v. *Khuda Baksh* (1894) 16 All. 247.

[8] *Roshun Mahomed* v. *Mahomed Kuleem* (1867) 7 W. R. 150.

Illustrations.

(1) P is joint proprietor of part of the land sold, and PA has property contiguous to the whole of the land; the right of P has priority over that of PA.[1]

(2) PA has laid beams on the wall of a neighbouring house. This does not make him a joint owner, but he remains a neighbour; similarly if two persons are joint owners of a beam laid on the top of the wall, they are classed as neighbours;[6] and if PA has the right of collateral support from the party wall separating his property from that of S, PA is only the neighbour of S and not his 'khalit.'[2]

(3) S and P are joint owners of a house in a street, or rather a private way;[3] S agrees to sell his share in it to B; (*a*) P has the first right of pre-emption; (*b*) if P waives it, it belongs to the inhabitants of the street equally without any distinction between those who are contiguous and those who are not, for they are all 'khalits' in the way; (*c*) if they all surrender the right it belongs to a 'musalik' or contiguous neighbour, who is not a 'khalit,' in the way.[3]

(4) S[4] and P are joint owners of a house in Queen's Road, (a public thoroughfare) with a right of way over a private street,[5] PA owning a house in the said street and has a right of way over the same. PB is the owner of a house situated in the Queen's Road, adjoining[6] S & P's house, without participating in the said right of way.—P is co-sharer, PA 'khalit,' and PB neighbour.[4] Similarly if the houses of S & P, PA and PB are all in the same "mansion" [compound or enclosure[7]] and PA has the same entrance from Queen's Road but PB has a separate door [passage] of his own.[4]

(5) P, the owner of land through which the subject of pre-emption receives irrigation, has priority over PA, a neighbour.[8]

(6) S and P had certain proprietory rights in an eight annas 'patti' of a certain 'mahal.' S mortgaged his share in the 'patti' to B and BA, who foreclosed. B's brother had a small share in the other eight annas 'patti' of the same 'mahal.' *Held*, that P could pre-empt, for though the coparcenery of the 'mahal' could not be said to have ceased, nor those who were coparceners in it to have become strangers to one another, yet there being a finding that the 'pattis' were separate, a partition by metes and bounds was not necessary, and that a private partition if full and final between the parties would have the same effect on rights of pre-emption as a formal partition.[9]

(7) S is entitled to and sells the upper floor of a house together with a right of way through the house of a third party P; PA is the

[1] Hed. 549 (col. i, para. 3).

[2] *Ranchoddas* v. *Jugaldas* (1899) 24 Bom. 414; cf. *Karim* v. *Priyo Lal* (1905) 28 All. 127.

[3] Bail. I. 476; not a thoroughfare; *ibid.* 477 *ll.* 8-15; *Gooman Singh* v. *Tripool Singh* (1869) 8 W. R. 437.

[4] Bail. I. 476 477

[5] Or a right of watering their vineyards from a small channel.

[6] Not on opposite sides of a thoroughfare.

[7] See R. Wilson suggests "court."

[8] *Chand Khan* v. *Naimat Khan* (1869) 3 Ben. L. R. (A.C.) 296; 12 W. R. 162.

[9] *Digamber Misser* v. *Ram Lal Roy* (1887) 14 Cal. 761.

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owner of the lower floor underneath S's floor; *held*, that P is a 'khalit' and has priority over PA[1] who is only a neighbour.

As to whether any priority is obtained by the pre-emptor being the buyer in the first instance, see above, s. 527.

This section is based on the following passages;[2] "a 'shureek' (or partner in the substance[3]) is preferred to a 'khuleet' (or a partner in its rights as of water or of way[3])." "'Khuleet' means literally 'mixed with.' Though rights of water and way are given as examples, it does not appear," says Baillie, "that a 'khuleet' in any other right than these has the right of pre-emption."[4] See, however, s. 541, *explanation III* above.

On waiver by prior pre-emptor right accrues to next in degree.

546. Where the person who has priority in the right of pre-emption waives his claim (before enforcing it) the person next after him becomes entitled thereto;[5] provided that he has asserted his claim immediately on getting information of the sale,[6] and his right is otherwise established in accordance with section 528 above.

(3) *Reciprocal Rights of Pre-emptors Equal in Degree.*

Co-owners' rights equal.

547. Pre-emptors who are equal in degree are, according to Hanafi law, entitled to pre-empt the land in equal shares, notwithstanding that they are co-sharers holding unequal shares in it.[7] According to Shafi'i the rights of co-sharers are in proportion to their respective shares.[8]

Illustrations.

(1) S, P, PA, and PB own a plot of land jointly in shares of three-eighths, a third, a sixth, and one eighth, respectively, and S sells his three-eighth share in it. Then under Hanafi law—

(*a*) P, PA, and PB can each take a third share (i.e., an eighth each);

(*b*) if P waives his claim before it has been enforced the whole belongs to PA and PB in equal shares (i.e, three-sixteenths each).

(*c*) if P is absent, and PA and PB alone claim pre-emption, they each take a half (i.e., three-sixteenths of the whole), and then if afterwards P appears and claims his share he must get one-sixteenth from PA and PB each (i.e, a third from the portion coming to each) and P will not get more, notwithstanding that after PA and PB had enforced their claims PA waives his claim.[9]

[1] *Ganeshi Lall* v. *Luchman Dass* (1873) 5 N. W. 31 (custom amongst Hindu residents of a town).

[2] Bail. I. 476 (*ll.* 1-2).

[3] "The explanations within parentheses are from the *Hidayah*, vol. iv., p. 1 (413)." Bail I. 476 *n.* 1.

[4] Bail. I. 476; *n.* 1.

[5] Hed. 549 (col. i.); Bail. I. 476. Abu Yusuf thinks the person with a prior right absolutely excludes one who is next after him, so that the latter cannot come in at all.

[6] Not of the waiver, Bail. I. 482 (*ll.* 11-14). So that the latter must assert his claim, at the same time as the one having the prior claim if both hear of the sale together.

[7] Hed. 549; Bail. I. 494-495; *Baldeo* v. *Badri Nath* (1909) 31 Ali. 519; *Moharaj Singh* v. *Lalla Bheechuck Lall* (1865) 3 W. R. 71 (as to co-sharers); *Khem Kurun* v. *Seeta Ram* (1870) 2 N. W. 257 (as to neighbours).

[8] Hed. 549 (col. ii, para. 3).

[9] Bail. I. 494 495; Hed. 549-550.

(2) S sells land ; and P A, a neighbour, pre-empts in the absence of P (who is a 'khalit' thus having a claim of pre-emption prior to PA). Afterwards P returns, and if he claims to pre-empt, he will get the whole of the land from PA.[1]

On one joint per-emptor waiving his claim the other joint pre-emptors become entitled to whole.

548. (1) Where there are two joint pre-emptors, and one of them waives his claim, the other acquires the right to pre-empt the whole land ;[2] provided that the waiver is made before pre-emption has been enforced either by the Court decreeing it,[3] or by possession of the land being transferred to the pre-emptor without such decree ; [after being so enforced, the rights of any pre-emptor who waives them lapse, and do not accrue to the other joint pre-emptor.][4]

And must exercise the whole or waive the whole claim.

(2) Where one of two joint pre-emptors acquires (as above referred to) the right of the other, he must exercise the right to pre-empt the whole land, or must relinquish it entirely ; he cannot pre-empt the share either only of himself, or only of the other pre-emptor.[5]

(3) The rules contained in this section apply with the necessary alterations where there are more pre-emptors than two.[2]

Illustration.

P and PA having rights of pre-emption equal in degree (under a 'wajib ul 'arz')brought two rival suits to enforce their rights. The Court gave to P and PA decrees respectively, having reference to a three annas and a two annas six pies share, conditionally on their paying the price within 30 days ; and directed that in case P made default in payment, PA should have the right to pre-empt P's share, on paying the price of that share within 15 days of such default, and 'vice versa.' Both P and PA made default in paying within 30 days ; and then PA paid into Court (within 15 days of the default by P) the price of P's share ; *held*, (affirming Mahmood J.) that PA's claim was inadmissable, as it would not cover the whole subject of pre-emption.[6]

§ 7.—Legal Effects of Pre-emption.

Effect of enforcing the

549. (1) On the right of pre-emption being enforced, the pre-emptor acquires the rights and becomes subject to the

[1] Bail. I. 495 (para. 3) ; Hed. 550.

[2] Hed. 549 (col. ii.); Bail. I. 494, 495 (para. 2.)

[3] Where the decree is itself conditional on something being done (e.g. payment of the price) the right cannot be said to be enforced until the condition is fulfilled. See *ill.* (1).

[4] *Ibid.* ; *quaere*, can it be waived after being enforced without the consent of the seller or purchaser ?

[5] See *ill.* (1).

[6] *Arjun Singh* v. *Sarfaraz Singh* (1888) 10 All. 182.

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Pre-emptor comes in place buyer.

obligations arising between the seller and the purchaser under the sale; [1] provided that the pre-emptor is not entitled to the option of dissolving the sale which the buyer has for three days under Muhammadan law; [2] but *semble*, he has the options of inspection and defect under the said law,[3] except in so far as the said options may be inconsistent with the terms in which the claim is decreed by the Court.

Buyer become vendor of per-emptor.

(2) Where the sale has been completed at the time when the claim to pre-emption is enforced, the purchaser becomes the vendor, with the pre-emptor as the vendee.[4]

Contingent charges.

(3) The pre-emptor does not become liable for any contingent charges incurred by the purchaser, such as brokerage, agency, or the like.[5]

Mesne rents and profits.

(4) The purchaser is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself and its transfer [6] to the ownership of the pre-emptor.[7]

Illustration.

S agrees to sell to B land which is mortgaged to M for Rs. 50. P enforces his claim to pre-emption, and takes possession of the land. P is liable to M for payment of the mortgage debt, notwithstanding that P may have had no notice of the mortgage at the time when he claimed pre-emption.[8]

Whether pre-emptor takes from buyer or seller.

It is stated that the pre-emptor takes the property from the buyer, and not the seller; [9] and that the buyer must always be a party to the suit,[10] but after he has taken possession of the land, the presence of the seller may be dispensed with;[11] even before he has taken possession he is said to be the proprietor, and the seller the possessor; [10] still, if before the sale is completed by transfer of possession to the buyer, the pre-emptor claims it from the buyer, he may require the pre-emptor to take it direct from the seller.[10]

These incidents of pre-emption may have been in the minds of Peacock C. J. and Mitter J. when they expressed the view in 'Kudrutulla's' case [12] and Pearson J. in 'Chundo *v.* Alimoodin' [13] to the effect that the pre-emptor takes the property

[1] Bail. I. 473 (para. 3); II. 195 (*ll.* 4-6).

[2] Hed. 560 (col. i. para. 2).

[3] Hed. 553, (col. i. para. 4). See comment.

[4] Bail. I. 490-491 ; for the sale having been completed, the buyer has become the owner of the property. See comment.

[5] Bail. II. 182 *verbatim*.

[6] Under s. 551 below.

[7] *Deokinandan* v. *Sri Ram* (1889) 12 All. 234 (F.B.); Mahmood J., dissenting, thought that the buyer was entitled to the profits until he actually obtained possession. The point is now specifically covered by the form in which the decree has to be framed. See below, s. 550, and comment thereto.

[8] *Tejpal* v. *Girdhari Lal* (1908) 30 All. 130.

[9] Bail. II. 185 (para. 3) *n.* 7 ; cf. *ibid.* 175 (*ll.* 1-3), 183 (para. 2).

[10] Hed. 553 (col. i.); Bail. I. 485 (*ll.* 26-33).

[11] *Hira Lal* v. *Ramjas* (1883) 6 All. 57.

[12] (1870) 4 Ben. L. R. (F.B.) 134 ; 13 W. R. (F.B.) 21.

[13] (1873) 6 N. W. 28. See s. 524. p. 448.

from the buyer, and that the seller passes out of the transaction. Mahmood J. and his colleagues held, however, upon the texts cited by him that the original notion underlying pre-emption was otherwise.[1]

Effect of Muhammadan law after enforcement.

It has been held (not without difference of opinion) that the question whether the sale is complete [2] so as to give rise to the right of pre-emption must be determined in accordance with the Muhammadan law. But the point with which the present section deals, is the legal effect of enforcing the right of pre-emption, and there seems less reason to doubt that this must be determined in accordance with Muhammadan law, in so far at least as the express terms in which the decree is passed leaves any point undetermined. Two of the most important incidents of Muhammadan law are referred to in the present section, viz., the options of inspection and defect.[3]

When the land transferred to pre-emptor.

550. (1) The subject of pre-emption is not transferred to the ownership of the pre-emptor, unless the Court decrees the claim to pre-emption ; or possession of the land is otherwise given to and taken by the pre-emptor.[4]

Pre-emptor insisting on decree of Court

(2) The pre-emptor may refuse to take possession of the land without an order of the Court, notwithstanding that the buyer or seller may be willing to transfer it to him.[4]

Form of decree.

(3) The Courts of British India, in decreeing a claim to pre-emption, will specify a day on or before which the purchase money shall be paid, and order that on such payment possession of the land shall be delivered to the pre-emptor, or, where there are several pre-emptors equal in degree, to them respectively, in proportion, to the right of each.[5]

Decree not transferable.

(4) A decree for enforcing pre-emption is a purely personal one and cannot be transferred.[6]

Form of decree.

The decree in a pre-emption suit is required by the Civil Procedure Code, O. XXV. r. 14 to be in the following form :—

"(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property, and the purchase-money has not been paid into Court, the decree shall—

Payment of consideration.

(*a*) specify a day on or before which the purchase-money shall be so paid, and

[1] See p. 448 above.

[2] See s. 526 above.

[3] On which see Hed. 255, 258. Book XVI. ch. III, IV.; see also Baillie, "Moohummudan Law of Sale."

[4] Hed. 550; Bail. I. 485. Refusal of the pre-emptor to take possession would no doubt be considered by the Court in dealing with costs. It is also stated that the seller must be a party to a suit for pre-emption so long as possession is not transferred to the purchaser, after which he need not be a party.

[5] See comment. According to strict Muhammadan law the purchaser may refuse to give possession of the land to the pre-emptor until the pre-emptor pays the price for it ; notwithstanding that the Court may have ordered him to deliver it. Hed. 552 (col. ii. para. 3).

[6] But this cannot prevent the pre-emptor mortgaging the property subsequently to the decree for the purpose of paying the price. (*Bela Bibi* v. *Akbar Ali* (1901) 24 All. 119) : or even selling it to a stranger and permitting him to pay the purchase money into Court : *Ram Sahai* v. *Gaya* (1884) 7 All. 107.

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Delivery of possession.

(*b*) direct that on payment into Court of such purchase-money,[1] together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (*a*), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

Several claims.

"(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(*a*) equal in degree.

(*a*) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,

(*b*) different in degree.

(*b*) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions."

Payment into Court effectuates the transfer or completes the pre-emption.

It will be seen that the form of the decree as given above specifically provides for that being expressly mentioned which follows as the result of the substantive Muhammadan law,—in accordance with which the decree of the Court and payment of the purchase money are necessary for the completion of pre-emption. Thus on the one hand, where an assertion and demand of a claim to pre-emption are made, but before they are enforced the pre-emptor dies, or forfeits his claim (e.g. if he sells the property, the ownership of which gives him the right to pre-empt), the claim is avoided under Muhammadan law[2] (see however s. 532 above); and on the other, the pre-emptor is entitled to the profits of the land accruing after he has enforced pre-emption by payment of the purchase money[3] notwithstanding that there may be a delay in the formal transfer of the land,[4] but he is not entitled to the rents and profits before payment;[5] while again, as soon as the payment is made into Court, the money is (so to say) converted into the subject of pre-emption, and so can no more be considered the property of the pre-emptor[1]; finally even the pre-emptor's non-compliance with the terms of the decree and non-payment of the purchase-money cannot affect his right of appealing from the decree.[7]

Act of buyer does not affect pre-emptors claim, but effective until pre-emption enforced.

551. The claim to pre-emption is not affected by any act on the part of the buyer purporting to transfer or alienate the land,

[1] The money is no more the pre-emptor's, as soon as it is paid into Court, and so his creditors cannot attach it. *Abdus Salam* v. *Wilayat Ali* (1897) 19 All. 256.

[2] Bail. I. 485.

[3] *Deo Dut* v. *Ram Awtar* (1886) 8 All. 502 (Oldfield and Mahmood JJ.).

[4] *Deokinandan* v. *Sri Ram* (1889) 12 All. 234 (F.B.), decree vests in pre-emptor the ownership from date of payment of price; and does not postpone the vesting till he obtains possession. *Buldeo Pershad* v. *Mohun* (1866) 1 Agra (REV.) 30.

[5] Hed. 552 (col. ii. para. 3) the decree under O. XX. r. 14, provides for this: "whose title shall be deemed to have accrued from the date of such payment."

[7] See above s, 528 *expl. I*—(*c*).

nor by his death; provided that any such act takes effect until the Court decrees the claim to pre-emption.[1] SECTION 551

So if the buyer (B) purports to sell the land to BA, the pre-emptor can claim it either from B or BA; and similarly, if B purports to make a gift or 'waqf' of it, or to convert it into a mosque, or cemetery, or to let it on hire, the pre-emptor may annul the said acts.[2]

552. The pre-emptor is not affected by any alteration in or additions to the terms of the contract of sale after it has been completed;[3] provided first that, according to Sunni (but not according to Shiah) law, where the seller after the contract is completed abates the price without remitting it altogether, the pre-emptor is entitled to the benefit of the abatement; but where the price is entirely remitted, the buyer has the benefit thereof;[4] provided secondly that where, after the completion of the sale, some defect is discovered in its subject, and the seller agrees to compensate the buyer for the defect, the pre-emptor is entitled to receive the compensation.[5]

not by contract for sale.

Abatement or remission of price.

Defect in subject.

Explanation—The right of pre-emption is not affected by the seller and buyer dissolving the contract of sale after it has been completed,[6] or the buyer agreeing to pay a higher price than was originally agreed upon.[7]

The converse of what is stated in the *explanation* is also referred to, it being stated that if the pre-emptor acquiesces in the sale, and then the seller and buyer agree to cancel it, the pre-emptor cannot claim to exercise the right of pre-emption,[8] on the ground that the cancellation of the sale is a fresh transfer.

553. The purchaser must give the land to the pre-emptor in the same condition in which it was when he took possession of it; provided that—

Pre-emptor gets land in same state as purchaser.

(1) According to Hanafi law, where the purchaser has made alterations or improvements, the pre-emptor has, subject to sub-section (4), the option of demanding that the land be put back into its original state, or of taking the land with the said alterations or improvements, on payment of their value.[9]

[1] Bail. I. 497 (para. 2); II. 185 (para. 2); Hed. 562 (col. i. para. 2).

[2] Bail. II. 185 (para. 2).

[3] Bail. II. 182-183; so that if the purchaser subsequently agrees to pay a higher price to the seller, the pre-emptor is not bound to pay the enhancement, which must be "considered in law . . . a gift." Similarly if the price is abated the pre-emptor must, according to Shiah law, pay to the purchaser the full price agreed upon.

[4] Hed. 555 (col. i. para. 2).

[5] Bail. II. 187 (para. 4).

[6] Bail. II. 184 (para. 3), *Bhadu Mahomed* v. *Radha Churn Bolia* (1870) 4 Ben. L. R. (A.C.) 219; S. C. *Bhodo Mahomed* v. *Radha Churn Bolia* 13 W. R. 332.

[7] Hed. 555 (col. i. para. 3); see *n.* 3 on this page.

[8] Bail. II. 185 (*ll.* 1-5).

[9] Bail. I. 496; Hed. 556 (col. ii. para. 2.)

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Subject deteriorating.

(2) Where the subject of pre-emption [perishes] or becomes damaged after demand by the pre-emptor, the pre-emptor has the option of enforcing his claim on payment of the full consideration or of waiving it; provided that where the damage is caused by the act of the purchaser he is responsible to the pre-emptor for the loss occasioned thereby.[1]

Improvements inland.

(3) According to Shiah and Shafi'i law, where the purchaser has planted trees or erected buildings on the land and subsequently demand is made of the claim to pre-empt, (*a*) the purchaser has the option of removing the said trees or buildings and is not obliged to level the ground; (*b*) and if he elects to do so the pre-emptor has the option of waiving his claim, or paying the full price for the land after the trees or buildings have been so removed; (*c*) if the purchaser declines to remove them the pre-emptor has the option—

(i) of removing them himself, paying to the purchaser compensation for any loss that he may sustain thereby; or

(ii) of taking possession of the whole, paying additional price as compensation for the said lands or trees; or

(iii) waiving the right of pre-emption.[2]

Cultivated land.

(4) Where the land has been cultivated the pre-emptor cannot oblige the purchaser to take up the seed, but must wait until the ripening of the crops, after which he must pay to the purchaser the full price of the land without any deduction for its rents during the said period.[3]

Compensation for pre-existing defect subsequently discovered.

(5) Where a defect which existed in the land prior to the sale, is discovered subsequently, the pre-emptor has the option of avoiding the transfer to himself from the purchaser; if he elects to exercise it, the purchaser has the option of avoiding the sale, or of demanding compensation, from the seller;[4] and if he elects to demand compensation, the pre-emptor has the option of pre-empting the property with the abatement in the price.[5]

Sale on credit right of pre-emptor.

554. Where the land is sold on the term that the price is not to be paid until a specified future period of time, the pre-emptor has, according to Hanafi and Shiah law, the option of paying the price either immediately or at the said future period, and in either case the land is not transferred to him until the price is paid;[6]

[1] Hed. 557 (col. ii. para. 2); Bail. II 185-186. There is some dissent as to the proviso amongst the Shiah authorities.

[2] Bail. II. 186 (para 2, 3); Hed. 556 (col. ii. para. 2); Abu Yusuf's exposition of Hanafi law is to the same effect.

[3] Bail. I. 496, II. 188 (*fifth*); Hed. 557 (col. i, last 9 lines) where it is stated that this is a special exception to the rule in sub s. (1).

[4] Bail. II. 192, 193 (*eighth*).

[5] Bail. II. 187 (para. 4), 193 *n.* 8.

[6] Hed. 555; Bail. I. 491, II. 190.

provided that where the said future period is uncertain[1] [or unspecified] the pre-emptor has no option to defer payment, but must pay it immediately if he wishes to exercise his right of pre-emption.[2] According to Shafi'i law the pre-emptor has the right of taking immediate possession of the house, and can delay payment of the price until the said future period.[3] SECTION 554

Explanation—Where under the circumstances above referred to the pre-emptor elects to pay the price immediately, and the land has prior thereto been already transferred to the purchaser, and the sale completed, the purchaser's right to defer payment of the price to the seller is not thereby affected.[4] payment to seller not affected by pre-emption.

Illustration.

S agrees to sell to B land on the terms that the price is not to be paid for a year; P exercises his right of pre-emption: (*a*) he has the option of paying the price immediately or after a year; (*b*) if he enforces his right of pre-emption after the land has been transferred to B, he must pay the price to B, not to S; (*c*) if after such transfer P elects to enforce his claim, and pays the price immediately, then B is not thereby bound to pay the price over to S until after the expiration of the year.[5]

555. Where the ground for the claim of pre-emption is an exchange of the land for some object which perishes, the pre-emptor may give to the seller its value in lieu of it.[6] The same rule applies where the object to be given in exchange is such that "there is no similar to it."[7] Exchange of land: the consideration perishing.

§ 8.—Devices for Evading Pre-emption.

556. Pre-emption is not favoured by the law,[8] and any device may be adopted (which is not fraudulent, or forbidden by any law permissible.

[1] As for instance if credit is given "till harvest," or "the treading out of the corn." Bail. I. 491.

[2] See p. 482, *n.* 6.

[3] Hed. 555 (col. ii. para. 3).

[4] Bail. I. 491; Hed. 556(col. i.)

[5] Bail. I. 491.

[6] Bail. I. 488 (para. 2).

[7] Bail. II. 183 (para. 3) though some Shiah authorities hold that in such a case the right drops.

[8] Cf. "The right of *shaffa* is but a feeble right, as it is a disseising another of his property merely in order to prevent apprehended inconveniences." This is stated to show why it is requisite for the *shaffi'* without delay to discover his intentions by making the demand, which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the *Qazi*; cited in *Ram Charun* v. *Narbie Mahton* (1870) 4 Ben. L. R. (A.C.) 216; 13 W. R. 256; and see *Nusrut Reza* v. *Umbul Khyr Bibee and others* (1867) 8 W. R. 309 *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 283; *Kudratulla* v. *Mahini Mohun Shaha* (1870) 4 Ben. L. R. (F.B.) 134; 13 W. R. (F.B.) 21. In Madras it has been held to be opposed to justice, equity and good-conscience (see above s. 5 p. 33). However Imam Muhammad considered evasions abominable, though Abu Yusuf did not take that view. Mahmood J. in his elaborate judgment in *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775 (F.B.) (*ad fin.*) has supported the existence of pre-emption, and apparently disclaimed the proposition contained in the section.

SECTION 556 for the time being in force), in order to prevent the right of pre-emption from arising, or to defeat the provisions of the law in favour of the pre-emptor.

Compare ss. 522, 523, comment, also p. 33 above.

Instances of devices.

The following devices are mentioned in the texts : [1] (1) transfer in the form not of a sale, but of a 'hiba bil 'iwaz,'—the land being nominally the subject of gift, and the consideration the ''iwaz ;' [2] (2) giving a portion of the land to the purchaser prior to sale by way of gift, or 'sadaqa,' demarcating or dividing it off [3] with a right of way thereto [4] common to the seller and purchaser; (3) sale of trees on the land with their foundations to the purchaser, thus making him a co-owner of the land with priority over either a 'khalit' or a neighbour; (4) [ostensible statement of the consideration at a higher figure than that which is really agreed upon ; and subsequently compounding the price ostensibly agreed upon for an article of the value of the real price]; [5] (5) [declaration that the sale is invalid or with an option to the seller]; (6) leaving unsold a strip of land along the boundary of the pre-emptor's land, and so that his land does not adjoin the portion actually sold.[6]

§ 9.—The Punjab and Oudh Laws Acts.

Pre-emption under the Acts.

557. Under the Punjab [7] and the Oudh [8] Laws Acts, the right of pre-emption is presumed to exist in all village communities and extends to the village-site, and the houses and lands within the village boundary, and is enforceable in accordance with the terms of the said Acts within the said limits.

The portions of the Punjab Laws Act referring to pre-emption are set out below, the terms of the Oudh Laws Act (where they differ) being given in footnotes :—

Right of pre-emption.

9. [6] [9] "The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons. 'It [10] arises in respect of sale (whether under a decree or otherwise) of immovable property and of foreclosures of rights to redeem such property.' [10]

[1] Bail. I. 504-506, II. 196-197; and Hed. 563.

[2] As the *'iwaz* must be agreed upon at the time of the *hiba*, it would not be a *hiba bil 'iwaz* but be turned into a *hiba ba shart ul 'iwaz*, to which pre-emption would apply; see above s. 525 *ill.* (1), s. 526.

[3] This is necessary under Hanafi law in order that the gift may not be void under the doctrine of *musha'*.

[4] The right of way makes the grantee a *khalit*, thus giving him priority over a neighbour.

[5] Here the pre-emptor would be entitled to pre-empt on the terms of the real contract of sale, and not the ostensible or fictitious one.

[6] This can defeat only a neighbour, besides it is imperfect, for it leaves the slip undisposed of. Bail. I. 506 *n*.

[7] The Punjab Laws Act IV. of 1872 (as amended by Act XII. of 1878) is referred to in the footnotes as P. L. A.; and the Oudh Laws Act XVIII. of 1876, as O. L. A.

[8] Figures or words enclosed in [ ] do not form part of the P. L. A., (but only of O. L. A.)

[9] Figures enclosed in [ ] refer to O. L. A.

[10] Words enclosed in ' ' do not form part of the O. L. A. (but only of P. L. A.).

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10. [7][1] "Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement-record or not, be presumed— Presumption as to its existence

(*a*) to exist in all village-communities however constituted, and

(*b*) to extend to the village-site, to the houses built upon it, to all land and shares of lands within the village-boundary, and to all transferable rights of occupancy affecting such lands.

11. [8][1] "The right of pre-emption shall not be presumed to exist in any town or city or any sub-division thereof, but may be shown to exist therein, and to be exercisable therein by such persons and under such circumstances as the local custom prescribes. Its existence in towns to be proved.

12.* "'If[2] the property to be sold, or the right to redeem which is to be fore-closed is situate within, or is a share of, a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,— Devolution of right when property to be sold or fore-closed is situate within a village.

(*a*) first, in the case of joint undivided immovable property, to the co-sharers;

(*b*) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor;

(*c*) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the landowners of the patti or other sub-division of the village in which the property is situate, jointly;

(*d*) fourthly, if the landowners of the patti or other sub-division make no joint claim to exercise such right, to such landholders severally;

(*e*) fifthly, to any landholder of the village;

(*f*) sixthly, to the tenants (if any) with rights of occupancy in the property;

(*g*) seventhly, to the tenants (if any) with rights of occupancy in the village;

[1] See p. 484, *n.* 9.

[2] See p. 484 *n.* 10.

* Section 12 of the P. L. A. is so different from the corresponding section [9] of the O. L. A. that the two have to be separately printed:—The Oudh Laws Act. s. 9 is as follows:—

9 "If the property to be sold or foreclosed is a proprietary or under-proprietary tenure, or a share of such a tenure, the right to buy or redeem such property belongs in the absence of a custom to the contrary,— Devolution of right when property to be sold or fore-closed is a proprietary or under proprietary tenure.

1st to co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendors or mortgagor;

2ndly, to cosharers of the whole mahal in the same order;

3rdly, to any member of the village-community; and

4thly, if the property be an under-proprietary tenure, to the proprietor.

"Where two or more persons are equally entitled to such right, the person to exercise the same shall be determined by lot."

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"'Provided that when the property is land to the trees standing on which the Government is entitled, such right belongs to the Lieutenant-Governor of the Punjab in preference to all other persons.

"'Where two or more persons are equally entitled to such right the vendor or mortgagor may determine which of them shall exercise the same.

"'Nothing in the former part of this section shall be deemed to affect the Punjab Tenancy Act, 1887, section 53; but if a landlord refuse or neglect to exercise the right conferred on him by that section, such right belongs, first, to the tenants (if any) with rights of occupancy in the property concerned, and secondly, to the tenants (if any) with right of occupancy in the village in which such property is situate.'[2]

Notice to pre-emptors.

13. [10][1] "When any person proposes to sell any property, 'or[2] to fore-close the right to redeem'[3] any property, in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned, of the price at which he is willing to sell such property, or of the amount due in respect of the mortgage, as the case may be.

"Such notice shall be given through any Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the chaupal or other public place of the village, town, or city in which the property is situate.

Loss of right of pre-emption.

14. [11][1] "Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within three months from the date of 'giving'[2] such notice he[4] pays or tenders 'to[2] the person so proposing to sell the price aforesaid or the fair market-value of the property or deposits the same in the Court from which the notice issued. When any money is so deposited, the Court shall give notice of such deposit to the vendor or mortgagor as the case may be.'[2]

Right of pre-emptor on foreclosure.

15. [12][1] "When the right of pre-emption arises in respect of the foreclosure of the right to redeem 'any[2] property,'[5] any person entitled to such right may, at any time within three months after the giving of the notice required by section 13, [10][1] pay or tender to the mortgagee or his successor in title the amount specified in such notice, or the amount really due on the footing of the mortgage, and shall thereupon acquire a right to purchase the property.

"On completion of the purchase, the person exercising the right of pre-emption shall be bound to pay to the mortgagee or his successor in title the amount specified in such notice, together with interest on the principal sum secured by the mortgage, at the rate specified by the instrument of mortgage, for any time which has elapsed since the date of the notice, and any additional costs which may have been properly incurred by the mortgagee or his successor in title.

Suit to enforce right of pre-emption.

16. [13][1] "Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds, (namely) :—

(*a*) that no due notice was given as required by section 13 [10];[1]

[1] See p. 484, *n.* 9.

[2] See p. 484, *n.* 10.

[3] O. L. A.: "or when he forecloses a mortgage upon."

[4] O. L. A. *add*: "or his agent" *and continue* "pays or tenders the price aforesaid to the person so proposing to sell."

[5] O. L. A.: "a mortgage."

(*b*) that tender was made under section 14 [11][1] or section 15 [12][1] and refused ;

(*c*) in the case of a sale, that the price stated in the notice was not fixed in good faith ;

(*d*) in the case of a foreclosure, that the amount claimed by the mortgagee was not really due on the footing of the mortgage, ' or ' [2] was not claimed in good faith, ' or ' [2] that it exceeds the fair market value of the property mortgaged.

" If, in the case of a sale, the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market-value of the property sold.

" If, in the case of a foreclosure, the Court finds that the amount claimed by the mortgagee was not really due on the footing of the mortgage, or that it was not claimed in good faith, or that it exceeds the fair market-value of the property mortgaged, the amount to be paid to the mortgagee shall not exceed what the Court finds to be such market-value.

Power to payment into Court.

16A. " ' When [3] any suit is instituted under section 16, the Court may in its discretion require the plaintiff to pay into Court the price of market-value of the property, or, in the case of a right to redeem property, the amount really due on the footing of the mortgage, and, if such requisition is not complied with in such time as the Court directs, may reject the plaint.' " [2]

Party to sale by joint owners.

19. " ' In [3] case of sale by joint owners, no person who has been a party can withdraw his own share and claim a right of pre-emption as to the rest.' " [3]

20. " ' In [3] villages in which the chakdári tenure prevails, the co-sharers in aa well have a right of pre-emption as to shares in such well in preference to a general proprietor in any such village having no share in the well but merely receiving a haq zamindari from the " chakárs." " "[3]

Date of payment. Preferential right in well under chakdari tenure.

The Oudh Laws Act, ss. 14, 15, provide that the decree shall specify a day for payment, and that if payment is not made on that day, the right of pre-emption will be lost. These sections are unrepealed, though the Civil Procedure Code provides the same now (see s. 550 above), and the sections corresponding to them in the Punjab Laws Act (ss. 17,18) have been repealed.

[1] See p. 484 *n.* 9. [2] See p. 484, *n.* 10. O. L. A. : " and." [3] See p. 484 *n.* 10.

CHAPTER XII.

ADMINISTRATION.

§ 1.—Preliminary.

Terms. **558.** In this chapter unless there is something repugnant in the subject or context,—

Probate. (1) "Probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.[1]

Executor. (2) "Executor" means a person to whom the execution of the last will of a deceased person is by the testator's appointment confided.[1]

Administrator. (3) "Administrator" means a person appointed by competent authority to administer the estate of a deceased person where there is no executor.[1]

Estate. (4) "The estate" means all the property of any description whatsoever which a deceased Mussulman owns at the time of his death, and in which his interest is not limited to his lifetime.[2]

Deceased. (5) "The deceased" means a deceased person whose estate has to be administered.

Illustrations. (6) In the illustrations the deceased is generally referred to as P (propositus); his heirs as H, HA etc.; his creditors as C, CA etc.; transferees of the assets of the deceased as T, TA etc. Italic letters refer to females.

The executor in Muhammadan law is called the 'wasi.' The word is derived from the same root from which 'wasaia' or will is derived and means "one who is recommended" and is used to denote the administrator appointed by the Court as well as the executor appointed by the testator.

[1] *Verbatim* from the Probate and Administration Act (referred to in the footnotes as P. & A. Act) s. 3.

[2] The "estate" may have one of three meanings (*a*) In this chapter (i e. for the purposes of administration) it means the gross estate; (*b*) in the next chapter (i e. for testamentary purposes) it means the net estate, viz., after the funeral expenses and debts have been paid; (c) in the final chapter (on inheritance) it means what is left over after the funeral expenses, debts and legacies have all been paid.

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Law governing estate of a Mussulman.

559. The law applicable to the estate of a deceased Mussulman is the Sunni or Shiah law according as he professed to be a Sunni or Shiah at the time of his death.[1] The Probate and Administration Act applies to all Mussulmans, and takes the place in British India of the Muhammadan law on all points covered by the said Act.

Muhammadan law.
1. Funeral expenses.
2. Debts.
3. Legacies.
4. Inheritance.

The general principle that the rights and liabilities of the deceased should, as regards third parties, be left, as far as possible, in the same state in which they would have been had he continued to live, is subject to certain necessary exceptions, so that a simple rule of chronological priority cannot apply. According to pure Muhammadan law, there are four distinct purposes to which the estate of the deceased is successively applicable: (1) his funeral expenses, (2) his debts, (3) his legacies, (4) the claims of his heirs.[2] The Muhammadan law has now been replaced by the Probate and Administration Act, ss. 101-105, the effect of which is that funeral expenses should be paid before all debts ;[3] (s. 101) that expenses of judicial proceedings for obtaining Probate or Letters of Administrations be paid next (s. 102) ; that the wages for services within three months of the death of the deceased should next be paid (s. 103). S. 104 provides, "Save as aforesaid no creditor is to have a right of priority over another. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend." S. 105 provides that "debts[4] of every description must be paid before any legacy.

Probate Act.
1. Funeral expenses.
2. Judicial proceedings.
3. Wages.
4.

Equal and rateable payment

Debts acknowledged on death-bed.

560. According to Hanafi law, debts of which there is no proof except an acknowledgment by the deceased while in death-illness ('marz-ul-maut')[5] are postponed to all debts of which there is other proof.[6] *Quaere*, whether this rule of law is abrogated by the Probate and Administration Act.

Insistence on

This rule of Hanafi law seems in one of its aspects to be a portion of the substantive law of wills: the acknowledgment of a debt when fictitious is hardly distinguishable from leaving a legacy. It need not of course be fictitious, and may refer to a debt which is not capable of being legally proved in Court, or of moral obligation only. Sir R. K. Wilson, in connection with the favour shown to such acknowledgments, refers to the "anxiety of Muslims not to run any risk of sending a dying man before his Maker with his just debts undischarged."[7] The same considerations made the Muslim lawyers hold that the release by a widow of her dower even to a deceased husband, "is valid on a favourable construction of the law."[8] The strength of feelings in the mind of Mussulmans in this matter can be understood by referring to the Quran

[1] See s. 7 p. 34 above.
[2] Bail. 1. 683.
[3] See Bail. 1. 623-624.
[4] The "proper dower" of a widow of the deceased has to be paid as a debt and not a legacy though he may have married her in death-illness ; cf. pp. 119, 120.
[5] On *marz-ul-maut* see comment.
[6] Bail. 1. 640, 684 ; Hed. 436-438, 684-685.
[7] "Anglo-Muhammadan Law" (3rd ed.) 311 s. 286.
[8] Bail. I. 544 and 544 *n*.

SECTION 560 II. 280-286, and to the traditions [1] in which the Prophet is reported to have refused to pray over those who died in debt, without leaving any means for paying it, until their creditors' claims were provided for, and to have said that "even martyrdom repeated thrice would not atone for debt undischarged."

Death-bed acknowledgment of debt.

When the testator acknowledges a debt on his deathbed, and there is no other proof of the debt, it ranks, in regard to priority, under Hanafi law, midway between a legacy and a debt ; it is of no effect if it is in favour of an heir (except under the 'Ithna 'athari' law) ; on the other hand as regards strangers it is effectual apparently against the whole estate, and not merely a third, having priority over legacies ; this priority must be attributed partly to the anxiety referred to above that debts should be discharged, and partly also to the fact that should the acknowledger recover from his illness, the liability will remain on him to discharge the acknowledged debt to the full extent : it will not be in the nature of a 'donatio mortis causa.' [2]

Marz-ul-maut' or death-illness.

In order to establish the existence of death-illness there must be present at least three conditions to the illness which has caused death : (*a*) proximate danger of death, so that there is a preponderance of apprehension of death ; [3] (*b*) there must be some degree of subjective apprehension of death in the mind of the sick person; (*c*) there must be some external 'indicia' chief among which are the inability to attend to ordinary avocations. [4]

Instances.

Whether a particular illness is to be considered 'marz-ul-maut' or not is a mixed question of law and facts. But it may be stated that pains of childbirth are considered by the Muslim authors as 'prima facie' a death-illness whereas lameness, gout, paralysis, consumption, a withered or palsied hand, after have continued for a long time and have no immediate danger of death do not constitute death-illness. [5]

'Hidaya' on 'marz-ul-maut.

The following is a literal translation of the passage from the 'Hidaya' dealing with 'marz-ul-maut': [6] "Paralytic, gouty or consumptive persons when their disorder has continued for a length of time [the length of continuance is to be measured by one year, [7] and the meaning of fear is that which takes hold of the mind, not the cause of it] [8] and they are in no immediate danger of death, do not fall under the description of sick, hence deeds of gift executed by such take effect to the extent of the whole property ; because when a long time has

[1] *Mishcat-ul-Masabih*, Book XII, Ch. 9, parts I, II and III.

[2] Cf. Justin. II. vii, 1, on *donationes mortis causa* with the very apt quotation from Homer there cited. Cf. s. 349 above.

[3] I.e., that at the given time death is more probable than life. Cf. " the most valid definition of death-illness is that it is one which it is highly probable will issue fatally," Bail. I. 543.

[4] *Sarabai* v. *Rabiabai* (1905) 30 Bom. 531. 8 Bom. L.R. 35 (per Batchelor J.) followed by C. A. in *Rashid* v. *Sherbanoo* (1907) 31 Bom. 264. See also *Fatimabibi* v. *Ahmed Bakhsh* (1908) 31 Cal. 319, (1907) 35 Cal. 271, 35 I. A. 67 *Hassarat Bebee* v. *Goolam Jaffer* (1898) 3 cal. W. N. 57. *Wazeerjan* v. *Sayed Altaf Ali* (1887) 9 All. 357 *Labbi Bebee* v. *Bebban Bebee* (1874) 6 N.W. 159 *Muhammed Gulshere Khan* v. *Maryam Begam* (1881) 3 All. 731 *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1 ; 34, I.A. 107.

[5] Bail I. 543 ; Hed. 684.

[6] The commentary on the Hidaya which is given both in the Edition of 1280 A. H. (Bombay *Matba—i Hydari*) and of 1304 (*Mustafai Press*) is enclosed in [ ] to distinguish it from the text. In Hamilton's translation (Hed. 685 col. 1, para. 3) certain words (enclosed in parenthesis) are interpolated by the translator, which do not occur in the original.

[7] "This limit of one year does not constitute a hard and fast rule, and it may mean a period of about one year," *Fatima Bibi* v. *Ahmed Bakhsh* (1903) 31 Cal. 319, affirmed by P. C. (1907) 35 Cal. 271, 35 I. A. 67.

[8] I.e. Subjective apprehension of death, so that if a man is actually in fear of death, it does not matter if really there was no reason to fear.

elapsed, the patient has become familiarized to his disease, which is then not death-illness. The reason being that that which brings on a change in the matter of management is the sickness of death, viz., such an illness as is generally fatal; and an illness cannot be so considered except when the patient is in a condition which increases (in virulence) from stage to stage till it ends in death. Where, however, it has become chronic, and such that it does not increase, and there is no fear of death from it, then it cannot be the cause of death—as blindness and the like. This cannot be regarded as death-illness in the beginning of his illness; and a consumptive man until he becomes bed-ridden cannot be regarded as 'mariz' (sick) because a man is seldom free from little illnesses. Hence, so long as he can go out for his necessary purposes, and is not bed-ridden he cannot be popularly considered to be in his death-illness. So 'Qazi Khan' says." SECTION 560

"When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness; and even though she should die of that illness yet if it were not death-illness, the answer would be the same, but if it were a death-illness, the gift would not be valid, without the sanction of the heirs." [1] Gift of 'mahr' on death-bed.

§ 2.—*Representatives of a Deceased Mussulman.*

561. (1) The executor or administrator (where there is any) of a deceased Mussulman is his legal representative for all purposes in British India.[2]

(2) Where the deceased dies without appointing any executor,[3] and letters of administration to his estate are not granted to any person [4] the whole of his estate devolves, as from the time of his death, upon his heirs in proportion to their respective rights of inheritance,[5] and subject to their liability [6] (in the same proportion) [7] to pay out of their shares in it the charges referred to in sections 101 to 104 of the Probate and Administration Act and to the legacies (if any) validly bequeathed by him.[8]

1. Executor.
2. Administrator.
3. Heirs.

(3) According to Sunni law the executor of a deceased person may validly appoint a successor to himself for carrying out the purposes of the will under which he was made executor.[9] In Successor to Sunni

[1] Bail. I. 543 (*ll.* 11-16.)

[2] P. & A. Act. ss. 4, 88; Cf. (*Mirza*) *Kurrut-ul-ain* v. (*Nawab*) *Nazhat-ud-Dowla* (1905) 33 Cal. 116, 32. I. A. 24, 7 Bom. L. R. 867.

[3] If an executor is appointed, the P. & A. Act applies, whether probate has been obtained or not: (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 241, 255, 256.

[4] Cf. *Sakina* v. *Muhammad Ishak* (1910) 37 Cal. 1839. During the interval that must elapse between the death of the deceased, and the grant of letters of administration, the heirs initially represent the estate, but on the grant of the letters, the rights of the administrator relate back to the death of the deceased P. & A. Act. ss. 14, 15.

[5] *Jafri Begam* v. *Amir Muhammad Khan.* (1885) 7 All. 822; cf. *Hasan Ali* v. *Mehdi Husain* (1877) 1 All. 533. See. 26 Mad. 734, 739.

[6] Cf. *Bholanath* v. *Maqbul-un-nissa* (1903) 26 All. 28.

[7] *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361.

[8] *Amir Dulhin* v. *Baijnath Singh* (1894) 21 Cal. 311, 315; *Jafri* v. *Amir* (1885) 7 All. 822, 842.

[9] Bail. I. 672 (para. 4) *Hafeez-oor-Rahman* v. *Khadim Hossein* (1871) 4, N. W. 106.

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Executor may appoint his successor; if none appointed then surviving executor.

the absence of such appointment, Abu Yusuf holds that the right devolves upon the survivors of two or more executors; Abu Hanifa and Imam Muhammad hold that an application to the Court is necessary for its directions.[1]

Shiah law.

(4) According to Shiah law the executor may be authorised so to appoint a successor to himself, but in the absence of being so authorised the better opinion is stated in the 'Shara'ya-ul-Islam' to be that he cannot validly do so.[2] Where there are several executors, and one of them dies without validly appointing a successor to himself, the right devolves upon the survivors,[3] and it is stated to be doubtful whether the Court has jurisdiction to appoint a successor to a deceased executor so long as there is any surviving executor.[2]

Illustrations.

(1) T says to E (*a*) "thou art my agent after my death;"[3] or (*b*) "attend to my children after me;"[4] or (*c*) "pay my debts," being then in a death-illness;[4] or (*d*) "to thee is the hire of 100 'dirhams' on condition that thou wilt be my executor." E is executor in each case, and in (*d*) he is also an unconditional legatee of 100 dirhams.[5]

(2) T makes a will giving shares in his property to his widow, son and grandchildren, and to charity, and directs that the son "should continue in possession and occupancy of the full sixteen annas of all the estate. . . . All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." He also purports to restrict the right of alienation. The son retains possession and management till his death. *Held*, the son's son could not prevent the plaintiff, a sharer, from taking the full proprietary right in it.[6]

(3) P gives a bond to C, and then dies, leaving H and HA as his heirs. C sues H and HA, describing them as P's representatives, and also as being in possession of his estate. H and HA are not proved to be in possession of the estate: *held*, that the suit should not on that account be dismissed, but a decree passed for payment out of the property of P, and if there is no such property, the decree will remain unsatisfied; costs to be paid out of the estate (if any), and not by H and HA personally.[7]

[1] Bail. I. 671 (paras 2, 3); Abu Yusuf holds that the survivor may act by himself after the death of his colleague just as one of several co-executors may act alone during the lifetime of the others.

[2] Bail. II. 250 (para. 5), 249 (para. 3).

[3] Bail. I. 622.

[4] *Ibid.* Baillie translates *marz* literally by "sickness;" in legal language that word means *marz-ul-maut* as stated in the *'Alamgiri*.

[5] *Ibid* (*ll.* 4-6). This is contrary to the Succession Act, s. 128, which applies to Hindus but not to Mussulmans.

[6] *Muhammad Abdul Majid* v. *Fatima Bibi* (1885) 8 All. 39; 12 I. A. 759.

[7] *Madho Ram* v. *Dilbur Mahal* (1870) 2, N. W. 449; cf. the following quoted from the Qazi Khan in *Jafri Begam* v. *Amir Muhammad Khan*. (1885) 7 All. 822, 841: "If the debtor has died without leaving any property in the hands of the heir, even then the heir will be (impleaded as) defendant, for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered."

SECTION 561
Muhammadan law of administration not applicable.

Mahmood J. has shown,[1] that except for the devolution of the property upon the heirs, most parts of the law of administration are adjective law, and that Muslims must accordingly be governed by the British Indian, and not by the Muhammadan, law of administration. The Succession Act, ss. 187, 190, 239, not having been incorporated in the Probate and Administration Act, they do not apply to Muslims, who are consequently under no necessity to apply either for probate, or letters of administration.

Representation of estate by the heirs.

In the absence of an executor or administrator, the heirs become the legal representatives, and they administer the estate, taking the place of the executor or administrator.[2]

The Privy Council have stated that the rules applicable to heirs of a Mussulman when they represent his estate "are quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personality."[4] It has, however, been held that the heirs are not bound to postpone the distribution of the estate till all the debts are paid.[5]

In a Hindu case Sale J. said "under ordinary circumstances the widow and heiress would be the legal representative of the deceased."[6]

PERSONS WHO REPRESENT A DECEASED MUSSULMAN

I. When a Mussulman dies leaving a will—
  (1) The executor is the legal representative—
    (*a*) as to one-third of the property for purposes of the will,
    (*b*) as to the rest as a bare trustee for the heirs.
  (2) The executor may, but need not, obtain probate—
    (*a*) if probate is obtained he represents the estate for all purposes, as stated above under clauses (*a*) and (*b*),
    (*b*) if probate is not obtained, he cannot sue for debts—for which purpose—
      (i) In the Presidency towns other than Bombay, probate is required.
      (ii) In the city of Bombay, probate, or a certificate under Bombay Regulation VIII, of 1827 is required.
      (iii) In the Mufassal,[7] probate or a certificate under the Succession Certificate Act, or (in Bombay) under the said Regulation is required.

II. When a Mussalman dies intestate—
  (1) the estate devolves on the heirs, who are the legal representatives;
  (2) letters of administration may, but need not, be obtained—
    (*a*) if they are obtained the administrator represents the estate for all purposes as; [cf. clauses I. (1), (*a*) and (*b*) above;]

[1] *Jafri Begam* v. *Amir Muhammad Khan.* (1885) 7 All. 822, 842.

[2] *Ib.*; cf. *Hasan Ali Mehdi Ali* (1877) 1 All. 533

[3] Cf. *Bholanath* v. *Maqbul-un-nissa* (1903) 26 All. 28.

[4] And their lordships refer to Sugden's "Vendors and Purchasers" (1862) p. 665, and Williams on Executors, p. 872. *Bazayet Hoosein* v. *Dooli Chund* (1878) 4 Cal. 402, 407; cf. *Hamir Singh* v. *Lakia* (1875) 1 All. 57, 58; *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad. 734, 738.

[5] *Pirthi Pal Singh* v. *Hasaini Jan* (1882) 4 All. 361.

[6] *Chandumull* v. *Ranee Soondery Dossee* (1894) 22 Cal. 259, 262.

[7] I.e. where the Succession Certificate Act applies.

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(*b*) if they are not obtained, the heirs are the legal representatives, but cannot sue for debts except after obtaining a certificate under the succession Certificate Act or Bombay Regulation VIII of 1827.

§ 3.—Powers and Duties of the Representative.

Power and duties of executors and administrators.

562. (1) After the payment of the funeral expenses and debts of the deceased, his executor or administrator is an active trustee for the purposes of the will as to one-third of the estate, and a bare trustee for the heirs as to the remaining two-thirds of the estate.[3]

(2) The powers and duties of executors and administrators are defined in the Probate and Administration Act which applies to all persons in British India including Mussulmans.[1]

Explanation—Where the estate consists wholly or in part of claims against third parties, and the legacies amount to more than one-third of the assets realised by the executor or administrator, there the legacies are to be paid only to the extent of one-third of the assets actually in his hands, and as the further claims are realised, the legatees are to be paid one-third out of the sums so realized.[2]

Muhammadan executor or administrator in British India.

Muhammadan law has been superseded in British India by the Probate and Administration Act, and the Privy Council [3] have laid down the rule as stated in the section with reference to an executor who has obtained probate. The position of the administrator (whether with or without the will being annexed to the Letters) would be similar. And it has been held that the Probate and Administration Act applies even where there is a will, and no probate has been obtained.[4] The rule has, therefore, been stated in the section without restricting it to an executor who has obtained Probate.

Muhammadan law of administration compared with Probate and Administration Act.

Some of the rules of pure Muhammadan law are compared below with the provisions of the Probate and Administration Act, referred to below as "the Act: (1) Where there are several executors, the Muhammadan authorities are not quite unanimous whether one of them can act by himself without the concurrence of the others. The better opinion is, however, that he cannot act alone, except for the preservation of the goods of the deceased, or for providing his funeral expenses, or for the immediate necessity of his family, or property.[5] S. 92 of the Act empowers any one executor to exercise the powers of all. But it has been held that this power is restricted to cases where probate has been obtained. So that there is no conflict of laws. See also s. 11 of the Act. (2) The Muhammadan law empowers the Court to appoint a

1. **One of several executors acting alone.**

2. **Joint 'wasi' appointed by Qazi when executor incompetent.**

[1] The provisions of the P. & A. Act are not dealt with in this chapter unless the law in the case of Mussulmans differs from the general law of British India.

[2] Bail. I. 631 (para 2.)

[3] (*Mirza*) *Kurrat-ul-ain Bahadur* v. (*Nawab*) *Nazhat-ut-dowla* (1905) 33 Cal. 116; 32 I. A. 244.

[4] (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 241, 255, 256; see *Sakina* v. *Muhammad Ishak* (1910) 37 Cal. 839.

[5] Bail. I. 670, II. 248, 249.

joint 'wasi' (administrator) when the executor appointed by the testator is weak or incompetent.[1] There is no such power under the Act, ss. 6, 16. *q. v.* (3) The more approved Shiah law agrees with s. 11 of the Act by which representation accrues to the surviving executors on the death of the others.[2] The Sunni authorities also differ amongst themselves, but apparently the executor of a deceased executor takes the place of the latter.[3] (4) An executor, who is a minor, may act as such under Muhammadan law, but on application being made to the Qazi, he may be removed.[4] The Act prevents a minor from applying for probate (s. 8), but is silent as to his capacity to act as such without obtaining probate. The limited grant of administration where a minor is appointed executor has its counterpart in Shiah law, and in Hanafi law according to the two disciples.[4] (5) Remarks similar to the last apply to executors who are not Mussulmans.[5] (6) It has been held that probate cannot be refused on the ground that the Court does not think that the duly appointed executor (though not incapacitated by law) is not a fit person.[6] Similarly, under Muhammadan law, one who has been nominated an executor, cannot be removed except for malversation; though an administrator may be appointed to act jointly with him. (7) Under the Sunni law it is no part of the duty of an executor to partition the property amongst the heirs. But in the partition he represents the minors. The legatee of a fraction of the estate is in the same position as an heir.[7] (8) Except by operation of the Act the property did not vest in an executor under Hindu or Muhammadan law.[8] (9) Under pure Muhammadan law the moral duty of accepting an executorship when asked to do so[9] and the legal incapacity from renouncing after accepting, are not always kept quite distinct.[10] (10) The Muhammadan authorities differ whether an executor can purchase any part of the property of the deceased, but it seems he may do so at a fair valuation.[11] (11) The rule of Muhammadan law that "an executor is an 'ameen' or trustee and, therefore, not responsible for any loss or destruction of the deceased's property unless occasioned by his departure from the conditions or rules of his office or by some personal neglect,"[12] may be compared with s. 146 of the Act. (12) Under s. 117 of the Act the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death. This repeals the Muhammadan law under which "in the case of a bequest, the transfer is to be decreed from the death of the testator and not from the time of taking possession."[13] (13) The Muhammadan law allows the executor remuneration for his work as such, to which he would not be allowed under the English law. See p. 258 above.

Survival of powers of joint executors.

Minor executor.

5. Non-Muslim executor.

6. Removal of executor.

7. Partitioning no part of 'wasi's' duty.

8. Property did not vest in 'wasi.'

9. Executor purchasing deceased's property.

10. Liability for misapplication of funds.

11. Nature of excutors' responsibility.

12. Time for payment of legacy.

13. Remuneration of executor.

[1] Bail. I.

[2] Bail. II. 250, 251, 249.

[3] Bail. I. 671, 672, 678.

[4] Bail. II. 248, 249, I. 669; Cf. P. & A. Act, ss. 31, 32.

[5] Bail. I. 669; II. 249, 251; cf. s. 564 above.

[6] Cf. P. & A. Act. ss. 8, 85.

[7] Bail. I. 673-674; cf. P. & A. Act ss. 4,

[8] *Ibid* ss. 4, 90. *Jaykali* v. *Sibnath Challinga* (1866) 2 Ben.L.R. (o.c.J.) 1, (Phear J.); *Kherodemoney Dassee* v. *Doorgamoney Dassee* (1878) 4 Cal. 455, 3 C. L. R. 315 (Markly J.) (*Mirza*) *Kurrat-ul-ain* v. (*Nawab*) *Nazhatuddowla* (1905) 33 Cal. 116; 32 I. A. 244.

[9] Bail. II. 250.

[10] Cf. Bail. II. 250; cf. Bail I. 665-667 *Ayesha bai* v. *Ebrahim Haji Jacob* (1908) 32 Bom. 364, Davar J. following *Rogers* v. *Frank* (1827) 1 Y. & J. 409; and cf. *Re goods of Viega*, 32 L. J. (P. & M.) 9; cf. P. & A. Act, s. 16 and the Trusts Act, s. 10.

[11] Bail. II. 250, I. 681; cf. P. & A.Act. s. 91.

[12] Bail. II. 250.

[13] Bail, II. 207.

SECTION 563

§ 4.—Forensic Recognition of Representative.

(1) Forensic Recognition how far Necessary.

Forensic recognition not necessary.—

563. The executor or legatee under the will of a deceased Mussulman can establish his rights as such in any Court of justice in British India without production of the probate of the will under which the right is claimed, or letters of administration with the will or an authentic copy thereof annexed;[1] provided that no Court will pass a decree against a debtor of a deceased Mussulman for payment of his debt[2] to his heirs or executors (or creditors)[3] or proceed upon their application to execute against such a debtor a decree or order for payment of the debt, unless the heirs or executors (or creditors) have obtained forensic recognition of their right to represent the deceased.

—Except for taking legal proceedings against debtor of deceased.

Though probate is not necessary for general purposes, yet in order to be enabled to sue on a debt due to the deceased, it is necessary to get some forensic recognition of the right to represent the estate either under that Act, or the Succession Certificate Act (VII. of 1889) or Bombay Regulation VIII. of 1827. These two enactments are considered below.

Forensic recognition necessary for suing on debt.

The Succession Certificate Act VII. of 1889, s. 4, is as follows :—

I. Succession Certificate Act, s. 4.

"4 (1) No Court shall—(*a*) pass a decree against a debtor of a deceased person for payment of his debt to a person, claiming to be entitled to the effects of the deceased person, or to any part thereof, or (*b*) proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,—except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased ; or

(ii) a certificate granted under s. 36 or 37 of the Administrator-General's Act, 1874, and having the debt mentioned therein ; or

(iii) a certificate granted under this Act, and having the debt specified therein; or

(iv) a certificate granted under Act XXVII. of 1860 or an enactment repealed by that Act; or

(v) a certificate granted under the Regulation of the Bombay Code No. VIII. of 1827 and, if granted after the commencement of this Act, having the debt specified therein.

(2) "The word 'debt' in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes."

Succession Certificate Act.

Clauses (i) to (v) above refer to the various modes of obtaining forensic recognition, and these will now be considered in their order.

[1] *Sakina* v. *Muhammad Ishak* (1910) 37 Cal. 839 (Pugh J.) the same had been held (Sargent C. J. and Bayley J.) in (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 244, 255.

[2] Succession Certificate Act, s. 4, cited in comment.

[3] Administrator-General's Act, s. 37, cited in comment.

SECTION 56:

(i) Mussulmans may obtain Succession Certificate outside Presidency towns though there is a will.

(i) The Succession Certificate Act, s. 1 (4), provides that "a certificate shall not be granted" under the Act "with respect to any debt or security to which a right can be established by Probate or Letters of Administration under the Indian Succession Act, 1865, or by probate of a will to which the Hindu Wills Act 1870 applies, or by Letters of Administration with a copy of such a will annexed." Neither the Succession Act nor the Hindu Wills Act applies to Muslims, and as the Probate and Administration Act (under which alone a Mussulman can obtain probate) has been expressly omitted[1] from this clause, it would appear that the representatives of a deceased Mussulman may apply for and obtain a Succession Certificate notwithstanding that the deceased has left a will.[2] Such a certificate can, however, only be obtained from a District Judge; hence, where the deceased has died leaving a will, the executor or heirs are apparently bound, within the Presidency towns, to obtain Probate or Letters of Administration for being enabled to sue for debts due to the deceased.[3]

(ii) Certificate by Administrator General.

(ii) The Succession Certificate Act s. 4 (1) (ii) applies to the Administrator-General, who (under the Act referring to him, s. 36) is empowered,—in cases where the assets do not exceed Rs. 1,000, and Probate or Letters of Administration has or have not been granted,—to grant certificates entitling the executor or widow or other heir to receive the assets of the deceased.

The Administrator-General's Act., s. 36, is as follows :—

Administrator General's Act

"Whenever any person[4] shall have died, whether within any of the said Presidencies or not, whether before or after the passing of this Act, and whether testate or intestate, and shall have left assets (whether movable or immovable or both) within any of the said Presidencies,[5] and the Administrator-General of such Presidency is satisfied that such assets do not exceed in the whole one thousand rupees in value, he may after the lapse of one month from the death, if he thinks fit, or before the lapse of the said month, if he is required so to do by writing under the hand of the executor, or the widow, or other person, entitled to administer the effect of the deceased, grant to any person claiming otherwise than as a creditor to be entitled to a share of such assets, certificates under his hand entitling the claimant to receive the property therein

In what cases granted.

mentioned, belonging to the estate of the deceased to a value not exceeding in the whole one thousand rupees. Provided that no certificate shall be granted under this section where Probate of the deceased's will or Letters of Administration of his effects has or have been granted, or in respect of any sum of money deposited in a Government Savings Bank."[6]

Not where Probate or Administration granted, nor for money in Government Savings Bank.

By the Administrator-General's Act, s. 37 (which does not apply to Mussulmans), on the failure of any person other than a creditor to apply for such a

[1] The P. & A. Act is expressly mentioned in s. 21 (1), of the Succession Certificate Act.

[2] The same result is brought about for Native Christians by Act VII. of 1901, s. 5.

[3] Obtaining probate or letters or a certificate is referred to as obtaining forensic recognition. See p. 502 *n.* 3.

[4] Originally the section began as follows: "Whenever any persons not being a Hindu, Muhammadan or Buddhist or exempted under the Indian Succession Act, s. 332, from the operation of the Act,'" The words in ' ' have been repealed, see p. 498 *n.* 1.

[5] It will be noted that this section applies when there are any assets "within any of the said Presidencies," and ss. 17 and 18 apply only to assets within the Presidency Towns.

[6] See the Government Savings Bank Act V. of 1873.

SECTION 563 certificate, the Administrator-General is required either to administer the estate himself, or to grant a certificate to a creditor.[1]

Certificate granted—(a) When assets less than Rs. 1,000, and (b) Applicant other than creditor.

The result is, therefore, that where a Mussulman dies leaving property of less value than Rs. 1,000, the Administrator-General of the Presidency within which the assets are, may "grant to any person claiming otherwise than as a creditor, a certificate entitling the claimant to receive the property therein mentioned," but to a creditor of a deceased Mussulman he cannot grant the certificate (as he can to the creditor of a person to whom the Succession Act applies). Nor may he administer a Mussulman's estate himself, except by order of the Court under s. 17 or 18 of the Act. The remedies available to creditors of a deceased Mussulman are discussed under s. 566 below ; see pp. 502-507.

Administration by Administrator-General, ss. 17, 18.

(iii) Succession Certificate Act.

(iii) The Succession Certificate Act s. 4 (iii) refers to certificates under that Act itself, which are granted by the District Court [2] within whose jurisdiction the deceased died or, if he had no fixed residence, any part of his property is situated (s. 5), and may empower the person holding the certificate to receive interest or dividends or to negotiate or transfer, or both to receive interest or dividends and to negotiate or transfer to the securities (s. 8). Such certificates are conclusive as against the persons owing the debts or liable on the securities which are mentioned in the certificates, and afford full indemnity to all such persons for their payments or dealings according to the certificate (s. 16).

(iv) Act. XXVII of 1860.

(iv) The Succession Certificate Act, s. 4 (iv) refers to certificates already granted under previous Acts similar to that Act.[3]

(v) Bombay Regulation.

Clause (v) refers to Bombay Regulation VIII, of 1827, which is more fully referred to below. The Succession Certificate Act, s. 15, provides that the certificate shall have effect throughout British India, and s. 16 makes it conclusive as to the debt or liability (subject to s. 25, by which the question can be raised again in a suit), and affords full indemnity to all persons making the payments or satisfying the liability in good faith.

II. Bombay Regulation VIII. of 1827. Preamble.

Referring now to Bombay Regulation VIII. of 1827, the preamble recites, "Whereas at the same time that it is in general desirable that the heirs, executors, or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management, or sue for the recovery, of

[1] Administrator-General's Act II. of 1874, s. 36, did not apply to Muhammadans before 1881. But by Act IX. of 1881, s. 5, the words "nor being a .... Muhammadan" were removed from the first clause of 36 and inserted at the end of the second paragraph of s. 37. Then s. 11 (2) of Act II. of 1890, repealed s. 5 of the Act of 1881, in so far as it inserted the said words in s. 37. Later, Act XII. of 1891, Sched I., Part I, repealed "so much of s. 5 of Act IX. of 1881, as had not been repealed," and also s. 11 (2) of Act II. of 1890. The said Sched I. was itself repealed by Act I. of 1903.

[2] I.e., a Court presided over by the District Judge : Succession Certificate Act, s. 3 (1). S. 26 empowers the Local Government by notification to invest any Court of inferior grade with the powers of a District Court for this purpose. See Punjab Courts Act, s. 23 (b). See also General Clauses Act, s. 3 (15): "District Judge" shall mean the Judge of a Principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

[3] It may be noted that by Act XXVII. of 1860, no debt was recoverable without a certificate, "unless the Court should have been of opinion that payment of the debt was withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled," (s. 2). By ss 3 and 15, as between Probate and Certificate, whichever was prior in time was to invalidate the other, with respect to the debt specified in the certificate.

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property belonging to the estate without the interference of Courts of justice, it is yet in some cases necessary or convenient . . . . ." [that the Courts should be authorized to grant certificates of heirship or administratorship]. And the important sections are as follows: S. 1. "Whenever a person dies leaving property, whether movable or immovable, the heir or executor or legal administrator may assume the management, or sue for the recovery of the property in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognised." Then ss. 2 to 5 provide for the recognition of the right as heir or executor or administrator for the purpose of rendering it more safe for persons in possession of or indebted to the estate to acknowledge and deal with him, and authorize the judge to grant a certificate of heirship, executorship or administratorship after the issue of a proclamation and an investigation. "S. 7: *First*—An heir, executor or administrator holding the proper certificate may do all acts and grant all deeds competent to a legal heir or administrator, and may sue and obtain judgment in any Court in that capacity. *Second*—But as a certificate confers no right to the property, but only indicates the person who for the time being is in legal management thereof, the granting of such certificate shall not finally determine nor injure the rights of any person, and the certificate shall be annulled by the Zilla Court upon proof that another person has a preferable right. *Third*—An heir, executor or administrator holding a certificate shall be accountable for his acts done in that capacity to all persons having an interest in the property in the same manner as if no certificate has been granted." S. 8 provides that the refusal to grant a certificate does not bar a suit.

Bombay Regulation VIII. of 1827, s. 7.

Heir or executor or legal administrator may manage or sue.

Ss. 2-5. object of certificate.

S. 7. effect of certificate. Certificate not final.

Annulment of certificate.

Holder of certificate accountable.

S. 8, suit.

(2) *Forensic Recognition how Obtained.*

564 (1) Probate of the will of a Mussulman, or Administration with it annexed can be obtained, whether the will is oral or written.[1]

oral will.

(2) One of several heirs of a deceased Mussulman cannot obtain a certificate under sections 2 and 4 of the Succession Certificate Act VII. of 1889, for collection merely of part of a debt due from the deceased.[2]

Certificate as to part of debt.

(3) According to Muhammadan law a non-Muslim may not be lawfully appointed an executor of the will of a Muslim, and where a non-Muslim is purported to be so appointed, on an application being made to the Court, he must be removed, provided nevertheless that, unless and until he is removed by the Court, his acts as executor are valid and effectual.[3]

executor probate.

[1] *In re* will of *Haji Mahomed Abba. Mariambai* v. *Hasan Ahmed* (1898) 24 Bom. 8.; 1 Bom. L. R. 715.

[2] *Ghafur Khan* v. *Kalanddari Begum* (1911) 33 All. 327; *Muhammad Ali Khan* v. *Puttan Bibi* (1890) 19 All. 129; *Bismilla Begam* v. *Tanassal Husain* (1910) 32 All. 335.

[3] Bail. I. 668, II. 248, 249. Similarly a minor remains executor until removed: Bail. I. 669.

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Removal of apostate.

(4) The Courts in British India will not remove an executor who is a Muslim at the time of his appointment, notwithstanding that he may subsequently have renounced Islam.[1]

Removing non-Muslim or refusing probate to him.

(5) *Quaere*, whether in British India the Courts will remove a non-Muslim executor, or refuse to grant probate of a Muslim's will to an executor who is a non-Muslim when he is nominated as executor.[2]

(3) *Effect of Probate.*

Effect of Probate.

565. Where probate of a Mussulman's will, or a grant of administration to his estate with the will (if any) annexed, is obtained, it establishes conclusively the claim of the executor or administrator to represent the estate as an active trustee as to one-third of the property for the purposes of the said will, and as a bare trustee for the heirs as to two-thirds of the property.[3]

Illustration.

P dies, leaving her grandchildren H and HA as her heirs. *P* had before her death made various gifts to E, and appointed him executor of her will, in which she confirms the gifts. Probate of the will is granted to E in 1900,—in spite of caveats by H and HA who had also meanwhile filed a suit in 1897, impeaching the gifts and will on the ground of undue influence. *Held*, that probate having been obtained of the will, it establishes E's claims to one-third of the estate for purposes of the will (i.e. as gifts to E) but the gifts to E having been shown to be made under undue influence, their confirmation by the will is effective only as a legacy, and valid only as to one-third of the estate, and as to the other two-thirds of the estate, E is a bare trustee for H and HA.[3]

The executor of a Mussulman takes no title as such to the property by virtue of the probate, except under the Probate and Administration Act. Hence the effect of probate must be that which is given by the Act itself, neither more or less. A Mussulman executor is an active trustee as to one-third of the property for the purposes of the will, and a bare trustee for the heirs as to two-thirds of the property.[3]

This section refers to some incidents of obtaining forensic recognition having peculiar relation to Muhammadan law. The general law of obtaining probate or letters or succession certificates has been dealt with under s. 563 so far as necessary.

[1] See the Caste Disabilities Removal Act, p. 30 above.

[2] *Moohummad Ameenoodeen* v. *Mahummad Kubeeroodeen* (1825) 4 Cal. S. D. A. 49; (see questions 2 and 3 answers at pp. 51, 52, 55); Morley's Dig. I. 251 (No. 109). Cf. *Henry Imlack* v. *Zuhooroonnissa*, 4 Cal. S. D. A. 301, 303; Morley's Dig. I. 251 (No. 111): Appointment of Christian executor held to be a legal act, per Leycestor C.J., and Sealy J., C. Smith second judge disenting—the parties being Shiahs (see 4 S. D. A. 302). See comment.

[3] (*Mirrza*) *Kurrut-al-ain Bahadur* v. (*Nawab*) *Nuzhat-ut-Dowla Abbas Hosscin Khan* (1905) 33 Cal. 116; 32 I. A. 241.

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Persons entitled to represent the deceased.

1. Executor.

2. Administrator.

3. Heirs.

(1) The executor appointed by the deceased has (*a*) the first claim to obtain probate; but if he does not apply for it, the Court may in its discretion appoint (*b*) another instead of him, as administrator with the will annexed, and in any case (*c*) the executor is the representative for the purposes of the will, for only one-third of the estate; the rest of the two-thirds becoming vested in him as a bare trustee for the heirs; (2) the person entitled next after the executor is one to whom letters of administration have been granted under the Probate and Administration Act—who may be an heir, legatee or creditor of the deceased; (3) where there is neither an executor nor administrator, the estate devolves upon the heirs collectively.

Executor alone can get probate when may be refused.

Under the Probate and Administration Act, s. 6, "probate can be granted only to an executor appointed by the will"; under s. 8 "probate cannot be granted to any person who is a minor or is of unsound mind." No others are excepted from those to whom probate must be granted, and the Calcutta High Court has held that probate cannot be refused to a duly appointed executor, unless he is disqualified.[1]

Non-Muslim executor may prove.

It has been held that a non-Muslim executor has sufficient interest in the will to be entitled to prove it,[2] and where a non-Muslim is sole executor, even if it is held that his appointment is invalid, the Court may, if necessary, grant him letters of administration with the will annexed; in any event the will cannot be declared to be invalid because, e.g., a Hindu is appointed executor.[3]

§ 5.—Legal Position of Heirs as Representatives.

(1) General Principles: Alternatives.

Powers and they represent the estate.

566. The powers and duties of the heirs of a deceased Mussulman where there is neither an executor nor administrator of the deceased, are governed by the adjective law of British India[4] and by equity, justice, and good conscience.[4]

1. THE LAW TO BE APPLIED WHEN THE ESTATE DEVOLVES ON THE HEIRS.

The law applicable to heirs as representatives of a deceased Mussulman.

There seem to be no legislative enactments directly governing the circumstances referred to in this section. For the Probate and other Acts do not contemplate any other legal representative except executors and administrators, and the latter are defined as persons appointed by competent authority to administor the estate of a deceased person when there is no executor. It has been held, for instance, that the heirs are not bound, as executors or administrators are, to postpone the distribution of the estate till all the debts are paid. This decision was given before the Probate and Administration Act was passed, but

[1] *Hara Coomar Sircar* v. *Doorgamoni* (1893) 21 Cal. 195. following *Surethurst* v. *Tomlin* (1861) 30 L. J. (PRO.) 269; *Re. goods of Sampson* (1873) L. R., 3 P. & D. 48; Williams on Executors (1912 ed.) I. 186.

[2] *Jehan Khan* v *C K. Mandy* (1868) 10 W. R. 1851, Ben. L. R. Short Notes of Cases, p. XVI.

[3] See p. 500, *n* 2.

[4] *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822, 841-845.

[5] *Bussunteram* v. *Kamaludin* (1885) 11 Cal. 421. Cf. "The Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right."—P. C. in *Bissessur Lal Sahoo* v. (*Maharaja*) *Luchmessur Singh* (1879) 6 I. A, 233, 238.

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decisions after the passing of the Act have held that a rateable distribution of the assets is not necessary.[1]

2. PARTIES TO SUITS INVOLVING RIGHTS OR LIABILITIES OF THE DECEASED.

Difficulty where the strict rules of procedure not observed. Conflict of principles.

The difficulties connected with questions relating to administration (which have resulted in conflicting decisions by the Courts) arise mainly where the parties have failed either through neglect, or ignorance, or fraud, to act on the principle that after the death of a person, his legal representatives must be parties to any transaction that is based on rights or liabilities arising from the act of the deceased, and that when there is neither an executor nor administrator, all the heirs together, and not merely one or other of them, can represent the estate. The Courts have tried when disputes arise under such circumstances to act so as neither to strain to too great an extent the forme of procedure which have been established to safeguard the rights of all parties, nor to make these forms themselves productive of hardship. This, as it may be imagined, is not always an easy task. Even in England, where matters are not complicated by the admixture of two systems of law, differences of opinion have frequently occurred.[2] Hard cases, said Cresswell J., make bad law. Frequently the circumstances of cases coming before the Courts are such that the ordinary rule of law has been strained to prevent its operating harshly on some party, and the principle itself becomes somewhat obscured by it.

The subject may be grouped under the following heads :—

I. When the representatives forensically authorised.

I. Where there is forensic recognition[3] of the legal representative, i.e. where either probate or letters of administration have been granted, it would seem that there is no room for questioning that the executor or administrator must be a party to the suit relating to the rights or liabilities of the deceased, and no one else can represent the estate.

II. Where not—i.e., where executors without probate; or no will, nor letters.

II. Where there is no person authorized by the Court either under the Probate Act, or otherwise to represent the estate then—

(1) If there are any executors, they must all act jointly, for s. 92 of the Act only empowers one of the executors to exercise the powers of all, in cases where probate has been obtained by him,[4] (and there is no direction in the will to the contrary) but not otherwise.

Various alternatives where only some heirs sued, the rest not being parties.

(2) If there are no executors, the following courses are open to the Court—

(*a*) To proceed on the basis that all the heirs must necessarily be made parties, and that the omission of any one of them makes the suit

[1] *Pirthi Pal Singh* v. *Husain Jan* (1822) 4 All. 361. *Veerasokarajee Papiah* (1902) 26 Mad. 792 (Hindu case) followed (*Haji*) *Saboo Sidick* v. *Ally Mahomed Jan Mahomed* (1904) 6 Bom. L. R. 1134. Similarly cf. *Wahidunessa* v. *Shubrattan* (1870) Ben. L. R. 54 ; cf. P.& A. Act, ss. 105, 107 *et. al.*

[2] E.g. *Rayner* v. *Koehler* (1872) 14 Eq. 262 ; *Coote* v. *Whitington* (1873) 16 Eq. 534 : *Re Lovett, Ambler* v. *Lindsay* (1876) 3 Ch. D. 198. Malins V. C. disallowed the plea that the suit must be dismissed because the true legal representative was not a party to the suit. hese rulings were, however, not followed by Romilly M. R. in *Cary* v. *Hills* (1872) 15 Eq. 79; and dissented from by Jessel M. R. in *Rowsell* v. *Morris* (1873) 17 Eq. 20. See also *Penny* v. *Watts* (1846) 2 Ph. 149 (where Lord Cottenham felt himself unable to entertain the claim, though there was only a formal defect, which could not be remedied without incurring additional costs), and see *Dowdeswell* v. *Dowdeswell* (1875) 9 Ch. D. 294 (C. A.)

[3] The expression is used by Westropp C.J. *Purshotam* v. *Runchhod* (1871) 8 Bom. H.C. R. (A.C.J.) 152, 156.

[4] (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 241.

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defective inasmuch as the deceased is not properly represented. This course, which would have been proper under the common law of England, has never been followed in the case of Mussulmans in India.[1]

(a) Abatement of suit.

(b) To hold that each heir represents the estate to the extent of his share in it, and is responsible for a proportionate part of every liability of the deceased—and thus each heir may sue and be sued to that extent. This was the conclusion at which Mahmood J. arrived in a most learned and elaborate judgment.[2] In that case three questions were referred to the Full Bench, the answers to which were as follows—

(b) Each heir separately represents portion of estate to which he is entitled

(i) Upon the death of a Muhammadan intestate, who leaves unpaid debts whether large or small, with reference to the value of his estate, the ownership of such estate devolves immediately upon his heirs, and such devolution is not contingent upon nor suspended till payment of such debts.

'Jafri Begam v. Amir Muhammad Khan.'

(ii) A decree relative to the debts of a deceased Mussulman passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of his estate, does not bind the other heirs, who by reason of absence or any other cause are out of possession, and does not convey to the auction purchaser in execution of such a decree, the rights and interests of such heirs as were not parties to the decree.

(iii) The Plaintiff in 'Jafri Begum *v.* Amir Muhammad Khan'[3] was not entitled to recover from the auction purchaser in execution of such decree, possession, of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place.

(c) To proceed (as is done in some decisions) on the basis that any one of the heirs (who is in possession of the estate) may sue[4] and be sued on behalf of himself and of the others. The judges who have laid this down have proceeded on the basis that theMuhammadan law is not less insistent than the Hindu law on the necessity of debts of the deceased being paid by the heirs, and so the same principle applies to Mussulmans as that by which a Hindu heir in possession and management of the estate may alienate it for ancestral debts—

(c) The heir (in possession) represents all others.

(i) This was first stated with reference to involuntary alienation by execution of a decree.[5]

Execution against him.

[1] It was suggested in *Ambashanker Harprasad* v. *Sayad Ali Rasul* (1894) 19 Bom. 273, but rejected by Sargent C. J. and Candy J.

[2] *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822. Note that in this case it was alleged that the plaintiff "did not prefer any objection in the course of the suit, notwithstanding that he had full knowledge of the same." 7 All. 824.

[3] (1885) 7 All. 825.

[4] Cf. "Any one of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to or by the deceased," Hed. 349. But the Muhammadan law is repealed by P & A. Act (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 241.

[5] See *Devalava* v. *Bhimaji Dondo* (1895) 20 Bom. 338, 344, 345.

SECTION 566 voluntary alienation by him.

(ii) Subsequently the Madras High Court decided that where one of several co-heirs is in possession of the whole of the property, he may meet the demand of a creditor of the deceased by a 'bona fide' voluntary sale[1] just in the same manner as he alone may be sued, and the property may be put to sale in execution of a decree against him.[1]

(d) Analogy with executor 'de son tort.'

(*d*) Quite apart from the question of representation, it has been considered by some judges that whoever is in possession of the property of the deceased, whether a stranger or an heir—and regarding property beyond the share to which he is lawfully entitled, the heir's position does not differ from that of a stranger—the person who is so in possession is liable to account for it on the same grounds as an executor 'de son tort' is liable,[2] and that though ss. 265, 266, of the Succession Act, reproducing the English law on the subject are not part of the Probate Act, and do not directly govern Mussulmans, the principle underlying them is applicable as equity justice, and good conscience.[3] It will be necessary to refer to the English law, relating to executors 'de son tort,' more fully before this view of the present question can be adequately considered. See below.

(e) Creditors' suits likened to administration suit.

(*e*) Lastly, some of the decisions in India have been based on the ground that a suit by a creditor is in the nature of an administration suit,[4] and as such binds the effects of the deceased, and not merely the parties to the suit. This view is considered below next after the abovementioned points.

3. THE ENGLISH LAW RELATING TO EXECUTORS 'DE SON TORT.'

Executor 'de son tort' in England.

The English authorities are divided on the question whether an executor 'de son tort' may be sued without joining the proper legal representative; but in a Calcutta case[2] the decisions of Malins V.C. were cited with approval without referring to the decisions of Lord Romilly M.R. and Jessel M.R. which dissent from the Vice-Chancellor's view.[5] It is difficult to say, therefore, whether the judges of the Calcutta High Court, in the case referred to, had considered the reasons for which the decisions of Malins V.C. are dissented from in England, and whether the course which is suggested as the more proper procedure in England[6] was present before their Lordships' minds.

(i) He may be sued, but true representative necessary party to administration suit. However—

Lord Cottenham has explained the position and the liability of an executor 'de son tort' in England, by saying that though a suit can be brought against

[1] *Pathummabai* v. *Vittil Ummachabai* (1902) 26 Mad. 734, 739, see below s. *ill.* 9 (1) p.

[2] *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311, 317, 318.

[3] Cf. the Civil Procedure Code, s. 2 (ii), which includes any person who intermeddles with the estate of a deceased person under the expression "legal representative."

[4] *Mutty Jan* v. *Ahmed Ally* (1882) 8 Cal 370; *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311.

[5] See cases mentioned in note 1 to 5 *ante*. The Calcutta judges merely say "it has been held by a Judge of much experience" So that perhaps they knew of the conflict of decisions in England. It need hardly be stated that Jessel M. R's. view carries more weight and is considered better authority,—the more so as he is supported by Lord Romilly M. R.

[6] E.g. appointment of a receiver (Lord Romilly M. R.) *Cary* v. *Hills* (1872) 15 Eq. 79.

him for the purpose of charging him, he does not represent the estate[1] (which the rightful executor or administrator alone does) and so, where a general administration is involved, the presence of the executor 'de son tort' is not sufficient; and he held that an allegation that the executor 'de son tort' has received assets sufficient to pay the claim does not enable the Court to dispense with the presence of the personal representative, and even if the defendant (i.e., the executor 'de son tort') admits that all the debts and the other legacies have been paid, the Court will not take his word for it.[2] Lord Cottenham, however, also said, "If a sum had been separated from the mass of the personal estate to answer this legacy, and had got into the hands of the defendants, the Court would decree payment of it to the legatee without involving him in the general accounts of the estate." To this must be added that payments by an executor 'de son tort' are good against the true representatives of the deceased, where the circumstances are such that the creditors might reasonably suppose him to be the true representative,[3] and the act itself was lawful, and one that the true representative was bound to perform in the due course of administration.[4]

(ii) General administration not always necessary.

(iii) When executor 'de son tort' may act as representative.

Hence, in accordance with the cases referred to under (*d*) above,[5] it would seem that where a creditor sues some only of the heirs or other persons who are in possession of the assets of a deceased Mussulman, and a decree is passed without objection being taken as to the absence of the [other] heirs, the defendants may be taken in India to be in the same position as an executor 'de son tort,' and the application of the assets in satisfaction of the decree may by analogy be considered in the same light as payments by an executor 'de son tort' of the debts of the deceased. There is, however, one important distinction between Muhammadan and English law which must be referred to Muhammadan law does not, like English law require the rateable payment of debts,[6] but every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of the Code of Civil Procedure, 1882, s. 252 (Act V. of 1908, s. 52). Now the necessity in English law for the legal representative of the deceased being made a party to a creditor's suit only arises in cases where a general administration is involved, and a general administration can seldom be required unless for the purpose of a rateable distribution of the assets amongst the creditors. It would, therefore, seem that the strict rule of English law requiring the presence of the representative on the record can

Distinction between English and Muslim law: rateable distribution not recognized in Muhammadan law—hence administration may oftener be dispensed with.

[1] The result being that though the executor *de son tort* is liable to be sued, he is not the only party necessary to the suit. Cf. Civil Procedure Code s. 2. (11), ss. 50-52. A legal representative is defined by that Act so as to include one who intermeddles in the estate, so that adding the executor *de son tort* as a party would not be misjoinder, but his presence cannot be sufficient.

[2] *Penny* v. *Watts* (1846) 2 Ph. 149; see at 152 (during arguments), 153, 154.

[3] Thus collusion between the creditor and some of the heirs, or knowledge by the creditor that there were other heirs, would prevent the application of the rule. Cf. *Assamathem* v *Roy Lutchmeeput Singh* (1878) 4 Cal. 142.

[4] *Thomson* v. *Harding* (1853) 2 El. & Bl. 630.

[5] See above p. 504.

[6] *Haji Sahoo Sidick* v. *Ally Mahomed Jan Mahomed* (1904) 30 Bom. 270; 6 Bom. L.R. 1135, following *Veerasokkarajee* v. *Papiah* (1902) 26. Mad. 792, and cf. Hed. 699 (Vol. IV, 545): "The depositor has himself the right to seize and carry away his deposit, if he finds it amongst the effects of the deceased, and the creditor has a similar right with regard to his debt." Cf. also Bail. I. 679.

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seldom have application in the case of Mussulmans. In a case like 'Penny *v.* Watts'[1] regarding a Mussulman's estate, probably the Court would not feel itself bound, as Lord Cottenham did, to order a general administration, against its own inclination.

4. CREDITORS' SUITS AND ADMINISTRATION

Creditors' suits and administration suits compared.

It is not easy to understand what is meant by those judges who proceed on the basis that every suit by a creditor is like an administration suit (see. (*e*) above[2]) but it would seem that they refer mainly to the fact that in a creditor's suit, as well as in an administration suit, the decree is passed not personally against the defendants, but against the property belonging to the deceased which has come to their hands. The distinction between an administration suit and an ordinary suit by a creditor has been forcibly pointed out by Mahmood J.[3] At the same time the judges who have proceeded on the basis that all creditors' suits are in the nature of administration suits, have apparently overlooked the fact that according to all the English decisions, in an administration suit it is imperative that the true representative of the deceased (i.e., the executor, administrator or *all* the heirs of a Muslim) must be parties. Lord Cottenham, in the case referred to,[1] was at pains to show that if an administration of the estate could have been avoided, the action would not have been defective for want of the true representatives,—but he found that administration could not in that case be avoided. One of the reasons why the Courts in India may not consider it necessary to order administration in circumstances where it would be necessary in England has been stated in the last paragraph. It would, therefore, seem that the proposition that all creditors' suits are in the nature of administration suits, and that consequently in such suits any one heir may bind the whole estate, is liable to criticism in two directions: (1) such suits are not like administration suits, and (2) in administration suits one of several heirs cannot by himself sufficiently represent the estate.[4]

5. APPLICABILITY OF PROBATE ACT WHEN HEIRS REPRESENT THE ESTATE.

Position of heirs when they administer estate.

Where the heirs are the only legal representatives of a deceased Mussulman, i.e., where he has not appointed an executor and letters of administration have not been obtained, it becomes a matter of some importance to consider how far the provisions of the Probate and Administration Act can take effect, —the application of that Act not having been made conditional on probate or letters of administration being obtained, nor even on there being some person[5] who by his acts or otherwise takes the place of an executor or administrator under the Act. Where the deceased has left a will and appointed executors, the effect of the Act on the rights and liabilities of the parties is generally clear; for most, though not all, of the provisions of the Act relating to

[1] (1846) 2 Ph. 149.

[2] See p. 504 above.

[3] *Jafri Begam* v. *Amir Md. Khan* (1885) 7 All. 822, 844-845. Mahmood J. refers to the form of decrees in administration suits annexed to the Civil Procedure Code to show the distinction. See now O. XX. r. 13, and Appx. D. to Sched. I., 17-20.

[4] *Penny* v. *Watts* (1846) 2 Ph. 149: *Rowsell* v. *Morris* (1873) 17 Eq. 20; *Cary* v. *Hills* (1872) 15 Eq. 79. See p. 522 below.

[5] E.g., an executor *de son tort*.

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executors are such, as may be given effect to, irrespective of probate being obtained. Where, however, there is no executor nor administrator, and the whole body of heirs represents the deceased, many of the provisions of the Act become inappropriate, if not inapplicable ; and where the sections are not so worded as to restrict their applicability to executors or administrators, difficulty may arise in applying to the body of heirs those provisions of the law which were originally framed with reference only to executors or administrators. Ss. 101 to 104 may be instanced. Another illustration is furnished by the devolution of the right of pre-emption.[1] The order in which payments are required to be made by the Act may be capable of being enforced as against an executor or administrator, but it is obvious that when the heirs themselves administer the estate there are no means of enforcing it. It has indeed been held that the heirs may distribute the estate amongst themselves notwithstanding the circumstance that a small debt is due.[2] Some distinction seems to be made whether the debt is small or large in proportion to the estate[3] but the point to note in the present connection is that the estate may be divided without first either paying off all the creditors or setting apart funds for paying them off.

Difficulty of applying Probate Act. to such heirs.

In a decision which was given long before the Probate and Administration Act was passed, but which deserves attention for the care with which the relevant passages from the 'Hidaya' are gathered in it, and for the reasoning based on them, it was said that the debts of the deceased must be paid before the estate is divided, but if the creditors be not present to assert their claims, the division of the estate is not to be postponed. The creditors who may subsequently appear and assert their claims are entitled to set aside the partition of the estate so as to render it available for the satisfaction of their claims, or they may hold the heirs personally liable to the extent of and in proportion to the shares they have taken in the estate of the deceased.[4]

Partition need not be postponed till all debts paid.

Again, it has been held as already pointed out, that there is no necessity for the heirs to distribute the assets rateably amongst the creditors.[5]

Distribution of assets not necessarily rateable.

(2) Suits to which Some but not all Heirs are Parties.

All heirs not necessary for creditor's suit.

567. (1) Where there is no executor nor administrator of a deceased Mussulman, and his creditor sues some one or more, but not all of his heirs, the suit is not defective for non-joinder

[1] See s. 532, pp. 463, 464 above.

[2] *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361. See also *Jafri Begam* v. *Amir Md. Khan* (1885) 7 All. 822 ; *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311 ; (*Syud*) *Imdad Hossein* v. *Mussummat Hoosein Buksh* (1870) 2 N. W. 327.

[3] *Bussunteram* v. *Kamaludin* (1885) 11 Cal. 421.

[4] (*Syud*) *Imdad Hoosein* v. (*Musumat*) *Hooseini Buksh* (1870) 2 N. W. 327. The question for decision being whether the widow was entitled to hold possession of the estate in lieu of dower, and Pearson and Turner JJ. expressed their dissent from (*Mussumat*) *Meerun* v. (*Mussumat*) *Najeebun* (1867) 2 Agra 335, an earlier decision of their own, in which they had said that the widow having got possession on the untenable ground of her being the sole heir, was in wrongful, and not lawful possession. See pp. 119, 120 above.

[5] (*Haji*) *Saboo Sidick* v. *Ally Mahomed Jan Mahomed* (1904) 30 Bom. 270. See p. 505 *n.* 6.

SECTION 567 of parties ;[1] [provided that the heirs who are sued are in possession of the whole of the estate[2]].

Decrees in suits to which all heirs are not parties.

(2) Where some only of the heirs of a deceased Mussulman are sued, as mentioned above, and (i) the suit is brought against the said heirs in their representative capacity,[3] (ii) they are in possession of property left by the deceased,[4] (iii) they have so acted that the creditor might reasonably suppose them to be rightfully representing the whole interest of the deceased in the said property, and (iv) the debt or liability is such that all the heirs are bound to satisfy it,[5] in such a case—

(a) Calcutta and Bombay decisions.

(*a*) The High Courts of Calcutta and Bombay have held that a decree may be passed for its payment or satisfaction out of the whole of the said property,[6] so as to bind also the interests therein of those heirs who are not parties to the suit ;[7] provided that if the said heirs are not sued in their representative capacity, or they have not acted as above referred to, or for any other reason the Court thinks it more equitable so to do—

(i) it may pass a decree for the whole of the claim to be satisfied out of the shares of the said heirs in the estate of the deceased ;[8] or

(ii) it may pass a decree that the said heirs should pay only a part of the debt proportionate to their respective shares in the said estate.[8]

(*b*) Allahabad decisions.

(*b*) The High Court of Allahabad has held that a decree cannot be so passed as to be binding on the heirs who are not parties to the suit, and that the auction purchaser in execution of such a decree does not

[1] *Ambashanker Hamprasad* v. *Sayad Ali Rasul* (1894) Sargent C. J. and Candy J. on a reference from the Small Cause Court (1894) 19 Bom. 273. In remanding the case the Court referred the judge to *Bussunteram* v. *Kamaluddin* (1885) 11 Cal. 421 and *Pirthi Pal Singh* v. *Hussaini Jan* (1882) 4 All. 361.

[2] See comment p. 512 ; & p. 509 *n.* 2 also p. 503 *n.* 4, p. 492, *n.* 7.

[3] In a case amongst Hindus it was said that where the heirs that are not sued are minors, it strengthens the conclusion that those that are sued, are sued in their representative capacity—per Sargent C. J. (and Haridas J.) in *Jairam Bajabashet* v *Joma Kondi* (1886) 11 Bom. 361 365 ; this hardly applies to Muslims.

[4] Their possession of the property makes their position analogous to that of an executor *de son tort* ; cf. p. 504, and *nn.* ; also *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311 and the Succession Act, ss. 265, 266, and per Parke B. (delivering the judgment of the Court of Exchequer) in *Buckley* v. *Barber* (1581) 164, 183.

[5] *Thomson* v. *Harding* (1853) 3 El. & Bl. 630.

[6] I.e., the property belonging to the deceased which is in the possession of the heirs who are sued.

[7] Cf. cases given as *ill.* (1)—(4) pp. 509, 510.

[8] Cf. cases given as *ill.* (1)

acquire the rights and interests of such heirs as are not parties of the said decree.[1] SECTION 567

(c) The High Court of Madras has held that where the heir or heirs who are parties to the suit are in possession of the whole of the said estate—but not otherwise—a decree may be passed binding on the other heirs who are neither in possession nor parties to the suit.[2] (c) Madras decisions.

Illustrations.

(1) P dies leaving a widow *W*, and a son S, as his heirs. C, a creditor of P, brings a suit against S alone. At the hearing S admits the claim, but points out that *W* should also be a party; *W* cannot at this stage be added as a party as the suit against her is barred by limitation. *Held*, that S can be sued alone without adding *W* as a party, and that S's share in the estate will be bound to pay a proportionate part of the debt. The estate not having been distributed, the Court points out that a question might arise whether S's share in P's estate is not bound to pay the whole debt, and not merely a share proportionate to his interest in the estate.[3]

(2) P dies, leaving as his heirs H, HA and HB. The estate is in the possession of H and HA, who alone are sued by the creditors of P, and in execution of the decrees passed against H and HA, the property left by P is sold, and purchased by D and DA. HB then sues to set aside the decrees on the ground of fraud, which she is unable to prove. *Held*, that HB is bound by the decree, notwithstanding that she was not a party to the suit in which it was passed, on the ground that all creditor's suits are in the nature of administration suits, and that, therefore, H and HA were bound to account for the assets come into their hands, and to that extent liable to pay the creditors,—the residue, if any, being divided among the heirs.[4] Calcutta and Bombay decisions.

[1] Cf. cases given as *ill.* (1) (7) (8) and (9).

[2] *Puthummabai* v. *Vitil Ummachabai* (1902) 26 Mad. 734, i.e., *ill.* (8). It was also stated incidentally in *Devalava* v. *Bhimaji Dhondo* (1895) 20 Bom. 338, 345: "The creditor can seek his relief against one of several heirs in a case when all the effects are in the hands of that heir." But in *Ambashanker* v. (*Sayad*) *Ali Rasul* (1894) 19 Bom. 273, where the question arose more definitely, no mention was made of the point, and the Bombay High Court seems to be inclined to follow the Calcutta view, though for different reasons. According to *Amir Dulhin* v. *Bai Nath Singh* (1894) 21 All. 313 failure to prove exclusive possession of all the assets does not involve a failure to establish her representative capacity *ib.* p. 315; and the heir's liability is to be measured not by the extent of his interest in the estate of the deceased, but by the assets which have come into his hands, and which he has not disbursed duly in the discharge of the liabilities to which the estate was subject at her husband's death, *ib.* p 318. Cf. p. 492 *n.*7, above.

[3] See p. 508, *n.* 1.

[4] *Mutty Jan* v. *Ahmed Ally* (1882) 8 Cal 370. Two other views were suggested by Morris J. as having previously governed similar cases: (*a*) That the heirs who were parties to the suit, were sued in their representative character, and what passed at the sale was the property of the deceased, citing (*Mussamut*) *Nuzeerun* v. (*Moulvie*) *Ameerooddeen* (1875) 24 W. R. 3: (*b*) That the principle of Muhammadan law is that one of the heirs may stand as litigant on behalf of all other heirs with respect to anything done to or by the deceased whether it be debt or substance; cf. p. 503, *n.* 4.

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(3) P dies indebted to C in the sum of Rs. 2,607. C sues P's widow *W* without making his other heirs parties. *Held*, that the suit is properly brought against *W*, whose liability is to be measured not by the extent of her interest in her husband's estate, but by the assets come to her hands, which she had not duly disbursed in the discharge of the liabilities to which the estate is subject at her husband's death.[1]

(4) P is indebted to C for repairs to a house, and dies leaving *H* and *H*A, a daughter and sister as his heirs. *H* obtains a certificate under Act XXVII. of 1860 (repealed by the Succession Certificate Act) and directs further repairs to be done to the said house. C then files a suit against *H* alone, styling her as the daughter and representative of P, to recover his original debt and a further sum for repairs executed under *H*'s directions. The suit is undefended, and a decree is obtained against *H*, in execution of which the house [2] is sold and purchased by T. *H*A then brings a suit against *H* and T for possession of her share in the house,[3] and it is *held*, that *H* did not represent the whole of the estate of P, and *H*A's share could not be sold in the said execution proceedings.

(5) *P* dies, leaving a son H, and a daughter *H*A. C, a creditor of *P*, brings a suit on the debt, and obtains a decree against *P* deceased, represented by her minor son H, represented by his guardian,—*H*A not being a party to the suit. *Held*, that *H*A is equally responsible for the debt, and bound by the decree, and the execution sale passes not only H's but also *H*A's share in the property of P, and it cannot be impeached on any ground except that the debt was not due.[4]

(6) P mortgages certain lands in 1862. On his death the mortgagee sues P's widow *H*, and son HA, and forecloses the mortgage. *H*B and *H*C, daughters of P, who are also his heirs, are not parties to the foreclosure suit. *Held*, that *H*B and *H*C cannot object to the decree simply because they were not parties to the suit; that *H* and HA were sued in their representative character (as representing P's estate) and the proceedings against them, as such representatives, were effectual against the whole of the estate, and not merely against the shares of *H* and HA therein.[5]

Allahabad rulings.

(7) P dies, leaving *H* and *H*A his widows, and *H*B a minor daughter, as his heirs; *H*B is in possession of certain properties bolonging to P. Decrees are obtained by creditors of P against *H* and *H*A and in satisfaction of the decree *H* and *H*A sell the properties in the possession of *H*B, purporting to execute the sale-deed on behalf of themselves and of *H*B as her guardians (*H*B having no legal guardian at the time). *Held*,

[1] *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311.

[2] So stated by Garth C. J., *Hendry* v. *Mutty Lall Dhur* (1876) 1 Cal. 395, 398, *l.* 3; but in the statement of facts, it is said that "in execution D's interest in the house and land was sold."

[3] *Ibid.* This case is approved by Mahmood J. in *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822, 844, but does not seem to be noticed in any other decision. It is hardly consistent with *Mutty Jan* v. *Ahmedully* (1882) 8 Cal. 370, and *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311, i.e. *ill.* (2) and (3), unless it can be brought in under the principle of *Assamathem Nissa* v. *Roy Lutchmeeput Singh* (1878) 4 Cal. 142, on the ground that the suit of B was undefended.

[4] *Khurshetbibi* v. *Keso Vinayak* (1887) 12 Bom. 101 (Sargent C. J. and Haridas J).

[5] *Davalava* v. *Bhimaji Dhondo* (1895) 20 Bom. 338 (Ranade and Jardine JJ.).

that *H*B is not bound by the decrees, nor by the sale, and she can recover her share in the properties of P on paying her share of P's debts, in satisfaction of which the sale was effected.[1]

(8) P dies leaving *H* and HA as his heirs. *H* alone is in possession of the whole estate of P. C, a creditor of P, sues *H* and obtains a decree against her, and in execution of the decree the whole estate is sold by auction. *held*, that HA is not bound by the sale, and on payment by him of his proportionate share of the debt, which was paid off from the proceeds of the auction sale, he can recover his share in the property sold.[2]

(9) P dies, leaving H and HA as his heirs. C, a creditor of P, obtains a decree against H alone as representative of P, H being in possession of the whole estate. H then transfers some portion of the estate to T. After the transfer C attaches the property so transferred, and claims to execute his decree not only against the right title and interest of H in the said property, but against all the interest that P had in it. *Held*, that H could have objected to more than his share in the property being attached under the decree on the ground that as to the rest he was a trustee for HA, and that T can likewise ask that the attachment be limited to the share of H in the property, even though H had purported to transfer to him both his own and HA's share therein.[3]

(10) P dies, leaving three widows, *H*, *H*A and *H*B, two daughters, *H*C and *H*D, and one son, HE. (*a*) *H* sells some of the property of P in discharge of P's debts, *held* that *H* is not like the managing coparcener in Hindu law, and thus not entitled to administer and manage the estate until partition. The creditors, however, have a right to sue such heirs as have taken the estate, but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir, inasmuch as the creditor of the deceased can seek relief against one of several co-heirs in a case where all the effects are in his hands; and it makes no difference whether the heir or heirs in possession meets or meet the demand of the creditors by a 'bona fide' voluntary sale, or the property is brought to sale in execution of a decree obtained against him. *Held*, therefore, that the sales by *H* for payment of P's debts were valid and binding on P's other heirs though they were not parties thereto.[4] (*b*) *H* also sells another property (item No. 11) to the 13th defendant in consideration of a debt of Rs. 25 due to him from P, and of a further sum paid by him to *H*, *held* that *H*B was entitled to receive her share in the said property on payment of a portion of the debt (Rs. 25) proportionate to her share in P's estate.[5] (*c*) *H* also sold

Madras

[1] *Hamir Singh* v. *Zakia* (1875) 1 All. 57 (F.B.) Turner A. C. J., Spankie and Pearson J J. The latter points out that the widows were not competent to act as the guardians of *H*B. The fact that *H*B was in possession of the property is emphasised in *Pathummabai* v *Vittil Ummachabai* (1902), 26 Mad. 736.

[2] *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716.

[3] *Dallu Lal* v. *Hari Das* (1901) 23 All. 268 (Strachey C. J. and Banerji J.).

[4] *Pathummabai* v. *Vittil Ummachabai* (1902) 26 Mad. 734 (Benson and Bhashyam Ayyanger J J.), referring to the alienations of "items" i., xviii. and xi. in favour of defendants 11, 12, 13 respectively—see p. 736 (para. 4), p. 737 (para. 6), p. 739 (para. 2) and p. 740.

[5] In this *ill.* (*b*) (*c*) (*d*) do not apply to s. 567, but it would not be convenient to have the points that were decided in this scattered in several places.

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'bona fide' certain other property of P, but not in the discharge of P's debts; *held* that *H*B was entitled to have her share in the said property, on payment of her share of the compensation due to the purchaser for improvements effected by him in the said property.[1] (*d*) *H* further allowed certain mortgage debtors of P to redeem the mortgage properties on payments of the full amounts due on the mortgage: *held* that *H*B was entitled to recover from the mortgagors her share in the mortgage properties in default of the mortgagors paying her within six months her share of the mortgage money.[2]

Necessity for all the heirs having possession of assets being before the Court.

The question as to who are necessary parties to a suit, has been discussed in its general bearings in the comment to s. 566. It has been remarked in the course of more than one decision [3] that a single heir can be sued without the other heirs being made parties, only in cases where all the assets of the deceased are in the possession of that heir; but the point has never been directly before the Court: the proviso to subsection (1) is therefore enclosed in [ ]. The reasons on which the remarks referred to are based, are probably twofold: (1) that every part of the estate is liable for the debts of the deceased, and therefore all those who are in possession of any part of the estate must be before the Court; (2) that the possession of the estate is necessary for establishing "that the executor 'de son tort' was really acting as executor, so that the creditor might reasonably suppose him to be the rightful representative"; for it is only in such a case that the creditor is entitled (under English law) to retain as against the representative of the deceased, payments made to him.[4] It may be pointed out that the object underlying the first mentioned rule may be safeguarded, in British India, by the form in which the decree is passed,[5] viz., a proportionate part of the debt may alone be ordered to be paid by the heirs who are parties. Again, the heirs who are parties are always entitled to ask that the other heirs should also be brought on the record; they may well be expected to take care of their own interests, by making such an application, if they have anything to gain thereby, and they should not be allowed to profit by omitting to do so: in cases where the other heirs have notice of the proceedings, they have likewise the power to apply to be made parties, should they desire to defend the action.

No decision on the point

It may be noted that in the Madras and Bombay cases,[3] the heirs sued were actually in possession of the whole of the estate, and in the Allahabad case [5] no part of the estate was in their possession, and so it does not follow from the decisions so far given that the Courts would decline to entertain a suit by a creditor of the deceased, if the whole of the estate is not in the possession of the defendants impleaded. The bearing on this point of 'Madho Ram *v.* Dilbur Mahal' should also be considered.[6]

[1] *Ibid.* relating to defendants 13, 14, items III. IV., pp. 737 (para. 6), 739 (para. 2).

[2] *Ibid.* relating to defendants 18, 19 items xv., xvi., pp. 737 (paras. 3, 4,) 739 (para. 3).

[3] *Pathummabai* v. *Vittil Ummachabai* (1) 209, 26 Mad. 734, 738 *Devalava* v. *Bhimaji Dhondu* (1895) 20 Bom. 338, 315, referring to Hed. 349, *q. v.*; *Hamir Singh* v. (*Mussumat*) *Zakia* (1875) 1 All. 57, 59.

[4] *Thomson* v. *Harding* (1853) 2 El. & Bl. 630.

[5] Cf. *Madho Ram* v. *Dilbur Mahal* (1870) 2 N. W., 449, and *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361.

[6] See p. 492, *ill.* (3) above.

(3) *Rights and Liabilities of the Heirs amongst Themselves.*

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Liability to contribute to co-heirs.

568. Each heir of a deceased Mussulman is liable to his co-heirs for contribution (out of the assets of the deceased come to his hands) towards the satisfaction of a decree for payment of a debt due by the deceased; provided first that such decree has been passed against the said co-heirs in a suit to which the said heir (from whom contribution is claimed) was not a party;[1] secondly, that the said decree was not limited in its amount to such a part of the said debt as is proportionate to the rights of inheritance of the said co-heirs in the said estate; and thirdly, that no heir can be made liable to contribute a larger share of the said debt than is proportionate to his own rights of inheritance.[2]

The proposition contained in the section is not laid down in so many terms in any decision, but it is submitted that it follows from the cases.[2]

The process for enforcing a rateable distribution of assets and liabilities is no doubt cumbrous, but results from the heirs not taking the proper course to have the estate of the deceased represented, and then distributed amongst themselves. When each heir has received his or her own due share it works out all right. The Contract Act, s. 146, the Probate and Administration Act, s. 138, the Transfer of Property Act, s. 82, refer respectively to contributions from co-sureties, co-legatees, and from properties mortgaged for the same debt.

Execution may be set aside as against shares of heirs not parties to suit.

569. Where, in a suit to which some, but not all, of the heirs of a deceased Mussulman, are parties (the estate not being otherwise fully represented), a decree is passed for the satisfaction of a debt or liability of the deceased, out of the whole of the property of the deceased,—any of the heirs who were not parties to the said suit may, on sufficient cause[3] being shown, impeach the said decree in so far as it affects their shares in the said property, and the Court may to that extent set aside an auction sale in execution of the said decree, contingently on such heirs paying or satisfying a part of the said debt or liability, proportionate to their rights of inheritance in the said property, or on such other terms as may be just and equitable.

Sufficient cause for setting aside execution, Cf. s. 567.

(2) In considering whether sufficient cause has been shown why a decree should be so set aside,—

(*a*) The Courts will have regard to the circumstances which guide them on the question whether the decree

[1] The decree would no doubt itself provide for the rights and liabilities *inter se* of those heirs who are parties to the suit.

[2] Cf. *Bussunteram* v. *Kamaluddin* (1885) 11 Cal. 421. See comment.

[3] As e.g. that the suit was barred as against some of the heirs: *ibid.*

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should initially be so passed as to bind all the heirs, or only those of the heirs who are parties to the suit.[1]

Consent decree.

(*b*) The High Court of Calcutta has held that where the decree is initially passed by consent against one or more heirs of a deceased debtor, it cannot legally bind the other heirs, and must be set aside in so far as it affects the heirs who were not parties to the consent decree.[2]

Illustrations.

(1) P mortgages certain property to C and then dies, leaving as his heirs a widow *H*, a daughter H_A, and a sister H_B; C sues H_A and H_B, not describing them as the representatives of P in the title, but in the body of the plaint it is stated that they are the heirs of P. C knows that H_B is an heir of P, and has reason to believe that she is alive at Madina, but he does not make her a party to the suit. By the consent of *H* and H_A, a decree is obtained by C against them. Under certain sales by the Sheriff, and certificates issued by the Court in accordance with those sales, the right, title and interest not only of *H* and H_A (who consented to the decree) but also of H_B were professedly purchased by T. *Held*, that the decree and the execution founded on it did not affect the share of H_B in the estate of P, which consequently did not pass to T under the execution sale.[2]

(2) P dies, leaving H, H_A and H_B as his heirs. H is in possession of the whole estate. Without the consent of H_A and H_B, H makes to C a payment on account of a debt which P owed to C. But for this payment, the debt would have been barred by limitation. C sues H, H_A and H_B for payment of the sum now due on the said debt. *Held*, (*a*) that the lower Court having decided that the debt was barred as against H_A and H_B, and there being no appeal against that decision, H alone was liable; (*b*) that as H had not been sued in a representative capacity, and it was not proved that he had made the payment on behalf of himself and H_A and H_B, the suit could not be considered an administration suit, and a decree could not be passed for payment of the whole debt out of the assets in his hands, but only for a part of it proportionate to H's interest in P's estate: (*c*) that both by Muhammadan law and according to equity, justice and good conscience, H's share in P's estate was not liable to be charged with the whole of the debt, but a proportionate part of it, inasmuch as he could not claim contribution from H_A and H_B, as against whom the debt was barred by limitation.[3]

[1] As the Allahabad High Court has ruled that a decree can never bind the absent heirs p. 508, that Court grants the relief almost as a matter of course: *Jafri Begum* v. *Amir Muhammad Khan* (1885) 7 All. 822; *Bholanath* v. *Maqbulunnissa* (1903) 26 All. 28.

[2] *Assamathem Nessa Bibee* v. *Roy Latch-Singh* (1878) 4 Cal. 142; S. C. reported as *Mir Ashraf Ali* v *Roy Lutchmiput* 2 Cal. L. R. 223. Cf. *Hendry v. Mutty Lall* (1876) 2 Cal. 395; above, p. 510 *nn.*3,4.

[3] *Bussunteram* v. *Kamaluddin* (1885) 11 Cal. 421; see also *Hendry* v. *Mutty Lall* (1876) 2 Cal. 396, above, pp. 509,510 *ill.* & *nn.*

SECTION 570

liability ceases and each proportionately liable.

570. After the estate has been distributed amongst the heirs, their joint liability ceases, and thenceforth each heir is liable to pay to the creditors of the deceased only such a part of the debts as is proportionate to the share which the said heir is entitled to receive out of the estate;[1] provided that such liability is limited to the assets come to his hands[2] for the due application of which he cannot account.[3]

Illustration.

P dies leaving H, HA, HB as his heirs, who divide the estate amongst themselves in accordance with their rights. A creditor of P sues H and HA, not making HB a party. *Held*, that H and HA are liable to pay parts of the debt proportionate to their shares in the estate and not the whole of it.[4]

Suing heirs who have no assets.

Cf. the Probate and Administration Act. s. 138. Mahmood J. has pointed out that the heirs may be sued even though they have no assets in their hands,[5] on the authority of the passage which has been quoted above, p. 492 *n.* 7.

Distribution prior to payment of

The case cited in the *ill.* to the section was decided on the 30th of March, 1882, just a day short of a year after the Probate and Administration Act became applicable. S. 105 of that Act ("Debts of every description must be paid before any legacy") could not have any direct application on the present point, which affects not legatees but heirs. But the principle of English law is that if an executor (whose place is taken by the heirs of a Mussulman), taking the assets in his hands to be sufficient for all purposes, pays the legacies before the debts, and afterwards finds the debts to be larger then he expected, he is not entitled to plead the payment of the legacies as a defence to a creditor suing for payment of his debt;[6] and our Courts may hold that on the analogy of s. 105, and of the rule of English law, the heirs are bound before distribution to set aside sufficient assets to satisfy the creditors of the estate, and that where they do not do so, they will not be allowed to plead distribution of the assets any more than the English executor is allowed to plead payment of legacies. If the analogy holds good, then in accordance with the Calcutta ruling that "the liability of an heir is to be measured not by his interest in the estate, but by the assets come to his hands,"[7] even after distribution any heir might be held liable to satisfy the whole of the debts of the deceased out of his share.

[1] *Pirthi Pal* v. *Husaini Jan* (1882) 4 All. 361; *Runnunteram Marwari* v. *Kamaluddin Ahmed* (1885) 11 Cal. 41; *Ambashanker* v. *Sayad Ali* (1894) 19 Bom. 273.

[2] *Mutty Jan* v. *Ahmedally* (1882) 8 Cal. 370, 374; *Bazayet Hoosein* v. *Dooli Chund* (1878) 4 Cal. 402, 408; 5 I. A. 211; *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311.

[3] (*Mussamut*) *Wahidunnissa* v. (*Mussamut*) *Shubbrattan* (1870) 6 Ben. L. R. 54, 59. See *Hamir Singh* v. *Zakia* (1875) 1 All. 57.

[4] *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361.

[5] *Jafri Begam* v. *Amir Md. Khan* (1885) 7 All. 822, 841 Cf. *Madho Ram* v. *Dilbur Mahul* (1870) 2 N. W. 449.

[6] *Re Lovett Ambler* v. *Lindsay*, (1876) 3 Ch. D. 198.

[7] *Mutty Jan* v. *Ahmed Ally* (1882) 8 Cal. 70; *Amir Dulhin* v. *Baij Nath Singh* (1894) 12 Cal. 311.

SECTION 571

(4) *Alienations by Individual Heirs.*

Rights of transferees in good faith for consideration.

571. Each heir of a deceased Mussulman has, subject to section 52 of the Transfer of Property Act,[1] the right to dispose of his own share of the inheritance (whether before or after distribution) in any manner that he may think fit, and to pass a good title to a transferee in good faith for consideration, notwithstanding any debts that may be due from the estate to the creditors of the deceased.[2]

Illustrations.

(1) P dies in 1861, leaving a widow *H*, and two sisters H_A, and H_B, as his heirs. *H* obtains decrees against H_A and H_B for her 'mahr' in 1864, and for her share in the estate of P. in 1865. H_A and H_B remain in possession of their shares in P's estate, and incur debts, for which a decree is passed against them in 1868, and the property is sold in execution to T. *H* claims that T takes the property subject to her right to be paid the 'mahr' thereout. *Held*, that *H* cannot follow the property in T's hands, but her remedy is to claim the 'mahr' from H_A and H_B to the extent of the assets that they may have received out of P's estate, for which they may not be able properly to account.[3]

(2) A dies in 1865, leaving three widows, *H*, H_A and H_B, and a son, Hc, as his heirs. While disputes are going on between the widows and son, who respectively claim large parts of the estate for dower, and under a 'mukarari,' Hc executes, on the 13th of June 1866, a mortgage bond in favour of T, charging a portion of P's estate with the payment of Rs. 4,800. Subsequently *H*, H_A and H_B obtain decrees against Hc to account for the assets of P in his hands, and to pay thereout the dower claims of *H*, H_A and H_B, and the debts of other creditors of P, and after satisfying the creditors, to divide the residue amongst the heirs of P, and in execution of these decrees the property mortgaged by Hc to T is attached. Later, on the 26th of June, 1867, T attaches the said mortgaged property in execution of a decree on his mortgage, and it is purchased at the auction sale by T_A. *Held*, (*a*) that before the suits by *H*, H_A and H_B were instituted, Hc had the right to convey either by absolute sale or by mortgage his own share in P's estate, and the mortgage

[1] The Transfer of Property Act s. 52, is as follows: "During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceedings, in which any right to immovable property is directly and specifically in question, the property cannot be transferred, or otherwise dealt with, by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose"

[2] *Bazayet Hoosein* v. *Dooli Chand* (1878) 4 Cal. 402, 406, 408, 5 I. A. 211 approving *Wahidunnissa* v. *Shubbrattan* (1870) 6 Ben. L. R. 54. See also *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822, 828, 833; *Land Mortgage Bank Ld.* v. *Bidyadhari* (1879) 7 Cal. L. R 460, 468.

[3] *Wahidunnissa* v. *Shubbrattan* (1870) 6 Ben. L. R. 54, 68; 14 W. R. 239. The P. C. "entirely concurred in this view of the law"; see *ill.* (2), p. 517 *n.* 1.

to T passed a good title to him, notwithstanding that debts might be due to P's creditors;[1] (*b*) that *H*, *H*A and *H*B cannot follow the mortgaged property in the hands of TA.[1] (*c*) that alienations by Hc pending the suits by *H*, *H*A and *H*B are affected by the doctrine of 'lis pendens,' and are bound by the decree obtained in the said suits.[2]

(3) P is indebted to C, and dies leaving *W*, a widow, *D*, a daughter, and S, a sister, as his heirs. *D* purchases *W*'s share in P's property and mortgages that share with her own share, amounting to a ten anna share in the estate to T. T subsequently purchases the six anna share in the property to which S was entitled, and then brings a suit against *D* on the mortgage, and obtains a decree for the sale of the property. He also obtains a decree for possession of the six anna share transferred to him by S. T transfers both his decrees to TA, who gets into possession of the six anna and ten anna shares respectively on 9th February 1875, and 12th September, 1875. On the 26th January, 1876, C (the creditor of P) attaches the property in execution of a decree which he had obtained on the 13th of July, 1872, but which had not been completely satisfied. —*Held*, that the property in the hands of TA is not charged with the payment of P's debts, and C cannot attach it.[3]

(4). P dies indebted to C, and leaving *H* and *H*A as his heirs. C sues *H* and obtains a decree against her. In execution of the decree P's property is purchased by T. Meantime *H*A sells her share in P's estate to TA. *Held*, that TA acquires the whole of *H*A's share in the estate, and not subject to the satisfaction thereout of the decree obtained by C against *H*, to which *H*A was not a party.[4]

Cf. the Probate and Administration Act, s. 90, corresponding to the Succession Act, s. 269.

When does estate vest in heirs?

Of course, the estate does not vest in the heirs if there is an executor or administrator,[5] nor in any case until the death of the ancestor. Until then it is a mere 'spes successionis,'[6] incapable of being transferred. As to the priorities between the creditors of the heirs and of the deceased, see the next section.

SINGLE HEIR DISPOSING OF PROPERTY OF DECEASED.

No heir can transfer more than his own share in the estate or in any property of the deceased

Sir R. Wilson says in his valuable work (s. 159), that "if while the estate is still undistributed, one of several heirs, being in possession of some specific property forming part thereof, sells or mortgages the same, the 'bona fide' purchaser or mortgagee acquires a good title to the whole of the property so dealt with, not merely to the interest therein of the alienor, both as against the other heirs and as against creditors of the deceased," and he cites 'Land Mortgage Bank *v.* Bidyadhari'[3] stating that it follows 'Bazayet Hossain'[1].

With great respect, it is submitted that the cases referred to have not decided that any heir can, without the concurrence of the others, part with more than his own interest in the property, nor is there any other authority

[1] *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402; 5 I. A. 71.

[2] *Mahomed Wajid* v. *Tayyabun*. *Ibid*. Cf. Transfer of Property Act, s. 52 (p. 516 *n*. 1).

[3] *Land Mortgage Bank* v. *Bidyadhari Dasi* (1879) 7 C. L. R. 460 (White and Field JJ.).

[4] *Sttanath Das* v. *Roy Lutchmiput Singh* (1882) 11 Cal. L. R. 268.

[5] P. & A. Act, s. 4, and see p. 493 above.

[6] Cf. p. 282 *ill* (1) above.

SECTION 571 for that proposition, and there is one decision directly contradicting it. Dealing first with the cases relied upon by Sir Roland Wilson, it will be observed that in *ill.* (3), though it is not stated that the estate was actually distributed, still each of the heirs had transferred her own interest in the property consisting of a two, six and eight-annas share respectively, to the transferee, who had in this manner acquired the whole property. No question arose in this case of any heir purporting to transfer more than her own right title and interest. The only question before the Court was whether the creditor of the deceased (*a*) could follow the assets into the hands of the transferree, or (*b*) he could only sue the heirs themselves for payment of the debt out of the assets come to their hands, for which they could not account. The latter alternative was accepted by the Court.

With reference to the Privy Council decision which is given as *ill.* (2) above, their Lordships distinctly say: "He (the son) had the right to convey *his own share* of the inheritance, and was able to pass a good title to the alience notwithstanding any debts which might be due from his deceased father."[1] There is nothing in the Privy Council decision to indicate that one heir can convey any other heir's share in the property.

The point in question arose directly in a case[2] decided by the Madras High Court which has already been referred to. There the first defendant was in possession of the whole estate, and a number of her dealings therewith were questioned by the plaintiff, one of them being that she had purported to alienate items No. XI, III, and IV in favour of defendants No. 13 and 14, partly for the purposes of satisfying the debts of the deceased, and partly for some purpose of which there was no evidence, and the Court set aside the said alienations in so far as they were not made for payment of the debts of the deceased, and so far as they went beyond the extent of the rights of the plaintiff.[2]

(5) Dealings with Creditors and Debtors of the Deceased.

Priority of Creditors of deceased over creditors of heirs.

572. Until any specific portion of the property of a deceased Mussulman is actually alienated to a transferee in good faith for consideration, the creditors of the deceased have a right to have their claims satisfied out of the said property in priority to the creditors of any of the heirs.[3]

Mere money decree does affect such priority.

Explanation—A mere money decree against an heir for his personal debt does not amount to such an alienation as will to any extent affect the priority to which the creditors of the deceased are entitled as above referred to.[3]

P dies, leaving his widow *W* and son S as his heirs. On the 27th of July, 1899, *W* obtains a decree against the estate for her unpaid 'mahr.'

[1] *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 406.

[2] *Pathummabai* v. *Vittil Ummachabai* (1901) 26 Mad. 734, 736 (para. 5), 737 (paras 2, 6), 739 (para. 2). See above p. 511 *ill.* (10).

[3] *Bholanath* v. *Maqbulunnissa* (1903) 26 All. 28, 35.

The decree is a simple money decree not purporting to charge any portion of the estate with the payment of her claim. On the 19th September, 1899, *W* attaches certain shares belonging to her husband's estate. C is a creditor of S, he also held a simple money decree [1] against S, and in execution of the decree attaches on the 21st of November, 1899, the same shares. *Held*, that the estate devolves upon the heirs subject to the liability to pay thereout the debts of the deceased; that a mere judgment against an heir for his personal debt does not amount to such an alienation of the assets as will to any extent defeat the creditors of the deceased, and that *W*'s decree has therefore priority over C's, so that C can only bring the said shares to sale subject to the rights of *W* under the decree (for 'mahr') obtained by her, but not otherwise. [2]

Alienation by [illegible] for creditor of deceased.

573. The Madras High Court has held that a single heir of a deceased Mussulman who is in possession of the whole of the property of the deceased, may voluntarily alienate such portion of the said property as is necessary for the satisfaction of the debts of the deceased. [3]

Such alienations are like acts of executor 'de son tort.'

Two questions are involved in the decision referred to in the section: (1) Whether any of the heirs can, as against his co-heirs or other representative of the estate, plead payment to a creditor of the deceased as due administration of the assets. (2) Whether the transferee acquires good title to property so transferred.

The Madras High Court has answered both questions in the affirmative, [4] though the judgment does not discuss the points involved.

Now, it is quite clear that a single heir making such payments as are referred to takes upon himself to represent the whole of the estate, without having any right to do so—for each heir can represent only a fraction of the estate proportionate to his share in it. It would therefore seem that the position of such an heir approximates to that of an executor 'de son tort' in England, [5] i.e., payments so made are good against the true representatives of the deceased only where (*a*) the circumstances are such that the creditor may reasonably take such heir to represent the estate, [5]—and one circumstance to be taken into consideration would be whether such heir is in possession of the whole of the estate [6] or not; and (*b*) the payment (or other dealing with

[1] If D had been a *bona fide* mortgagee or purchaser from C, the case would have been different. (*Mt.*) *Wahidunnissa* v. (*Mt.*) *Shubbratun* (1870) 6 Ben. L. R. 54; *Bholanath* v. [illegible]*nissa* (1903) 26 All. 35; *Bazayet* v. *Dooli Chund* (1878) 4 Cal. 402, 5 I.A. 211; *Kinderley* v. *Jervis* (1856) 22 Beav. I.

[2] *Bhola Nath* v. *Maqbul-un nissa* (1903) 26 All. 35.

[3] *Pathummabai* v. *Vittil Ummachabai* (1902) 26 Mad. 734. 739. Cf. *Jafri Begam's* case, 7 All. 822 *Contra*, *Hasan Ali* v. *Mehdi Husain* (1877) 1 All. 538.

[4] Both questions arose with reference to defendants 11, 12, 13, involving items i, xviii, and xi respectively in *Pathummabai* v. *Vittil Ummachabai* (1902) 26 Mad. 734, 736.

[5] Cf. Indian Succession Act, ss. 265, 266; *Thomas* v. *Harding* (1853) 2 El. & Bl. 630; *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822, 825 (question 3).

[6] Cf. *Pathummabai* v. *Ummachabai* (1902) 26 Mad. 734, 738; *Devalava* v. *Bhimaji Dhondo* (1895) 20 Bom. 335, 345; *Hamir Singh* v. *Mussamat Zakia* (1875) All. 57 59; so conversely not being in possession of the estate is no defence when the heirs of the deceased are sued by his creditors. See above p. 492, s. 561 *ill.* (3).

SECTION 573

the estate) is such that the true representative would have been bound to make it.[1] So that the other heirs would not be bound, e. g., if the debt was not due.[2]

Title acquired by alienee from single heir.

Similar considerations affect the question as to the title that the alienee acquires under the circumstances above referred to. It will be remembered that where the property is transferred to a third person 'bona fide' for valuable consideration, the creditors or heirs of the deceased cannot follow it in the hands of the transferees. The mere existence of debts belonging to the estate do not affect the title of the transferee, even though he has knowledge of the debts;[3] so that such debts or charges are not in the nature of a trust[4] on the property of the deceased, binding on the transferee. This does not, of course, imply that individual heirs may pass the whole of any particular property. Each heir may transfer only his rights in the property, but such rights are transferable without being charged with payment of a proportionate part of the deceased.

Payment to one heir of debt due to deceased.

574. One of several heirs of a deceased Mussulman cannot give a valid and sufficient discharge to a debtor of the deceased for the whole of the debt, but only for a part thereof proportionate to that heir's share in the estate.[5]

Illustrations.

(1) P dies, leaving H and HA as his heirs. M, a mortgagor of A, pays the mortgage-debt to H alone. *Held*, that M is bound to pay over again to HA his share in the mortgage debt.[6]

(2) P dies, leaving a widow *W*. D, a debtor of P, pays the debt to *W*. Subsequently H, a nephew of P, obtains a certificate of heirship (and representation) to P, and sues D. *Held* that payment by D is a valid defence, if D can show that H is the legal heir of P.[7]

Individual heir cannot give valid discharge to debtor.

The present section is in accordance with the decision of the Madras High Court mentioned in the footnote to it. Its effect is that, though a single heir purports to act as the representative of the deceased so that the debtor may reasonably supp se him to be such, still the heir is not clothed with the same

Graysbrook v. *Fox* (1565) Plowd. 275, 282; *Buckley* v. *Barber* (1851) 6 Exch. Rep. 64, 183 (per Parke B.); *Thomson* v. *Harding* (1853) 2 El. & Bl. 630, 639.

[2] *Khurshetibi* v. *Keso Vinayek* (1887) 12 Bom. 101, 103.

[3] *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 401. (*Mussamut*) *Wahidunissa*. v (*Mussamut*) *Shubbratun* (1870) 6 Ben. L. R., 54; see also *Jafri Begam* v. *Amir Md. Khan* (1885) 7 All. 822, 828, 833; *Land Mortgage Bank Ld.* v. *Bidyadhari Dasi* (1880) 7 Cal. L. R 460, 463.

[4] As to trusts, see Trusts Act, s. 96, Lewin on "Trusts" (10th ed.), 1045. The alienee of a trust estate with knowledge of the trust is bound by the trust though, he has paid the full value of the trust property, *Fakiruddin* v. *Abdul Hussein* (1910) 13 Bom. L. R. 826.

[5] *Pathummabai* v. *Vittil Ummachabai* (1902) 26 Mad. 734, 737 (paras 3, and 4), 739 (para. 3, relating to defendants 18 and 19, and items xv. xvi.).

[6] *Sitaram* v. *Shridhar* (1903) 27 Bom. 292 (Chandavarker and Aston JJ.) This was a case between Hindus but the same principles would apply to Muslims, except that "the Hindu law as a general rule constitutes one of them (i.e., the co-heirs), the senior in age, as the *karta* or manager of the inheritance on behalf of the co-heirs." *Ibid*., 295. In this case had the payment been made to the *karta* the decision might have been different.

[7] *Purshotam* v. *Runchhod* (1871) 8 Bom. H. C. R. (A.C.) 152, 155, (F.B.).

powers for giving a discharge to the debtor as he is for passing a good title to a creditor of the deceased. And the reason of this distinction is that every creditor of the estate is entitled to receive the whole of his debt out of the assets, and if any heir discharges the duty of paying off the creditor, he only gives to the creditor his due. On the other hand, no single heir is entitled to receive the whole of the debt due to the estate, and the debtor can only give to each heir what is his own due. It is for the same reason that a certificate under the Succession Certificate Act or Bombay Regulation VIII. of 1827 is necessary before a Court will pass a decree against a debtor of the estate for payment of the debt. See above pp. 496-499.

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Reason.

Forensic recognition.

It may be pointed out that the converse of the rule in this section does not apply : In other words, while on the one hand in every debt due to the estate, each heir is proportionately interested, yet on the other, it cannot be maintained that inasmuch as every part of the property of the deceased is liable for the payment thereout of all his debts, therefore each creditor of the deceased is entitled only to a proportionate part of each property of the deceased, and cannot have more than such portion transferred to him so as to affect the rights of other creditors. To take an example: If P dies, leaving as his heirs two sons, S and SA, a debtor of P cannot pay the whole of the debt to S alone, and S's receipt for any portion of the debt beyond a half of it would be an ineffectual discharge as against SA. But on the other hand, if P leaves property of the value of Rs. 10,000, and two creditors C and CA, each to the extent of Rs. 10,000, still it would be permissible for S and SA to transfer the whole of the property to C alone and CA would then acquire a valid title to the whole and not only to half of the property.[1] For Muhammadan law, unlike English law, does not require a rateable payment of debts. It can only be in cases where the assets are not sufficient to discharge all the debts that the point can be of importance. In such cases, of course, the creditors have other remedies.

Every part of property liable for debt, but whole of any property may be given in satisfaction of any creditor.

§ 6—Protection of Estate.

575. Where there is danger of misappropriation, deterioration or waste[2] of the assets left by a deceased Mussulman, the Court may deliver possession of the property to some person under the Succession (Property Protection) Act, or authorize and enjoin the Administrator-General or a Receiver to collect and take possession of such property.

Steps for protecting property of the deceased :

Appointment of—

1. Curator.
2. Administrator-General.
3. Receiver.

This section is based on the Succession (Property Protection) Act XIX of 1841, and the Administrator-General's Act ss. 17 and 18.[3] The law contained in these Acts is the general law of British India, and it is deemed unnecessary to

[1] (*Haji*) *Saboo Sidick* v. *Ally Mahomed Jan Mahomed* (1904) 30 Bom 270, 6 Bom. L. R. 1135, following *Veerasokharajee* v. *Papiah* (1902) 26 Mad. 729.

[2] These words are taken from the Administrator-General's Act, s. 18. Cf. preamble to the Succession (Property Protection) Act XIX. of 1841 (which, previous to Act I of 1903 used often to be referred to as the "Curator's Act"): "where there is reason to apprehend danger of misappropriation, waste, or neglect, and where such appointment will, in the opinion of the authority making the same, be beneficial under all the circumstances of the case."

[3] See p. 498 above.

SECTION 575 Receivers. 'Cary *v.* Hills.

state their provisions in greater detail. The Administrator-General's Act, ss. 17 and 18, apply only when the assets are within the Presidency towns. See the Provisions of the Civil Procedure Code (O. XI.) for the appointment of receivers and cf. 'Cary *v.* Hills,'[1] in which Lord Romilly M.R., said that if the estate has been taken possession of by a person who is not the legal representative, and no other person is constituted the legal representative, the proper course is to file a bill for a receiver to take care of the property until a legal personal representative is appointed.

Necessity of some one to represent the estate.

Lord Romilly said : "You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the Court ; if you were able to do so, you would work great injustice. If at the hearing of an administration suit, the Court finds that it has not the legal personal representative of the testator before it, then its arm is paralyzed, and it can do nothing. This plea in substance says that there is no legal personal representative of the testatrix, and indeed it is not alleged or even suggested that any person other than the Defendant has been constituted, her legal personal representative. It is true that the bill alleges that the Defendant has possessed himself of some part of the personal estate; but if he had possessed himself of every penny, that would not entitle the Plaintiff to the relief he asks. If a person has taken possession of the estate, you may file a bill for a receiver to take care of the property until a legal personal representative is appointed, and the Court will appoint a receiver for that purpose; but that is a totally different thing from making a decree for general administration."[1]

Wrongful possession.

Receiver.

[1] (1872) L. R 15 Eq. 79. 82. Muhammadan law empowers the *Qazi* to appoint a joint manager when the executor appointed by the deceased is incompetent. See above pp. 494. 495.

CHAPTER XIII.

WILLS.

§ 1.—Preliminary.

576. In this chapter unless there is anything repugnant in the subject or context—

(1) "Will" means the legal declaration of the intentions of a Mussulman with respect to his property, which he desires to be carried into effect after his death.[1] Will.

(2) "Estate" means all the property[2] which a deceased Mussulman owns at the time of his death, after his debts have been discharged, and his funeral expenses paid thereout.[3] Estate.

Will is thus defined in the 'Hidaya:' "Will means the endowment with the property of anything after death,"[4] and the 'Shara' ya-ul-Islam' says: "To bequeath is to confer a right to the substance or usufruct of a thing after death; it requires declaration and acceptance."[5] The Arabic word for will is 'wasiat,' meaning "precept." The earliest wills of the Arabs must have been nuncupative, made in many cases, in the midst of battle and surrounded by the tribesmen.[6] The importance given in the Muhammadan law books to the rules dealing with bequests of fractions of the estate, and the fact that the rights given to many of the heirs consist of the same nature, suggest that the will in pre-Islamic times must often have consisted merely of a nomination of a universal successor, an easy step being to nominate more than one person to form conjointly the universal successor. Will defined. 'Wasiat.' Nomination of universal successor.

577. The will of a Mussulman is (subject to the Probate and Administration Act) governed in British India by the Muhammadan law.[7] Law of

[1] Cf. Probate and Administration Act. s. 3.

[2] Of any description whatever except such in which the interest of the deceased was limited to his life-time.

[3] Cf. s. 558, and p. 488 *n.* 2, above.

[4] Hed. 670.

[5] Bail. II. 229.

[6] Compare for Roman law. Gaius, II. 101. Justin. II. x. 1.

[7] See pp. 29, 30, above. Cf. (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1894) 8 Bom. 241.

SECTION 578

§ 2.—*Testamentary Competence and Capacity.*

(1) Competence of Testator to make a Will.

Competence to make a will majority and soundness of mind.

578. (1) Every Mussulman who is of sound mind[1] and has attained majority under the Indian Majority Act is competent to make a will;[2] *quaere*, whether a Shiah who has attained the age of ten years and is capable of discernment may validly make a will.[3]

Minor's will may be ratified.

(2) A bequest made by a person while a minor may be validated 'ab initio'[4] by his subsequent ratification.[5]

Lunatic's will does not become valid by his becoming sound; will invalidated by testator's lunacy.

(3) A will made by a person when his mind is unsound does not become valid by his subsequently becoming of sound mind.[5] A will made by a person while of sound mind becomes invalid if the testator subsequently becomes permanently unsound of mind.[6]

Will of suicide, invalid.

Exception—According to Shiah law where a person wounds himself mortally, or takes poison for committing suicide, and then makes a will, it is invalid ; provided that if he makes his will and then commits suicide, it is valid.[8] The onus of proving that a will is invalid under this rule of law is on the person impugning it.[7]

of testamentary competence.

The question as to the age at which a Mussulman may make a will in British India requires a consideration of both the Indian Majority Act and the Muhammadan law—the latter forms the rule of decisions in questions relating to succession except in so far as such law has by legislative enactment been altered or abolished."[8] Now the Succession Act, 1865, s. 46, which specifically deals with the question of the age at which a person may make a will does not apply to Mussulmans, nor is the said section incorporated in the Probate and Administration Act, or in any other Act to which Muslims are subject, such as for instance the Hindu Wills Act is with reference to the Hindus. But five years after the Succession Act, the Indian Majority Act was passed, and only questions relating to marriage, divorce, dower, adoption, and religion or religious usages, are excepted from its operation. So that, by implication, majority in the matter of succession (and the law of wills forms a part of the law of succession[9]) is to be governed by that Act : in other words, the provisions of Muhammadan law as to majority so far as the law of wills

Succession act not applied.

Wills not excepted from Majority Act.

[1] Roman law did not permit the dumb to make a will, Justin. II. XIX. 4., cf. also III. XIX, 7 ; Gaius III. 105.

[2] Bail. I. 617. See comment.

[3] Bail. I. 613 ; II. 229.

[4] *Sic*, Bail. I. 617.

[5] Bail. I. 617.

[6] Ameer Ali "Mahommedan law" I. 467 : "according to *Kazi Khan* if a person makes a *wasiat* and subsequently thereto becomes a permanent lunatic, in such a case the *wasiat* will become void. But when the madness has not lasted over six months, the bequest will not be avoided."

[7] Bail. II. 232 (para. 2) ; *Mazhar Husen* v. *Bodha Bibi* (1898) 21 All. 91 (P.C.) will of suicide valid, when made in contemplation of taking poison, but before it had actually been taken.

[8] The exception is not expressly mentioned in the case of the High Courts. See above p. 29.

[9] *Mancharji Pestanji* v. *Narayan Lakshumanji* (1863) 1 Bom. H. C. R. 77, 80, 81.

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is concerned is "altered or abolished" by the Indian Majority Act which provides that minors shall be deemed to have attained majority on completing 18 or 21 years.[1] But in order that the Majority Act should affect the competence of a Mussulman to make a will, it must be held that either the Majority Act or the Muhammadan law requires the attainment of majority as a condition precedent for testamentary competence,—in other words, that under either the Act, or the Muhammadan law, being a major is a necessary qualification for having the power to make a will— it has first to be determined whether the attainment of majority is necessary for competence to make a will under Muhammadan law; and then whether or not majority will be determined for this purpose by the Indian Majority Act: The act does not contain any specific provision of substantive law laying down the effect of being a major or a minor as regards any juristic act,—while according to Shiah law, majority does not seem to be a necessary ingredient of testamentary capacity, inasmuch as that law fixes an age (viz., 10 years) independently of the age of majority for competency to make a will. If this is so, then strictly speaking the Shiah law of wills must be deemed to be unaffected by the Indian Majority Act, and a Shiah who is ten years old, and has discretion must be considered competent to make a will. The Courts would, no doubt, strive hard to avoid this conclusion, and would scarcely hesitate to read into the Majority Act a provision which though not expressed, seems to be its implied object and purpose, and without which it would almost be rendered nugatory. Under Hanafi law, on the other hand, competence to make a will connotes puberty; now puberty being the age at which according to Muhammadan law, a person attains majority, it has to be considered with reference to each subject and context, whether the term puberty must by operation of the Indian Majority Act be replaced by the words "attainment of 18 or 21 years (as the case may be)." In coming to a decision on this point as regards wills (should the question ever arise) the Courts will, no doubt, be influenced by the close analogy that testamentary capacity has to contractual capacity. A will purported to be made by a person under 18 years would (apart from the doubts above referred to) be peculiarly liable to attack on the ground of undue influence.

Two questions:

1. Is attainment of majority an ingredient in testamentary capacity?

2. How must majority be determined?

Shiah law.

Hanafi law

Will of junior and under influence.

As some doubt has been expressed[2] as to whether the Shafi'i law on this point does not agree with Shiah law, the following translations from Shafi'i texts may be useful: (1) "A will is valid if made by one who is capable of duties being imposed on him, and free (although he may be a non-Muslim) so also by one who is under inhibition on account of imbecility, according to the faith (of Shafi'i), but not by an insane man, nor a man who is not in his senses, nor a child: though according to one authority it may be valid if made by a child who has discernment.[3] (2) "The constituent parts (of a will) are: the legatee, the object of bequest, the words (of appointment) and the testator. It is required of him (i.e. the testator) that he be capable of having duties imposed on him, being free, and having freedom of will for action, and it would not be valid without

Shafi'i law agrees with Hanafi, not Shiah law.

[1] The two divisions (the law of succession and of minority) are cross divisions: for it is plain that the law governing a minor who purports to make a will falls within both the divisions. See Holland, "Jurisprudence" (7thed., (1895) 122, 123 which brings out this point with great clearness by a tabular statement.

[2] Hed. 673; Wilson, 415.

[3] *Minhaj-ul-Talibin*: Wills, (lines 1-3).

SECTION 578 these conditions."[1] No doubt under the Majority Act no minor would be considered to be capable of having duties imposed on him.

(2) Testamentary Capacity, how Limited.

Testamentary capacity :

579 (1) Subject to subsection (2) below a testamentary disposition by a Mussulman is invalid if and in so far as it purports—

One-third of estate. Bequests to heirs invalid.

(*a*) to dispose of more than one-third of the testator's estate,[2] or

(*b*) to benefit any of his heirs,[3] or

Not opposed to Islam. Consent of heirs validates (*a*) and (*b*).

(*c*) to benefit an object opposed to Islam as a religion[4]—

unless in cases (*a*) and (*b*) above referred to the heirs whose rights are affected by such disposition[5] consent to it after his death[6] expressly or impliedly [or by passive acquiescence.[7]]

Exceptions under Shiah law.

(2) Under the Shiah 'Ithna 'ashari' law[8]—

1. Consent during lifetime.

(*a*) the consent above referred to is valid, notwithstanding that it is given in the life-time of the testator, and is not ratified after his death ;[9]

(*b*) the testator may, without the consent of his heirs, validly bequeath—

2. Bequests to heirs.

(i) legacies to any of his heirs, payable out of a third of his estate ;[10]

Shaikh-ul-Islam Zakari al Ansari's *Man*- Book on *Wasaia* (*ll.* 1-4.)

Bail I. 614, 634, etc., II. 233.

Fatima v *Ariff* (1881) 9 Cal. L. R. 66. See next note i. e. p. 6526 *n.* 5.

[4] I.e. the actual heirs at his death, not the presumptive heirs at the time of the bequest. *Upon the Petition of Keramat-ul-Nissah Bibi* (1817) 2 Morley 120. *Jumeenooddeen Ahmed* v. *Hossein Ali* (1865) 2 W. R. Mis., 49. (will disinheriting all heirs) : *Qadir Ali Khan* v. *Nowsha Begam* (1867) 2 Agra 154 (altering rights of heirs) : *Mahomed Mudun* v. *Khodezunnissa* ALIAS *Khookee Beebee* (1865) 2 W. R. 181 (more than half to daughter) *Muhammad* v. *Imamuddin* (1865) 2 Bom. H. C. R. 53 (2nd Ed. 50) (to brother without consent of husband), *Baboojan* v. *Muhammad Nurool Haq* (1868) 10 W. R. 375 : *Oomutoonnissa Beebee* v. *Areejoonisa Beebee* (1865) 4 W. R. 66.

[5] A Mussulman has no power to appoint by will guardians for marriage of his minor children, Bail. I. 47, II. 8.

[6] *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683. (Consent during life is not enough in Sunni law) *Nusrut Ali* v. *Zeinunnissa* (1871) 15 W. R. 146 ; *Cherachom Vittil Ayisha Kutti Umah* v. *Vali Pudiakel Biathu Umah* (1865) 2 Mad. H C. R. 350 ; Ameer Ali, "Mahommedan law" (3rd ed.) I. 486, states that consent during the last illness of the testator is irrevocable, because the heir is supposed to have then acquired the right. No authority is cited for the proposition.

[7] Macnaghten 244, 245 *Ramcoomar Chunder Roy* v. *Faqueeroonissa Begum* (1822) 1 Ind. Jur. (o.s.) 119 heiress continued to reside in house bequeathed to her : *held* this is no consent to will, in absence of some act of actual consent or ratification : otherwise, where heir affixes his signature to will consenting thereto without undue influence as in *Khadijah Bibee* v. *Suffer Ali* (1865) 4 W. R. 36. *Sharifa Bibi* v. *Gulam Mahamed* (1892) 16 Mad. 43. See also *Cherachom Vittil* v. *Valia* (1865) 2 Mad. H. C. R. 350 *Nusrut Ali* v. *Zeinunnissa* (1871) 15 W. R. 146 *Daulatram* v. *Abdul Kayum* (1902) 26 Bom. 497.

[8] Bail II. 236.

[9] The Shiah *Isma'ili* law corresponds to the Sunni law *Da'ayam-ul-Islam*. See comment. Bail. II. 236.

[10] Bail II, 244 (para 2)

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(ii) any part of his estate (though it exceeds a third) for the performance of such religious duties as are incumbent on himself.[1]

3. Bequests for incumbent religious duties.

(iii) the whole or any part of his estate by way of 'muzaribat' or 'qeraz'[2] on the terms of an equal division of profits between the legatee and his heirs,[3]—*sed quaere*.[4]

4 Bequest in 'muzaribat.'

(3) Where a testamentary disposition of more than a third of the testator's estate is validated by the consent of the heirs, given after his death, it operates except according to Shafi'i law as the act of the testator, and not as a gift by the heirs; and it is not necessary that possession of the subject of the bequest be given to the legatee in order to complete its transfer to him.[5]

Bequest validated by consent of heirs is not a gift requiring possession.

(4) *Semble*, the burden of proof is on the legatee to show that the will does not infringe the rules above referred to.[6]

Burden of proof on legatee.

Explanation—In the absence of heirs[7] and as against the right of the State to take by escheat,[7] the testator may bequeath the whole of his property by will.[8] Where the testator purports to make a disposition which is not valid unless the heirs consent to it, and some of the heirs consent while others do not, the legacy, in so far as it requires such consent, is to be paid out of the shares of the consenting heirs alone.[9]

When no heirs

Where some only of the heirs consent.

Illustrations.

(1) T a Sunni makes a will leaving a house, which exceeds in value one-third of his estate, to a stranger. If the heirs consent, the bequest is valid.

[1] Bail. II. 234.

[2] The two words have the same meaning. Richardson gives the following (amongst other) meanings: "*qeraz*, repaying, requiting (good or bad), going partnership; trading with another's capital . . . ." *Muzaribat*, selling the goods of another for half the profit, . . . partnership." Bail. I. 161 *n*. 3 defines *muzaribat* as "a contract in which the capital is contributed by one party, and the labour and skill by the other, with a mutual participation in the profit." The *Tahrir-ul-Ahkam* a great Shiah authority says: "*muzaribat* or *qeraz* is a legal transaction, by unanimous consent. It is the delivery of property by one person to another, that he may labour with it under a provision that the labourer shall be a partner in the gain, without being subjected to any share of the loss . . . a contract of *muzaribat* may be executed by a person on his death-bed, and if he provide more than the ordinary hire for the manager this provision becomes binding in the event of his death, over the whole of his property."

[3] Bail. II. 234 (para. 4) *Tahrir-ul-Ahkam* Book on *Qeraz* Ch. 1.

[4] See comment.

[5] Bail. I. 616.

[6] Cf. *Sukoomut Bibee* v. *Warris Ali* (1874) 22 W. R. 400.

[7] This also refers to the case where the rights of the heirs do not exhaust the estate, i.e. where the testator leaves only a husband or wife surviving him. See s. 579 *ill.* (7), (8).

[8] E.g. in *Moohummud Ameenoodeen* v. *Mohummud Kubeeroodeen* (1825) 4 S. D. A., CAL. 49; cf. *Ekin Bibee* v. *Ashruf Ali* (1864) 1 W. R. 152.

[9] Irrespective of the subject of bequest being within or beyond a third of the estate.

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(2) T makes a will leaving property, whether exceeding in value one-third of the estate or not, for a purpose prohibited by Islam. The heirs consent. The will is not validated by the consent of the heirs.[1]

(3) A Mussulman cannot validly make a will (*a*) for building Jewish Synagogues,[2] or (*b*) Christian Churches,[2] or (*c*) for translating the 'Towreet,' or 'Injeel,' (the law or gospels),[2] or (*d*) aiding a tyrant or oppressor,[2] or (*e*) directing that so much of his property should be given to L, LA, and LB for reading the Quran, over his grave,[3] or (*f*) that his grave be plastered, or a vault or arch be placed over it, unless such precautions are required against the ravages of wild animals,[3] or (*g*) that he should be buried in his mansion, or that poor people should be buried in it, unless he directs that his mansion be converted into a general cemetery,[3] or (*h*) for shrouds to Muslims, unless it is restricted to poor Muslims.[4]

(4) T directs that one-third of his property should be spent after his death on building a 'masjid.' This is valid.

(5) T a Sunni Mussulman, bequeaths a legacy to his brother B, having at the time of the will no other heir; afterwards a son, S, is born to T, who thus becomes the sole heir of T. The bequest to B is valid without the consent of S.[5]

(6) T a Sunni Mussulman, has a son, S, and two brothers, B, and BA. T leaves a legacy to B, then S dies in T's life-time. The legacy to B is not valid without the consent of BA.[5]

(7) *T*, a woman, dies leaving her husband H, and no other heirs. *T* purports to bequeath half of her property to L. The bequest is valid as against H only to the extent of a third of the estate, hence a third of the estate is given to L, in the first instance, and H takes his legal share of a half of the net estate, i.e. a half of the two-thirds of the estate or one-third of the whole. Then out of the residue (i.e. one-third) that would have escheated to the State, L can again take a sixth to complete the half that is bequeathed to him. So that ultimately the estate is thus divided: H takes one-third, L one-third plus one-sixth (i.e., a half); and one-sixth escheats to the State.[6]

[1] *Abdul Karim* v. *Abdul Qayum Khan* (1906) 28 All. 342.

[2] Bail. I. 625 II. 230.

[3] Bail. I. 624.

[4] Bail. I. 625. It would seem that it is unlawful to restrict a burial place by any qualifications except of a charitable nature.

[5] Bail. I. 615.

[6] Bail. I. 634. But see (*Shek*) *Muhammad* v. (*Shek*) *Imamuddin* (1865) 2 Bom. H.C.R. 50, 53: In this case the will was held to be totally invalid, as the testatrix purported to give to her brother her whole property disregarding her husband's rights. The law seems to be that where there is an attempt to exclude an heir the will is invalid; but *ill.* (8) indicates that purporting to bequeath the whole property to a stranger is not necessarily tantamount to such attempt. In the case referred to no one appeared to support the will, as being valid to the extent of one third, before the High Court. The Judgment is meagre: the brother was probably also an heir, which would be another ground for holding it invalid; for though the judgment holds it invalid as it is a bequest by the testatrix of the whole of her property "which it was not lawful for her to make," the ground taken by the High Court is hardly enough to avoid the will *in toto*. In *Bafatun* v. *Vilaiti Khanum* (1903) 30 Cal. 683, the Court proceeded on the basis that the husband or wife succeeds to the whole estate if there is no other heir.

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(8) T dies leaving him surviving only *W* his wife, and purporting to bequeath all his property to L. L takes five-sixths, and *W* one-sixth.[18] For H takes at first one-third as legatee; then *W* takes one-fourth of two-thirds i.e., one-sixth, and then the residue does not escheat to the State, but goes to L.[1]

(9) *T* devises the whole of her estate to a stranger. One of her sons attests it, and the other consents to her making it; the property is then attached in execution, and the legatee sets up the will to remove the attachment; *held* that the attachment must be removed from the whole of the property and not merely from a third, as the sons had by their conduct acquiesced in the will after the death of the testatrix.[2]

'Sunna' on testaments.

The restriction on a Muslim's testamentary capacity to a third of the estate has been referred to the following traditions as its ultimate authority—

Will of Muslim restricted to one-third of estate.

"Sa'd ibn Abi Wakkas said: 'I was ill in the year of the conquest of Mecca, and was near dying, and the Prophet came to see me, and I said: "Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, leaving all my wealth for religious and charitable purposes?" He said. "No;" I said, "may I do so with two-thirds of it?" He said, "No;" I said, "Shall I with one-half of it?" he said, "No;" I said "May I with a third of it?" His Highness said "Make a will disposing of a third in that manner; for a third is a great deal, particularly of this great wealth which you possess, for verily if you die and leave your heirs rich, it is better than leaving them poor to beg, for verily the money which you expend for God's pleasure, you will be rewarded for, even to the mouthful which you lift up to your wife's mouth.'" '"[3] "Sa'd ibn Abi Wakkas said: 'His Highness came to see me when I was sick, and said "have you made your will leaving anything to be expended in the road of God, and for charitable purposes?" I said "Yes I intended to do so." He said 'In what proportion of your wealth have you intended so doing?" I said "All my wealth is for the road of God." The Prophet of God said "Then what have you left your children?" I said "There is no necessity for my leaving anything to them, for they are rich." His Majesty said "Make your will leaving one-tenth in the road of God." And I continued repeating my desire to leave more, till at last the Prophet said "Then make your will leaving one-third for that purpose, and one-third is a great deal." '"[4]

This rule with general scheme of succession.

It has been said that the tradition cited above—the two versions evidently refer to the same occasion—may have had reference to the particular circumstance, standing by itself. It may no doubt be liable to that interpretation, but the law of intestate succession discloses one great principle underlying the reforms in the law introduced by the Prophet, viz., where the pre-existing customary rules of succession are amended, so that persons who were not recognised as heirs by the customary law, acquire rights under Islam (ousting to the extent of the rights so acquired, the customary heirs) in such cases the rights given by Islam to the newly entitled heir comprise as a rule half the interest which is

[1] See p. 528, *n.* 6.

[2] *Daulatram* v. *Abdul Kayum* (1902) 26 Bom. 497.

[3] *Mishcat-ul-Masabih*, XII. xx. 1.

[4] *Ibid* XII. xx. 2.

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Bequeathable third how fixed.

still left to those who used to take under the customary law—or as the Arabic idiom would have it "the property is to be divided in thirds,"—those whose rights were prior in time taking twice as much as those who had just acquired them, i.e., the former took two-thirds, and the latter one-third. May it not be that this same principle was clearly understood in regard to wills? It finds place in the books of all the schools. Thus the scheme of the law of (intestate) succession is not complete, unless it is borne in mind that while definite fractions of the estate are given to the various heirs recognised by the law, there is left over a third of the estate in the entire discretion of the testator to be dealt with in accordance with his particular circumstances, and it is an injunction of the Prophet that every man with a family should make a will. So that while on the one hand no person is permitted (according to the most general views of the law) to disturb the operation of the law amongst those who are already recognised as heirs, yet on the other, the scheme in the mind of the law-giver is not complete unless the testamentary powers are utilized for the purpose of providing those who do not succeed under the general law. Unfortunately the assumption that every man will act with the necessary prudence, is not always justified.

Will completes the scheme of Succession.

Bequest in favour of heir, allowed by 'Ithna ashari' law.

The difference between the 'Ithna 'ashari' and other systems of Muhammadan law about bequests in favour of heirs deserves special attention:

According to the 'Shara'ya-ul-Islam' "a bequest in favour of one's kindred is highly proper whether they be his heirs or not."[1]

Isma'ili' Shiahs do not permit such bequests.

On the other hand such bequests are invalid not only under Sunni law, but also under the other school of Shiah law, viz., the Shiah 'Ismai'li' law; and the reason assigned for such invalidity in the 'Da'ayam-ul-Islam'—the most authoritative work amongst the Ismai'lis (unprinted),—is that the law of succession being laid down in the Quran, it is setting at nought the precepts of Islam to attempt to alter the relative rights of the heirs (see s. 579 (1) (*c*)). This is shown by the following official translation of portions of photographed extracts, from the said work made in the case of 'Tyabally *v.* Abdulali.'[2]

Isma'ili' authority.

"Question No will for an heir?"[3] "I said to (? asked) the Syed (may peace be on him), 'Is it stated that no will shall be executed in favour of an heir?' He said, 'Yes.' I asked, 'Is then a gift allowable in favour of an heir?' He said, 'Yes' I said [? asked] 'What is the meaning of his [that is the Prophet's) words "No will shall be executed in favour of an heir"?—If one says while one is sick "I give my one-third to such and such a one of my sons," will not that be allowable?' then he (may peace be on him) said 'Does he take the one-third as well as the inheritance? [If so[4]] it is not allowable, unless it is allowed by the heirs?' Then he said 'A gift made during sickness is also not allowable because a gift made during sickness is tantamount to a will.' I say verily in the opinion of Syed a will made in favour of an heir is not allowable under any circumstances, whether (it is made) during health or during sickness . . . .[5] And it is stated on the authority of him, (peace be on him) that if a bequest

[1] Bail. IL 247 (para 6.)

[2] Unreported suit 555 of 1910 of the Bombay High Court.

[3] The text of this portion appears in the margin.

[4] The words "if so" inserted by the Official Translator seem to be quite out of place—F.B.T.

[5] The words omitted refer to another point, viz., "He said, about a man who had bequeathed to another man a share out of his one-

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to an heir had been allowed, he would have been given, out of the inheritance, more than what is appointed for him by Him, [i.e., God] (be His name honoured and glorified), and whoever makes a bequest to a [particular] heir of his, certainly reduces the right which God has appointed for him [i.e., another heir] and acts contrary to His Book (be His memory glorified) and the act of a person who acts contrary to His Book shall not be allowed." The view taken by the 'Ithna 'ashari' authorities is opposed to this reasoning, and is based on the Quran: [1]

> "It is prescribed for you that when one of you is face to face with death, if he leave (any) goods, the legacy is to his parents and to his kinsmen in reason. A duty this upon all those that fear."
>
> Quran II. 175

The Sura in which this verse occurs was, however, promulgated in the second year of the Hijra (i.e., in 622-623 after Christ) whereas the verse by which parents are declared to be heirs is Sura IV. 12, promulgated after the battle of Ohod in the third year of the Hijra. The later verse replaced by a definite rule of law what was merely a recommendation in the earlier Sura, so that it may well be argued that the recommendation of a legacy in favour of parents was made when they were not heirs, and was the first step towards giving them the right to inherit, and this view is supported by the following tradition "Abu Umamah said 'I heard the Prophet of God say in his Khotbah' (in the year of his farewell pilgrimage) 'verily God has given to everyone his right, then there is no will for heirs.'" [2]

Reasons for difference of views

The reasons why such different interpretations where put on the same verse of the Quran, by the 'Ithna' ashari' Shiah and the other Muslims, are not easy to find out. Throughout all branches of the law, however, it will be found that the original customs of the Arabs have a much more stable position in the Hanafi law than in the Shiah law. Possibly one of the causes of this may be that the Shiah law developed somewhat later, and continued developing for a longer period,[3] and in countries where the original laws of the Arabs were neither established, nor sufficiently known or ascertainable. The rules against disturbing the provisions of the law of Islam in favour of the various heirs, were no doubt necessary when the Arabs had recently been forced to abandon their customs relating to inheritance (especially in regard to the exclusion of females) and where there was a natural tendency to revert to them as far and as often as possible, or to bring about the same result by testamentary dispositions. Where, however, those customs had been forgotten, there was less necessity for insisting that the relative rights of the heirs should not be so disturbed.

Consent of heirs cannot be withdrawn.

The Sunni authorities lay down that if the heirs have once consented, they cannot withdraw their consent [4] and the 'Shara'ya-ul-Islam' states as to Shiah

third, that he (i.e. the legatee) should be given one sixth thereof, because the shares allotted to heirs come out of six, and this is the unanimous opinion (of the Jurists) so far as we know" on which there is a note by the Official Translator: "According to the Koran the share of a legal heir is any one of the following six shares, two-thirds, one-half, one-third, one-sixth, or one-eight" cf. Bail. I. 689 (para. 3).

[1] Sale's translation is still more in favour of the *Ithna 'ashari* view, but it is less literal

[2] *Mishcat-ul-Masabih*, XII, xx., 2.

[3] The *Ithna' ashari* Shiahs recognise 12 successive *imams* or heads of religion, the *Isma' ilis* only 7. Shafi'i lived later than Abu Hanifa, and travelled extensively. His system agrees on many points with that of the Shiahs.

[4] Bail. I. 616; Hed. 671.

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law that if the heirs at first assent, and then declare that their assent was given through a mistake as to the value of the bequest, or as to its excess over the third of the estate, the decree will be given for the amount, that they admit. An exception is, however, made where the bequest is of a slave or mansion the value of which must have been known to the heirs, and the consent once given cannot in such a case be retracted.[1]

Consent of presumptive heirs.

As under Shiah 'Itna, 'ashari' law the testator may obtain the consent above referred to during his life-time, the question may be raised whether, if the presumptive heirs for the time being give their consent, the will becomes valid even against other heirs, whose rights to inherit arise subsequently to the will, as was held in a case governed by Hindu law on the point of alienation by a widow.[2] It would seem that the analogy of that case would not apply in Muhammadan law ; see 'Fahmida *v.* Jafri,'[3] which, however, does not appear to be quite accurate in so far as it implies that the Shiah law requires the consent of heirs to be given after the death of the testator. The Sunni law lays down in clear terms that the actual heirs after the death of the testator must consent to bequests beyond one-third[4] just as the legacy is invalid only if it is in favour of one who is actually heir after the death of the testator. But the complication of consent previous to the testator's death does not arise, except in 'Ithna' ashari' law.

Bequest of over one-third in 'muzaribat.'

The 'Jawahir ul Kalam'[5] has a long comment (too lengthy to be quoted) on the passage in the 'Shara'ya-ul Islam'[5] on which s. 579 clause (iii) is based: It appears that (1) the Shiah jurists are agreed that during the minority of the children of the testator, either the whole property, or at least the shares of the minor children, may be bequeathed in 'muzaribat;' (2) when the heirs are not the minor children of the testator, then the testator has the power of bequeathing in 'muzaribat' not only a third of his property, but apparently any portion of the property, so long as the benefit to the 'wasi' (viz., the person to whom the property is bequeathed in 'muzaribat') does not exceed one-third of the testator's estate. So far there seems little dissent, but some jurists (including the author of the 'Shara' ya-ul-Islam'[6]) seem to hold that the whole property may be so bequeathed regardless of the restriction contained in the last sentence ; but this seems to be doubtful.

Restrictions on testamentary capacity of some kind or the other, are to be found in most systems of law.[7]

[1] Bail II., 236.

[2] *Bajrangi* v. *Manokarnika* (1907) 30 All. 1.

[3] (1908) 30 All. 153.

[4] Bail. I. 615.

[5] *Jawahir-ul-Kalam*, IV. 656-658

[6] Bail. II. 234 (para. 4) *Tahrir-ul-Ahkam*, Book on *Qeràz*, Ch. 1.

[7] Thus in HINDU LAW the restriction is based on a division of the property into ancestral and self-acquired. In ENGLAND the Statutes of Henry VIII dealing with wills (32 Henry VIII., c. 1, and 34 Henry VIII., c. 5) enacted that all persons seised in fee simple might . . . by will in writing devise to any other person . . . two thirds of their lands held in chivalry, and the whole of those held in socage : which, on the alteration of tenures by the statute of Charles II, amounted to the whole of their landed property except their copy-hold tenements." The FRENCH CIVIL CODE provides by artt. 913, 915, that advantages resulting from donations inter vivos or from wills cannot exceed (*a*) one half of the property of the person who has made such disposition—if he leaves (i) only one legitimate child at his death, or (ii.) one or more ascendants in each of the paternal and maternal lines ; or (*b*) one-third of the estate if he leaves two children ; (*c*) one-fourth if he leaves ascendants in only one line—Henry Cachard's " French Civil Code " (1895) pp. 213-214.

(3) Subject of Bequest.

SECTION 580

Subject of bequest.

580. (1) A bequest may be validly made of anything which is in existence, and capable of being transferred at the time of the testator's death.[1]

Right of occupancy. Rights limited in point of time, as during life of legatee.

(2) The right to occupy a house during a future period of time,[2] or of taking the future produce of immovable, or other property for a limited time, or for the life-time of the legatee, may validly be the subject of a bequest:[3]

(3) Where the bequest is of a right to take the profits of a house, the legatee, except under Shafi'i law, has no right to live in it.[4] Under Shafi'i law the legatee becomes "as it were the proprietor of the house."[5]

Illustrations.

(1). T makes a will in 1880 providing that L should have the right to occupy T's house during the year 1890. If T dies in 1885, the bequest is valid,[6] but if he lives till 1891, it is void; and if the bequest is valued at more than the third, then the period of residence has to be apportioned with the heirs, so as to fall within the third.

(2) If T bequeaths to L *(a)* "the produce of his garden or land or the occupancy of a manor;" L is entitled to the existing and future produce whether the legacy purports to be "for ever" or not;[7] *(b)* "the fruit in his garden,"[7] if there is some fruit in the garden at T's death, L takes the existing but not the future fruit, unless specifically stated,[7] *(c)* "the wool of his flocks" or "their progeny" or "their milk, for ever" L is only entitled to the wool or progeny or milk existing at his death, and not the future produce[7] *(d)* "the produce of a house to the poor;" L has the right to receive it, as the bequest is lawful,[8] *(e)* his mansion to L, and of the right to occupy it to LA; both bequests are valid and effectual.[8]

(3) T by his will leaves a third of his estate to L. T is afterwards killed by the wrongful act, neglect, or default of X, and T's executors sue X, and recover damages in respect of the death of T. L is entitled to a third of the damages so recoverd.[9]

Bequest of service, or of

Cf. "A bequest of the service, of a slave or the occupation of a manor, or the produce of both, or of land and gardens, is lawful. And it is lawful for a limited time."[10] But ordinarily it will be presumed that the full proprietary interest is bequeathed, where either the unlimited right to take the profits, is bequeathed

[1] Bail. I. 614, 652.
[2] Bail. II. 240.
[3] Bail. I. 652.
[4] Apparently the reason is that the heirs are entitled to manage the property, and to give the produce to the legatee, who is given no right to occupy the house. Of course the heirs may permit him to occupy it; cf. Bail. I. 654. But see p. 49 above.
[5] Hed. 693.
[6] Bail. I. 652.
[7] Bail. I. 655 *n*.
[8] Bail. I. 656.
[9] Bail. II. 234.
[10] Bail. I. 652.

SECTION 580 or when the testator purports to impose restrictions as regards use or alienation which he cannot lawfully impose.[1]

(4) Effect of attempt to Exceed Powers.

(a) Disregard of Rights of Heirs.

Words purporting to exclude children, of no effect.

581. Where a testator purports to exclude some of his children [or, *quaere*, other heirs] from their shares in his estate, the words of exclusion will be treated as null and void, and will not be interpreted as amounting to a legacy of a third of the estate to the heirs who are not excluded.[2]

Illustrations.

(1) T says: "I give my son's," or "my daughter's share in my estate to L." If T means thereby to replace his son or daughter by L, the bequest is void.[3] But if he means "I give to L as much as to my son" or "as my daughter," the legacy is valid, and the son's or daughter's portion will be ascertained, and an equal portion given to the legatee.[4]

(2) T dies leaving a wife *W*, and no other heirs. By his will T purports to bequeath the whole of his estate to L. *W* does not consent to the will: hence as against *W* the will is valid only as to one-third of the estate; of the other two-thirds *W* takes her one-fourth share as Quranic sharer i.e. one-sixth of the whole estate. The rest is then available for L who thus ultimately gets five-sixths of the estate.[5]

This section follows from the preceding: If one heir cannot be preferred to the detriment of another, much less can any heir be absolutely excluded. These rules, it will be seen, are the counterpart of the rules against adoption: the ties of blood can neither be disregarded nor can any other tie take their place: either act would "induce a breach of the ties of kindred."[6]

(b) Disregard of Rule of Bequeathable Third.

(i) Effect of Will Purporting to Bequeath more than One-third.

Abatement of legacies exceeding a third.

582. Subject to section 107 of the Probate and Administration Act,[7] where a Mussulman purports to make a testamentary

[1] *Fair Muhammad Khan* v. *Muhammad Said Khan* (1898) 25 Cal 816; 25 I. A. 77. v. *Roheemunnissa*, (1872) 17 W. R. 190; *Muhammed Abdul Majid* v. *Fatima Bibi* (1885) 8 All. 39; 12 I. A. 159.

[2] Bail. I 629, II. 238. See however, Bail. I. 634 *ill* s. 581, *ill.* (2), and p. 528 *n.* 6 above.

[3] Bail. I 629.

[4] I.e., the legatee will share just like a son or daughter, and not in priority to them, as would be the case with other legatees—subject of course to the rule about the third of the estate, Bail. I. 629.

[5] Bail. I. 634.

[6] Hed. 671.

[7] The P. & A. Act s. 107 is as follows: "If the assets after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportion; and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself, or to any person for whom he is a trustee."

disposition of more than a third of his estate and the heirs do not consent thereto— SECTION 582

(1) According to Sunni law— (Sunni law).

(*a*) The legacies must first abate equally and rateably, subject to clause (*d*) below. Abatement.

(*b*) Next, the rateable portion (so abated) of each legacy which is for a secular, and not for a pious, purpose must be alloted to it.

(*c*) Thirdly, where any of the legacies are for pious purposes, their rateable portions (so abated) must be consolidated, and, out of the amount so consolidated, priority given to the extent of the full legacy mentioned in the will in the following order— Legacies for pious purpose

(i) The 'faráiz' or actually prescribed charities have precedence over other legacies for pious purposes.

(ii) Next come the 'wajibat,' i.e., which are not prescribed, but considerd necessary.

(iii) Thirdly come the 'nawafil,' which are voluntary.

(iv) Within each of the said divisions unless there is any legacy for an object to which priority is expressly given by the Hanafi lawyers,[1] each has priority in the order in which it is mentioned in the will.[2]

(*d*) Where any legacy is by itself of greater value than a third of the estate, there according to Abu Hanifa (from whom Abu Yusuf and Imam Muhammad dissent) the said legacy, in competition with the other legacies, must be reduced in the first instance to a third, and thereafter it will abate as mentioned above. This rule does not apply even according to Abu Hanifa where the subject of bequest is money, or it takes the form of a 'muhabat.'[3] Any single legacy exceed the third.

(2) According to Shiah law— (Shiah law)

(*a*) Those bequests that are prior in date take priority over those that are later in date, unless there is Priority according to date.

[1] There is a good deal of literature on the subject of the relative merits of pious bequests and charities which may have to be produced in Court, and, if necessary, proved in case a dispute arose, but the following order appears in the *Fatawa Alamgiri* and the *Hidaya* :—

(*a*) *Haj* (or pilgrimage.)
(*b*) *Zakat*.
(*c*) Alms.
(*d*) Expiation.
(*e*) *Sadaq-i-Fitrat*.
(*f*) Sacrifices.
(*g*). Vows.

[2] Bail. I. 626; Hed. 676; see p. 512 *ill.* (1). Wilson, "Anglo-Muhammadan Law," 203 s 271, is (it is submitted) inaccurate.

[3] See comment p. 538 below. *Muhabat* is a colourable sale or purchase, for a price below or above the real price

SECTION 582

anything in the will to show that such later bequest was intended by the testator as a revocation of the former.[1]

Legacies of fractions of estate.

(*b*) Where the bequests consist of legacies of fractions of the estate, and two legatees are successively given a third of the estate, it is a presumption of law [2] that the latter bequest was a revocation of the former.[3]

(*c*) Where the bequest to the said legatees do not consist of an exact third of the estate but of some other fraction, there it is a question of construction whether—

(i) there is an assumption on the part of the testator to deal with more than a third of the estate,—in which case the bequest which is earlier in point of time will have priority over the latter bequest; [4] or

(ii) there is such a repugnance between the two bequests as to indicate that the testator did not intend both bequests to take effect, but only one of them to do so,—in which case the later bequest prevails, and the former is presumed to be revoked.[4]

Explanation—It will be presumed, until the contrary is shown, that of two bequests contained in the same testamentary document, the bequest which is mentioned later, is later in point of time.[5]

Illustrations.

(1) "A man has made a will that (*a*) a hundred 'dirhams' shall be paid to the 'faqirs,' (*b*) a hundred to his relatives, and (*c*) that the poor should be fed in expiation of the prayers that he has missed [for which 40 'dirhams' would be required.] Then he dies [leaving 216 'dirhams'] and there are one month's prayers due from him: A third of his estate is not enough to pay for all these bequests. In such a case Shaikh Muhammad ibn Al-Fazl has said that the third should be divided in this way (with the following priorities): first 100 (should be allotted) for the 'faqirs,' next 100 for the relations, and thirdly (a sum should be allotted) for paying the price of feeding (the poor) at the rate of two maunds of wheat for each prayer [this sum, as stated above, amounts to 40 'dirhams;' so that the total legacies amount to 240 'dirhams;' and the third of the estate is only 72; hence the legacies must abate in the proportion of 72 : 240, i.e., to 30, 30, and 12 respectively] and then (*a*) whatever amount comes to the share of the relations [i.e., 30 'dirhams'] should be given to them, and (*b*) out of whatever portion

[1] Bail. II. 212 (*ll.* 9-21 of para 2.)

[2] It is difficult to say whether the presumption is irrebuttable. There is no such presumption under Hanafi law. Bail. I. 626.

[3] The testator is presumed to know and to bear in mind the rule of law that he can bequeath only a third of the estate. Bail II. 235.

[4] Bail II 234-235.

[5] Bail. II. 212; see comment p.

comes for the 'faqirs' [i.e., 30 'dirhams'] and for feeding the poor [i.e., 12 dirhams making altogether 42, with the 30 for the 'faqirs'] the food for the poor should first be paid out, and after the food has been paid out in full [i.e., 40 is to be paid out, for the poor] then (*c*) the 'faqirs' will be paid, i.e., the loss will be borne by the share of the 'faqirs' [who get only 2 'dirhams']. This is in the 'Fatawa Qazi Khan."[1]

(2) T, a Sunni, dies leaving estate worth Rs. 15,000, and purporting to leave legacies amounting to Rs 10,000, i. e., to L a house worth Rs. 4,000, and to LA another house worth Rs. 6,000. *Semble*, L and LA take half of the houses bequeathed to them respectively, the heirs taking the other halves.[2]

(3) T, a Shiah, dies leaving Rs. 3,000 as his net estate. In his death-illness he purports to make a 'waqf' of Rs 1,000, a colourable sale of property (valued at Rs. 2,000) to L at the price of Rs. 1,000, and a gift to LA of Rs. 1,000. The heirs do not consent, as each of these must be regarded as a legacy of Rs 1,000, the first according to priority of date will prevail and the others are invalid.[3]

(4) T dies leaving a son S, a daughter *D*, and purporting to bequeath three-fourths of his estate to S, and one-fourth to *D*. Under Sunni law the bequests are invalid, and *D* is entitled to take one-third of the estate.[4] If T is a Shiah, the bequest that is earlier in point of time will prevail to the extent of one-third of T's estate, and the later bequest will have effect only out of the surplus (if any) left over out of the one-third; i. e. if the bequest to S is earlier, he takes one-third as legatee, and then the two thirds are inherited by S and *D* in the proportion of 2 : 1; and if *D*'s is earlier she takes one-fourth as legatee, and the son then takes one-twelfth (i. e. one-third minus one-fourth) as legatee, and the residue (i. e. two-thirds is finally inherited by the two) in the proportion of 2: 1. The 'Ithna 'Ashari' Shiah law is referred to. Under Isma'ili law a legacy to an heir is invalid.

(5) In 1900 T, a Shiah, makes a bequest of Rs. 75 to L. In 1901 he makes bequest of Rs. 100 to LA. T dies in 1902, leaving Rs. 300. The bequest to L will be paid in full, and LA can take only Rs. 25.[3]

(6) T, a Shiah, dies, and a will is found amongst his papers in the following terms "I give to L a legacy of Rs. 75, and to LA a legacy Rs. 100." It will be presumed that the legacy to L was earlier, and it will therefore have priority in the same manner as in *ill* (5).[3]

[1] *Fatawa Alamgiri* IV, 324; (*Wasaia*, ch. 5). The words in [ ] are added by me. The legacies being originally 100 for *faqirs*, 100 for relations, and 40 for the prayers, i.e. 240 in all and the third of the estate being 72, there is an abatement in the proportion of 72: 240; or 3: 10, which reduces the legacies to 30, 30, and 12. Then the legacy for secular purposes (so abated) is paid out, (i.e. 30 to the relatives) whereas the two (abated) legacis for pious objects, viz. 30 for the *faqirs*, and 12 for prayers, are consolidated, making together 42, out of which the expiation of prayers being an incumbent duty is satisfied in full (i.e. 40 are given to it) leaving 2 for the *faqirs*.

[2] There is no express authority as to the mode in which abatement takes place under Sunni law when specific legacies exceeding a third of the estate are given and not consented to.

[3] Bail. II. 212; cf. *ib*. 234-235.

[4] *Fatima* v[1] *Ariff* (1881) 9 C. L. R. 66.

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(7) T, a Shiah, dies leaving a will, saying "I bequeath one-third of my estate to L." There is also a codicil to T's will, in which he says "I bequeath one-third of my estate to LA." LA will take a third of T's estate, and the legacy to L is considered as revoked.[1]

(8) T, a Shiah, dies leaving a will purporting to bequeath one-fourth of his estate to L, then he makes a codicil leaving a fourth of his estate to LA, and saying that one half of his estate should go to his heirs. The bequest to L has priority, and LA takes one-twelfth of the estate (i. e. one-third minus one-fourth).[1]

(9) T, a Shiah, says in his will: "My daugther's son is living with L, a stranger. I give to L one-fourth of my estate" Then T makes a codicil saying "L has ceased to maintain my daughter's son, who is now living with LA. I give to LA one-fourth of my estate." The legacy to L is revoked.

Legacy of more than a third.

Abu Hanifa differs on one point relating to abatement of legacies from his disciples. The 'Fatawa 'Alamgiri' does not indicate according to which view the 'fatwa' was given. But apparently the view of the majority would prevail. Abu Hanifa holds that if any one of the legacies is by itself in excess of a third of the estate, then (unless all the legacies fall within the two exceptions given below, or are consented to by the heirs) such a legacy, is to be cut down to one-third, and the legatee shares only in that proportion in competition with the other legatees. So that if T leaves a legacy of a half of his estate to L, and a fourth to LA, according to Abu Hanifa the bequeathable third of the estate has to be divided between them in the proportion of one-third and one-fourth. The two disciples do not accept this view, and according to them L and LA would share in the proportion named by the testator i.e., a half and a fourth. Abu Hanifa himself is of opinion that the principle of cutting down each individual legacy to a third of the estate does not apply in two cases,

(1) where the legacies take the form of 'muhabat,'[2]

(2) where the legacies consist of sums of money.

Mode of determining priority of legacy in point of time.

It may be mentioned that according to Shiah law bequests for satisfying religious duties which are incumbent on the testator rank as debts, but all the other debts will have priority over them.[3] Where a doubt arises as to which of two repugnant bequests was first mentioned, according to the Shiah authorities it must be determined by casting lots.[4] In British India this rule of Shiah law could have no force, as the question would be determined in accordance with the Indian Evidence Act. Cf. however the Oudh Laws Act, s.9., p. 485 above.

(ii) *Effect where there is Accession to Subject of Bequest*

583. Where there is an accession to the subject of the bequest after the death of the testator but before acceptance by the legatee, such accession will be considered to form part of the subject of the bequest, and in order to be valid without the consent

but before

[1] Bail II. 234, 235.

[2] See comment s. 582 (1) clause (*d*). A colourable sale or purchase for a price below or above the real price.

[3] Bail II. 231. See above pp. 489,527

[4] Bail. II. 212.

of the heirs, both the original bequest and the accession must fall within one-third of the estate [1] SECTION 584

2. Accession after acceptance.

584. Where the legatee accepts the bequest on the death of the testator, and there is an accession to its subject after such acceptance but before actual partition or distribution of the estate,—

(1) according to the author of the 'Kuduri' the accession becomes the property of the legatee, and it need not fall within one-third of the estate to be valid; but

(2) according to the 'Fatawa 'Alamgiri' the opinion of the Shaikhs is that the accession forms part of the legacy, and must fall within one-third of the estate, to be valid.[2]

3 Accession where there has to be abatement.

585. Where there is an accession, to the subject of a bequest, and there has to be an abatement because the legacies exceed a third of the estate—

(1) according to the two disciples, the original subject of the bequest and the accession both abate equally and rateably, and the legatee takes only such shares in each as together make up a third of the estate.[3]

Abu Hanifa's view.

(2) according to Abu Hanifa the legatee is entitled to have the whole of the bequest (in so far as it falls within the third of the estate, and is otherwise valid) satisfied out of the subject of the bequest as it was prior to the said accession, and if the legacy is valid beyond the value of the original subject then to have recourse to the said accession.[4]

Illustrations.

(1) T bequeaths a mare to L. After the death of T, but before a partition of the estate, the mare foals: and the values of the mare and its foal are together less than one-third of the estate. L is entitled to both.[2]

(2) T dies leaving estate worth Rs. 900 and bequeaths a mare of the value of Rs. 300 to L. (*a*) If, after T's death, but before partition, the mare foals and the foal is also valued at Rs. 300, according to Abu Hanifa L is entitled to the mare, and to a third of the foal. According to the two disciples he is entitled to two-thirds of the mare and two-thirds of the foal. (*b*) If the mare foals after L accepts, but before the distribution of the estate, according to the 'Kuduri,' L is entitled to both, but according to the 'Fatawa 'Alamgiri' the better opinion is that L's rights are the same as in

[1] Bail. I. 637-638.
[2] Bail. I. 638.
[3] Bail. I.
[4] Bail. I. 639.

SECTION 586

§ 3.—The Legatee : Competence : Joint Legatees.

Competence to hold property and competence to be legatee.

586. (1) Subject to section 579 above, a bequest may be made by a Muslim in favour of any person capable of holding property,[1] or for the benefit of an institution,[2] or for a religious or charitable object.[3]

Bequest to unborn persons.

(2) A bequest to a person not in existence at the time when the will is made, is void; provided that a bequest may be made to a child who is in the womb of its mother at the time when the bequest is made, and who is born within six months after it is made.[4]

Legatee must be in existence at time of bequest and not of death of testator.

It must be noted that the legatee is required by the 'Fatawa 'Alamgiri' and the 'Hedaya' to be in existence at the time of the bequest, and not at the time of the testator's death. The 'Shara'ya-ul-Islam states similarly that "a bequest in favour of a foetus hereafter to be conceived by a particular woman, or 'to whomsoever may hereafter be found of the children of such a man' is altogether null and void."[5] The Egyptian Code on the other hand speaks of 'apres de la mort du testateur', it is quoted by Scott J. in a case[6] where the distinction was not material as the testator died in 1861, and the plaintiff who claimed as legatee under the will was not born till 1884.

Bequest to non-Muslim.

It is laid down in the texts that a bequest may be validly made by a Muslim in favour of a 'zimmi', i. e, a non-Muslim living under the protection of a Muslim government; whereas a bequest in favour of a hostile non-Muslim is not valid: The exception is based on a distinction between 'dar-ul-Islam' (i. e. country subject to the Government of Mussulmans) and 'dar-ul-harb' a country not so subject. That distinction is out of date[5] and could have no applicability in a country where " all or almost all the great religious communities of the world exist side by side under the impartial rule of the British government. While Brahmin, Buddhist, Christian, Mahomedan, Parsi, Sikh are one nation, enjoying equal political rights, and having perfect equality before the tribunals, they coexist as separate and very distinct communities having distinct laws affecting every relation of life."[6]

Legacy to murderer void.

587. A bequest becomes void if the legatee (not being under puberty, nor insane) causes the death of the testator, whether the bequest was made before the act which causes death or after it.[7] According to Sunni law (but not according to Shiah law) a bequest is so avoided notwithstanding that the legatee has unintentionally

[1] Bail. II. 230, I 625.

[2] Bail. I. 624.

[3] Bail. I. 625. It would seem that it is unlawful to restrict a burial place by any qualifications.

[4] Hed. 674 Bail. I. 617; II. 244, 246 *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158, 163 per Scott J.; *the Tagore case* i.e. *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872) L.R., I.A., SUPP VOL. 47, 70,) to which Scott J. refers requires the legatee to be in existence at the testator's death. The succesion act s. 77 of course does not apply to Muslims.

[5] See Bail. I. 616, 169-171 and *nn*. Bail. II. 244 (para. 2) shows that the Shiah law is uncertain on several points.

[6] *Skinner* v. *Orde* (1871) 14 Moo. I. A. 309, 323.

[7] Bail. 1 615-616. The slayer is disqualified from inheriting, *ib. n.* 1.

caused the death of the testator.[1] Such a bequest may be validated by the consent of the heirs[2] and if the legatee is the sole heir the bequest to him is valid.[3] SECTION 587

No comment is necessary to show the reason of the provision of the law that no person who has caused the death of another can inherit from the latter.[4] The original cause of inheritance amongst the Arabs in Pre-Islamic times was itself closely connected the blood-wite and blood-feud, and so the rule is expressly stated by the Muslim jurists. On the other hand the Courts in England had to fall back upon general principles in order to exclude Mrs. Maybrick and Crippen from taking benefits in the estates of the persons they murdered, respectively.[5] In the latter case Sir S. Evans said: "It is clear that the law is that no person can obtain, or enforce any rights resulting to him from his own crime, neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." Reason for the rule. English law.

588. Where a bequest is in the way of God, or a general charitable intention is disclosed by the testator, it is lawful, and it must be expended on good objects, and for the benefit of the poor.[6] Bequest for charity

Hence if a person bequeaths one-third of his property "for good purposes," it may be expended in erecting bridges or mosques or for students of learning.[7] And in the will of a Khoja, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," has been held to be valid,[7] and a scheme directed to be settled for the application of the fund to charitable objects, by analogy of 43 Eliz. c. 4. But when under colour of a religious bequest, there is really a legacy to the trustee personally, it will rank as such, and if the (nominal) trustee is one of the testator's heirs, it is not valid without the consent of the other heirs.[8] For "good purposes." "To be disposed of in charity as my executor shall think fit."

589. (1) The assent of the legatee expressly or impliedly given after the death of the testator, is necessary to complete his title to the subject of the bequest;[9] and the legatee may prevent its vesting in himself, by disclaiming the legacy, provided that he Consent of

[1] The *Shara'ya-ul-Islam* does not seem to contain any thing on the effect of a legacy to the slayer, but no doubt the law is the same as that of such a person inheriting. See comment. This may have some effect if the terms of the bequest impose conditions; e.g. if he is to take jointly with another or to take merely the produce or to have the use of or if he is given merely the right to reside in a house.

[2] This is the opinion of Abu Hanifa and Imam Muhammad; Abu Yusuf dissenting. Bail. 1.

[3] See p. 540, *n.* 7.

[4] Bail. I. 695, 615, 676, II. 369.

[5] Cf. *Cleaver* v. *Mutual Association Fund* [1892] 1 Q. B. 147 Esher M.R., Fry and Lopes L.JJ. on general principles held that though the executors of Maybrick could recover the sum for which he had insured his life, in favour of his widow, yet Mrs Maybrick having been found guilty of his death could not demand that sum from the executors. Evans P. followed this decision in *the estate of Cora Crippen* [1911] P. 108, 112.

[6] Bail. I. 625.

[7] *Gangbhai* v. *Thaver Mulla* (1863) 1 Bom. H. C. R. 70.

[8] *Khajooroonnissa* v. *Roushan Jehan* (1876) 2 Cal. 184 : 3 I. A. 291 ; 26 W. R. 36.

[9] Bail. I. 614 ; II. 229.

SECTION 589 has not already assented to it at any time after the death of the testator.[1]

Partial assent. (2) A legatee may according to Shiah law validly accept part of the bequest, and disclaim the remainder.[2]

Death without assent. (3) Where the legatee, having survived the testator, dies without assenting to or disclaiming the legacy, according to Sunni law he is presumed to have impliedly assented to the legacy;[3] according to Shiah law the right to assent or disclaim, devolves on his heirs.

Illustrations.

(1) T is the owner of a certain farm, and as such has a right to graze his cattle on L's field. T bequeaths his farm to L. If L accepts the legacy, the easment is extinguished under the Easements Act s. 46, but if L dies without accepting it, according to Shiah law the easement may remain unextinguished, because the heirs of L may accept the legacy, and may not be the owners of the field.[5] According to Sunni law L's dying without disclaiming the legacy is implied acceptance, causing the easement to be extinguished.[6]

(2) T bequeaths to L certain shares in a Company which are not fully paid up ; L survives T, but dies without assenting to or disclaiming the legacy. Under Sunni law the heirs of L are bound to pay the calls on the shares out of L's estate, if any: under Shiah law they would have the option to disclaim the legacy.[7]

Implied acceptance. Acceptance may be inferred from conduct, as giving effect to a bequest, or purchasing something on account of the heirs, or paying debts, in which case the acceptance is as good as if made in express terms.[8] In 'Hardoon v. Belilios'[7] the defendant refused to pay calls on shares on the ground (amongst others) that he had never accepted their transfer to him, and Lord Lindley said in the Privy Council : "No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer."[9]

Legatee predeceasing testator. **590** Unless a contrary intention is shown in the will, where a bequest has been made to a person who predeceases the testator, under Sunni law it lapses, and becomes part of

[1] Bail. II. 230 ; cf. Trusts Act. s. 46.
[2] Bail. II. 230 ; cf. Trusts Act. s. 46
[3] Bail. I. 614.
[4] Bail. II. 230.
[5] Bail. II. 230, where the *ill.* refers to a bequest of a female slave and her unborn child to her husband.
[6] Bail. I. 614, 652.
[7] cf. *Hardoon* v. *Belilios* [1901] A.C. 118, 123 : on pp. 126, 172 the facts are discussed which were held to amount to acceptance.
[8] Bail. 614.
[9] Roman Law required "extraneous heirs" to accept a bequest in order to perfect it : with heirs of the same family acceptance was presumed unless the bequest was rejected, Gaius II. 153-170. English law does not require acceptance by the grantee to vest the property in the donee, though when he obtains knowledge of the transfer, he may repudiate it. *Butler & Baker's Case* (1591) 3 Rep. 25; *Thomson* v *Leach* (1691) 3 Mad 296; *Siggers* v. *Evans* (1855) 5 E. B. 367 ; *Standing* v. *Bowring* (1885) 31 Ch. D. 283.

the residue;[1] under Shiah law it passes to the heirs of the legatee, and if the legatee dies without leaving any heirs, the bequest lapses.[2] SECTION 590

591. Where the testator leaves a bequest jointly to certain named or otherwise ascertained individuals, there unless a contrary intention appears, the bequest must be divided equally amongst all the legatees.[3] Joint legatees share equally.

Explanation—Where a legacy is given to a class of persons described generically, they jointly rank as a single individual in competition with such other individuals or classes as are joint legatees with themselves.[3] mentioned as a single individual.

Illustration.

T leaves a third of his property—(*a*) to L, and to 'faqirs,'—L takes a sixth and the 'faqirs' a sixth; (*b*) to his cousins (who are three in number) and to 'faqirs' and to 'miskins' (poor persons)—the three cousins take each one-fifteenth of the estate, the 'faqirs' one-fifteenth, and the 'miskins' one-fifteenth.[3]

592. (1) According to Sunni law where a legacy is given to several persons jointly, and one of them dies before the testator, and— On death of a joint legatee no right of survivorship unless the deceased legatee was disqualified 'ab initio.'

(*a*) where at the time that the legacy is given all the legatees are in being, and are so described by the testator as to be capable of identification, and they fulfil the conditions (if any) on which he purports to give them the legacy and they are competent in law to take the legacy;[4] or

(*b*) there is anything in the will to show that each of the legatees is to take only a definite part of the legacy,—

there the surviving legatees do not take the whole of the legacy, but only such a part of it as they would have respectively taken if all the legatees had survived the testator. In other cases the surviving legatees take the whole subject of bequest.[5]

(2) Where one of several joint legatees is disqualified on the ground that he is an heir of the testator, or that he has caused the Disqualification of being heir or murderer is not disqualification 'ab initio.'

[1] Bail. I. 631; *Oomuttoonnissa Beebee* v. *Areefoonnissa Beebee* (1865) 4 W. R. 66, though the legacy purported to be to her nephew, *nuslun bad nuslun, buttun bad buttun*: but it purported to exclude the heirs in favour of the nephew. Cf, Indian Succession Act, s, 92.

[2] Bail. II. 247 (para. 3). Some Shiah authorities agree with the Sunni view.

[3] Bail. I. 636.

[4] Bail. I. 632

[5] Bail. I. 631-634.

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death of the testator, his share lapses, and is not taken by the surviving legatees.[1]

survivors.

(3) Where, at the time that the bequest is made, one of the legatees is not in being, or where one or more of the legatees is or are described generally, and there is no one answering the description and fulfilling all the conditions on which the will purports to give the legacy, and which are required by law to entitle him or them to take it, his part accrues to the survivors.[1]

Illustrations.

(1) T bequeaths a legacy to the child of *L*, 'en ventre sa mère' within six months after T's death (*a*) if *L* gives birth to a dead child, the legacy is void ;[2] (*b*) if *L* gives birth to two children, one alive, and the other dead, the living child takes the whole legacy ; (*c*) if *L* gives birth to two children who are both alive, and then one dies, the living child takes half of the legacy, and the heirs of the one that dies take the other half.[3]

(2) T bequeaths one-third of his property (*a*) to L and LA (LA being dead at the time of the bequests, whether with or without T's knowledge) or (*b*) to "L and LA, if LA is alive" (LA being dead) or (*c*) to L and L's posterity,[4] or (*d*) to L and L's child (and L's child dies before T) or (*e*) to L and to such of his children as may be poor (and none of children are poor). In all these cases L takes the whole legacy.[5]

(3) T bequeaths a third of his property (*a*) "to L and LA, if LA survives T" or "if LA is poor" (and LA predeceases T, or becomes rich) (*b*) or "to L and the children of LA if they become poor" (and the children of LA do not become poor) or (*c*) to L and L's heir. In all these cases L takes a third of the estate.[5]

(4) T leaves one-third of his property "to L, and to LA" or "between L and LA." The repetition of the word to and the use of the word between shows that he wished them to take severally and neither L nor SA can take more than one-sixth.[5]

(5) T leaves one-third of his property "between L's children and LA's children" and one of them has no children the whole third goes between the children of the other there being no indication that they are to take severally.[5]

(6) T leaves a legacy of one-third of his property to L and LA. Both L and LA survive the testator, but L dies before accepting the legacy, and then LA accepts it. LA takes the whole third. If L had died before T, LA would have taken only one-sixth.[6]

[1] Bail. I. 631-634.
[2] Bail. I. 617.
[3] Bail. I. 618.
[4] The word for posterity is *'aqib* in the original literally "those that are to follow." Cf. "as to B's [*aqib*] posterity, as they are to follow him after his death, they are to be considered as non-existent at present." Bail. I. 632 : cf. *nemo est haeres*
[5] Bail. I. 631.
[6] Bail. I. 632.

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(7) T leaves one-third of his property "to L and to such children of LA as may become poor." At T's death if none of the children of LA are poor, L takes the whole one-third—if some are poor then L and such children take 'per capita.'[1]

(8) T bequeaths a third of his property (*a*) "to the sons of L," if L has no sons at the date of the will, but before T's death, sons are born to L, such sons take the legacy. If L had 3 sons LS, LSA, LSB at the time when T made his will, and then Ls and LSA die, and LSC and LSD are sons born to L previous to T's death, then LSB, LSC and LSD take the legacy equally, if they survive T; (*b*) "to LS, LSA, LSB, the sons of L," then LSB will take a third of the legacy (i.e. one-ninth of A's estate) on Ls and LSA predeceasing T; and the said LSC and LSD will not take anything, as they were not mentioned in the will.[2]

(9) T a Sunni purports to leave a legacy of Rs. 100 to L, a stranger, and to LA, an heir. L can take Rs. 50, but LA cannot take his Rs 50 unless the heirs consent.[3]

(10) T bequeaths his mansion to L, and the right to reside in it to LA. Here both bequests take affect as stated. But if T bequeaths first the right to reside to LA, and then the mansion to L, then if they are mentioned connectedly they take what is mentioned for them respectively, but if they are mentioned separately, then L takes not only the whole of the mansion exclusively, but shares with LA the right to reside in it.[4]

§ 4.—Form of Will.

No formality necessary.

593. A Muhammadan is not obliged to observe any special formality in making his will, and his intentions with respect to his property which he desires to be carried out after his death, in whatever form they are declared, may operate as a will, provided that they are declared with sufficient clearness to be capable of being ascertained.[5] In particular the will need not be framed or couched in any technical form or language,[6] it need not be in writing;[7] if in writing, it need not be signed by the testator, or

Writing not necessary nor witnesses.

[1] Bail. I. 632.

[2] Bail. I. 635.

[3] Bail. I. 636-637.

[4] Bail. I. 657-658.

[5] E.g. in (*Prince*) *Suleman Kadr* v. *Darab Ali Khan* (1881) 8 Cal. 1; 8 I. A. 117.

[6] *Saiad Kasum* v. *Shaista Bibi* (1875) 7 N.W. 313; *Abdul* v. *Tajudin* (1904) 6 Bom. L.R. 263, 264 268; *Mazhar Husen* v. *Bodha Bibi* (1898) 21 All. 91 (P. C.) (letter as will). See also *Kuvarbai* v. *Mir Alam Khan* (1883) 7 Bom. 170, *Din Tarin Debi* v. *Krishnagopal Bagchi* (1908) 36 Cal. 149 (matrimonial arrangement deed as will, Hindu parties); *Re goods of Morgan* (1866) L. R., 1 P. & D. 214; *Robertson* v. *Smith* (1870) L.R., 2 P. & D. 43; Williams on Executors (10th ed.) 95.

[7] Oral wills recognised in *Kishwar Khan* v. *Jewan Khan* (1799) Cal. S. D. A. 25; 1 Morley 619; (*Nawab*) *Aminud-Dowlah* v. (*Syud*) *Roshun Ali Khan* (1851) 5 Moo. I.A. 199 (Shiah). *Tameez Begum* v. *Furhut Hossein* (1870) 2 N. W. 55, (absence of writing where ample time available, may throw doubt on the fact of the words being used as expression of will, but cannot affect validity of will, if proved), *Aulia Begum* v. *Alauddin* (1906) 28 All. 715 (will not signed by the testatrix, nor by any one on her behalf, but found by District Judge, reversing subordinate judge, that the document represented the will of the lady, and she was competent at the time to make it, and High Court upheld it as valid will.) *In re will of Haji Mahomed Abba* (1899) 24 Bom. 8 (Probate granted of oral will, followed in *Gakul Chand* v. *Mangal Sen* (1903.) 25 All. 33.)

SECTION 593 attested by witnesses; and, if oral, no specific number or class of witnesses need be present at the time of the declaration.[1]

Bequest requires declaration and acceptance

It is stated in the 'Shara'ya-ul-Islam' that a bequest requires declaration and acceptance, and "by declaration is to be understood any word demonstrative of such an intention, as if a person should say, 'give such an one after my death,' or 'this is for such an one after my death,' or 'I have bequeathed it to him.'"[2] And dealing with dispositions of property on deathbed it is stated that such as are not to take effect till after the testator's death, are treated as legacies, whereas such as are to take effect immediately according to some take effect as legacies, and according to others as against the whole estate.[3]

No formality required in a will.

So if a person says "if any event should happen to me, then I give a legacy of Rs. 100, to such a person, or Rs. 1,000 to him out of my third,"[4] or if "a sick man makes a bequest, and being unable to speak from weakness gives a nod with his head, and it is known that he comprehends what he is about—if his meaning be understood and he dies without regaining the power of speech the bequest is lawful."[5] Thus a deed in the form of a gift, but providing that possession of the property was not to be given to the donee till after the death of the donor, was construed as a will, and affect was given to it as far as possible.[6] Similarly a testamentary disposition in a 'wajib-ul-'arz' may operate as a will.[7] But the principle was held not to apply in a case where the parties intended the disposition to operate during the life-time of the donor, and where it had been contended that possession had been given.[8]

Gift construed as will.

Similarly "when a person has 'said this my slave is to such an one, and this my mansion is to such an one,' without using the word bequest, and there is no mention of bequests, nor of the words 'after my death,' the expressions constitute a gift, both by analogy, and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death the gift is void."[9]

As regards witnesses it is laid down in the Quran,

Will need not be attested.

> "Let there be witnesses between you when death draweth nigh to any of you at the time of making the testament, two witnesses, just men from among yourselves, or two others of a different tribe from yourselves, if ye be journeying in the earth and the calamity of death surprise you."
>
> Quran, V., 105.

Quran iv. 105 merely recommendatory.

This verse has evidently been interpreted as containing merely a recommendation and not a rule of perfect obligation; for no mention is made of witnesses in (e.g.) the 'Fatawa'Alamgiri' or 'Hidaya,' when the constituents of a will are discussed;[10] again the books on 'wasaia' or wills in these works are divided

[1] Cf. Succession Act ss. 50, 53, (which do not apply to Muslims). See comment.

[2] Bail. I. 623.

[3] Bail. II. 229, 256.

[4] Bail. I. 623., i. e. all that he can bequeath. Thus "1000 *dirhams* from my third" sufficiently indicates a testamentary disposition, whereas "1000 *dirhams* from my property,' or "from the half" or "fourth of my property," would be a gift: Bail. I. 623 (*ll.* 27-33.)

[5] Bail. I. 641 (para. 2.)

[6] (*Saiad*) *Kasum* v. *Shaista Bibi* (1875) 7 N. W. 313.

[7] *Mahomed Altaf Ali Khan* v. *Ahmed Buksh* (1876) 25 W. R. 121 (P.C.).

[8] See p. 545 *n.* 6.

[9] Bail. I. 623; cf. *Edwards* v. *Jones* (1836) 1 M. & Cr. 226. Per Lord Cottenham as to when a transaction must be considered a gift *in praesenti* and when a *donatio mortis*

[10] Cf. Bail. I. 613, 614.

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into ten and eight chapters, respectively and only the last of them make any mention of witnesses.[1] The following illustration occurs in the 'Fatawa'Alamgiri': "And if out of two witnesses one says that the deceased made this one an executor on Thursday, and the other one gives evidence that the testator made him an executor on Friday, then such evidence will be accepted: this is contained in the 'Muhit.'"[2]; this shows at any rate that the two witnesses need not be simultaneously present. As to Shiah law there may be room for explanation, and perhaps for doubt. For though when the essentials of a will are mentioned, no mention is made of witnesses,[3] yet it is also stated[4] that "wills or bequests are established in law by the testimony of two witnesses who are 'Mooslims' and just persons, or in case of necessity, when two just 'Mooslim' witnesses are not to be had, by that of two 'zimmees' or infidel witnesses."[4] This, it is submitted, must refer merely to the proof of a will, and not to its validity; for it applies to written no less than oral wills; nor does there seem to be any distinction between an oral and a written will in Muhammadan law, and it is recognised that no attesting witnesses are required when the will is in writing. Further, in order to understand the effect of this passage it must be borne in mind that, unlike the Indian Evidence Act s. 134, (which provides that "no particular number of witnesses shall in any case be required for the proof of any fact") Muhammadan law specifies the number of witnesses required for the proof of different transactions: generally two witnesses for all civil cases.[5] So that the references in the Arabic texts to the evidence required for the proof of wills are really a re-statement of the general adjective law of proof, and not any part of substantive law,—whereas in the cases of marriage amongst the Hanafis, and divorce amongst the Shiahs the authorities lay it down specifically that witnesses are necessary for the legal validity of the said transactions, and not merely for proving them.[6]

Written and nuncupative wills not distinguished.

§ 5.—Interpretation of Wills.

594. Subject to the provisions contained in this chapter, and unless a contrary intention appears in the will, it is construed to speak as if it had been executed immediately before the

[1] Entitled "on giving *evidence* as to wills," and "of *evidence* with respect to wills"

[2] *Fatawa 'Alamgiri, Wasaia*, ch x. *ad med.*

[3] Bail. II. 229, 231.

[4] Bail. II. 242.

[5] Hed. 353 "Evidence required in a case of whoredom is that of four men, . . . in other criminal cases of two men . . . in all other cases . . . of two men, or of one man, and two women."

[6] Wilson, "Anglo-Muhammadan Law," 307 s. 313, citing Quran, V. 106 (for V. 105,) says, "if oral, the will must (probably) be made in the presence of two male adult moslems as witnesses." Sir Roland seems to suggest that oral wills are to be governed by a different law from written wills, on the ground that the Quran contemplates oral wills alone. But were the Quran so interpreted as to make two witnesses necessary for an oral will, it is submitted that the same rule would apply to written wills, unless there were something in the Quran to show not merely that it contemplates oral wills only, but also that it excludes written wills from the law laid down therein. In the time of the Prophet most transactions were oral and even in the law of gift and *waqf*, as treated in the texts of a date, far later than the Prophet, documentary dispositions of property are seldom referred to. So far as the later texts are concerned, this may well be explained (as Sir B. K. Wilson does) by "the strong propensity of legal writers to blindly follow their predecessors, without taking note of new facts."

SECTION 594 death of the testator, and the bequests contained in it take effect accordingly.[1]

Ambiguous will to be interpreted by heirs who may avoid it

595. Where the will is made in terms so ambiguous that the law affords no interpretation of it, it must be left to the heirs to explain its meaning as they may think proper.[2]

Illustrations.

(1) T says in his will "something or some trifle should be given to L," or "I leave some property to LA." The heirs may give to L or LA whatever they like.[3]

(2) T says I bequeath a 'saham' (a technical name for an heir's portion) to L.," Abu Hanifa is of opinion that the expression is uncertain and the heirs may interpret it as they please. But the author of the 'Mabsut' says that L is entitled to the smallest share of the heirs, or to half of the property if there is no heir, and the other half of the property is to escheat.[4]

(3) T bequeaths to L "a garment or a beast." The heirs may give to L any garment, or any beast.[4]

(4) T bequeaths the best of his 3 garments to L, the next in quality to LA, and the last to LB. If one of the garments is lost, and it cannot be ascertained to whom the remaining two garments were allotted by T, the heirs have the right to claim that the legacies are void "since the parties entitled are unknown, and ignorance of this fact prevents the validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, unless the heirs will deliver up the remaining garments." If they consent to the legacy being given affect to, then L will have two-thirds of the better of the two garments in existence, LA will have one-third of the better, and one-third of the worse, and LB the remaining two-thirds of the worse.[5]

may avoid ambiguous will.

The Muhammadan law does not differ from the English law, under which the bequest would be absolutely void for uncertainty. For as the heirs have the power of putting whatever interpretation they like on it, and if they choose, to give something to the legatee, they do so out of what would otherwise be their own portion. *Ill.* (4) shows that they may avoid the bequest if they like.

Failure of prior bequest accelerates or avoids later bequest according to intention of testator.

596. Where there is a bequest to an heir consisting of an interest in a property limited in point of time, and it is followed by a second bequest of the reversion of the same property to a second legatee, and the former bequest fails because the heirs do not consent to it, the latter bequest does not necessarily become invalid by such failure, but may be accelerated unless an intention

[1] Cf. Succession Act, s. 77. Wills Act 1837, i.e. 1 Vict. c. 26 s. 24. *In re Gillins, Inglis* v. *Gillins* [1909] 1 Ch. 345.

[2] Bail. I. 636 (*ll.* 6-10 but see *ll.* 17-19) II. 238, 239, 241, (paras 3, 4).

[3] Bail. I. 629; II. 239.

[4] Bail. I. 629, cf. the passage from the *Da'a-yamulIslam* translated at pp. 531, 532 above, for Shiah *Isma'ili* law.

[5] Bail. I. 637.

is shown that the second legatee should not take till after the death of the former,[1] or unless the intention of the testator would be wholly defeated by such acceleration.[2] *Semble*, the same rule applies wherever the prior of two successive bequests fails. SECTION

Illustrations.

(1) T bequeaths property to L for his life, and "from and immediately after his decease" to LA. 'Prima facie' these words are to be understood as denoting the order of succession of the limitations, no intention is shown that LA is to take nothing till after the death of L; in such a case it makes no difference whether the previous estate is removed by death, or revocation. Consequently the estate of LA is accelerated in either case.[1]

(2) T purports to give the rents of more than a third of his property to his heirs in proportions other than the legal proportions; and after the death of the last child, to charity. If the heirs do not consent to T's will, both the bequests must fail, because it would wholly defeat T's intentions if the heirs are ousted for the benefit of the charity.[2]

Subject of bequest described but not denoted.

597. Where the bequest contains a description of articles which form its subject, but does not appropriate for it any particular article of the said description, and the testator does not own any such article at his death, there if there is anything in the terms of the bequest showing that the testator intended to give a legacy of the value of articles of the said description, in that case they will be purchased out of the estate, and given to the legatee otherwise the bequest fails.[3]

of r other

598. Where the subject of a bequest purports to be the whole or a specified fraction of the testator's money, or of any other object or commodity which is estimated by weight or measure of capacity, there for the purpose of determining the number or quantity of the said commodity which forms the subject of the bequest, regard will be had to the number or quantity of the objects or commodity of the said description which the testator owned at the time when the bequest was made, and not at the time of his death.[4]

weight or

[1] *Lainson* v. *Lainson* (1854) 5 De G. M. & G. 754, followed by P. C. in Hindu case *Ajudhia Bukhsh* v. *Mussummat Rukmin Kuar* (1883) 11 I. A. 1. See also *In re Whitethorne*, *Whitethorne* v. *Best* [1906] 2 Ch. 121 (Buckley J.) and *in re McEacharn*, *Gambles* v. *McEacharn* (Eve J.), Sol. Journ., 21 Jan. 1911 p. 204.

[2] *Fatimabibi* v. *Ariff Ismailji Bham*, (1881) 9 C. L. R., 66 (Wilson J.) cf. *Ismail Mahomed* v. *Hurbai* [1898] Printed Judgts. (Bombay) 107 (Farran C. J. and Candy J.)

[3] Cf. Succession Act, ss. 129-137, 140, 141, where a bequest of property specified and distinguished from all other parts of the testator's property, is called a specific legacy; and "where the testator bequeaths a certain sum of money or a certain quantity of any other commodity and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative:" The distinction being that in the one case specified property is given, and in the other a legacy is directed to be paid out of specified property.

[4] Bail. I. 631, 636.

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Explanation—Where the subject of the bequest is not money or objects or commodity of a homogeneous nature, there for the purpose of determining the number or quantity bequeathed, regard will be had to the number or quantity of the objects or commodity of the said description owned by the testator at the time of his death.[1]

Illustrations.

(1) T has 100 goats, each of the value of Rs. 5, and no other property when he makes his will bequeathing half of his goats to L. (*a*) If T dies a year after making his will, and his net estate at his death consists of 60 goats, and Rs. 1,000 in cash, L takes 50 goats. (*b*) If T leaves no other property except 60 goats, then L takes only 20 goats unless the heirs consent. (*c*) If instead of goats there is a bequest of half of T's clothes (which are of different kinds and values) and two-thirds of the clothes perish before the death of T, then L takes half of the clothes actually left by the deceased, (provided of course that there was either other property of at least twice the value of the half of the clothes left by the deceased, or the heirs consent to the bequest in excess of a third).[2]

(2) T makes a bequest of a third of his flocks, and (*a*) all his flocks perish before his death,—the legacy is void, even though T should have purchased other flocks before his death, (*b*) If T has no flocks at the time of the bequest, and subsequently purchases some, the legacy will be valid as to a third of the flocks belonging to him at his death.[2]

(3) T has no sheep and bequeaths (*a*) "a sheep from his property" This means that a sheep or the value of one, has to be given to the legatee out of T's property,[3] (*b*) "a sheep to L," then it is doubtful whether the bequest is specific, and so of no effect, or is to be interpreted as a bequest of the value of the sheep[3] ; (*c*) "a sheep out of his flocks ;" this is a specific bequest, and so of no effect.[3]

(4) T says "I bequeath my roan Turkish horse" or "my blind horse to L." The bequest is specific, and refers to one that is in the possession of the testator at the time of his death.[3]

(5) T bequeaths to L his Turkish horse, without any qualification, the bequest is not specific, but includes property acquired by T subsequently.[3]

§ 6.—Revocation of Will.

Revocation of will expressed or implied.

Revocation implied by alienation.

599. (1). A Testator may revoke his will or any part of it either expressly or by implication.[4]

(2). An act by which the testator extinguishes[5] or disposes of his right in the subject of the bequest implies a revocation of the

[1] Bail. I. 631, 636.
[2] Bail I. 636.
[3] Bail. I.635-636.
[4] Bail. I. 618.
[5] Cf. Succession Acts. 139.

bequest to that extent; and where the said act consists of a sale or gift of the property, the bequest does not revive by the testator again becoming owner of the subject of bequest by re-purchasing it, or by revoking the said gift.[1] SECTION 599

(3). An addition to the subject of the bequest operates as a revocation, provided that the addition is of such a nature that the subject of the bequest cannot be delivered without it.[2] Or addition.

(4). Where the same article is bequeathed successively to two persons, the latter bequest does not necessarily operate as a revocation of the former unless an intention to revoke is shown by the will; and where the legatee in whose favour the latter bequest is made is dead at the time of the said bequest, it is void, and the prior bequest is not thereby revoked. But not necessarily subsequent bequest.

(5). A denial by the testator of the validity of a bequest that he has made,[3] or of the fact of his having made it,[4] does not operate as a revocation of it. Denial not revocation.

Illustrations.

(1). T bequeaths a house to L. Subsequently, T says: "The house that I gave to L, is for LA." This is an express revocation, unless LA is dead at the time of the second statement, in which case the first bequest remains unaltered.[3]

(2). T bequeaths to L (*a*) a piece of cloth, and then T cuts it up and sews it;[5] (*b*) or cotton, and afterwards weaves it or spins it into thread, or uses it for stuffing quilting, or lining a garment; or (*c*) iron, and afterwards makes a vessel, or a sword of it; or (*d*) fried barley, and afterwards mixes it with butter; or (*e*) a slave,[6] and afterwards pledges him. All these acts operate as revocations of the bequests.

(3). T bequeaths a piece of silver to L, and then fashions it into a ring. Abu Hanifa's view is that this is not a revocation, and this is stated in the 'Fatawa'Alamgiri' to be correct,[1] though it is opposed to Abu Yusuf's view, and apparently to that of Imam Muhammad's, and to *ill.* (2) above.

(4). T bequeaths to L a third of his property, and then makes a gift of a third of his property to R. The bequest to T is not revoked.[1]

(5). T bequeaths a mansion to L, and "largely bedaubs it with mud," or builds within it, or sells it, or makes a gift of it. The bequest is revoked, and is not revived by T repurchasing the mansion, or revoking the gift:[1] but if he puts plaster on the house, or pulls it down, it is not revoked.[7]

[1] Bail. I. 619.
[2] Bail. I. 618.
[3] Bail. I. 620.
[4] Bail. I. 619. There is a difference between the views of the two disciples on this point, but the *Hidaya* is clear in its preference for the view expressed above.
[5] Cf. Succession Act, s. 139.
[6] Bail. I. 618-620.
[7] Bail. I. 621.

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(6) T bequeaths land to L. If he sows it with vegetables, it is not revoked, but making a vine-yard or planting trees upon it, would revoke the bequest.[1]

§ 7.—Death-bed Gifts.

Deathbed transactions without consideration take effect as bequest.

600. The restrictions contained in this chapter on the powers of disposing by will of more than one-third of the estate, or so as to benefit heirs,apply also to other transactions made by a person while he is in ' marz-ul-maut ' or death-illness in so far as they are made without consideration.[2]

Illustrations.

(1). A gift [3] made in ' marz-ul-maut ' can take effect only as a legacy, i. e to the extent of a third of the estate and (except under the Shiah ' Ithna'ashari' law) in so far as it is not in favour of the heirs,[2] provided that such a gift is not valid even to the said extent, unless, possession has been taken by the donee.[4]

(2). T owns a house worth Rs 3,000, and has no other property. He purports to make a gift of it while in death-illness to L, who makes an ''iwaz' for the gift, of the subject of which T takes possession, then T dies. If the ' 'iwaz' is Rs. 2,000 in value or more, the gift and ''iwaz' are both valid, as in that case L benefits only to the extent of Rs. 1,000, or less, viz. within the third of T's estate. If the ''iwaz' is less than Rs. 2,000 in value, then the heirs of T have a right to claim back a portion of the gift, equal to the difference between Rs. 2,000 and the value of the ' 'iwaz,' [5] and the donor has the option of retaining the house, provided that he makes an ' 'iwaz ' of Rs. 2,000 i. e. of two-thirds of the net assets.[4]

(3). *T* a woman while in death-illness makes a gift of her dower to her husband H, who predeceases her. She has no claim for her dower as against H's estate, because the release can only be questioned after T's death.[6]

(4). Where the deceased makes a ' mahabat ' (i.e. a colourable sale or purchase) to his own disadvantage while he is in ' marz-ul-maut ' there in so far, and to the extent to which the pretended seller or purchaser has been favoured by the deceased, the transaction can have effect only as against a third of the estate : but such a sale or purchase has priority over a gift made in ' marz-ul-maut ' [7] and over all legacies.[8]

[1] Bail. I. 621.

[2] See *ill.*, and above pp. 490, 526, Bail. II. 209. See also *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1 (P C.), where gifts in favour of heirs were upheld as it was found that the donor was not on his death bed; but it was assumed that otherwise they would have been invalid.

[3] *Muhammad Sayid* v. *Muhammad Ismail* (1911) 33 All. 233; *Wazir Jan* v. *Altaf Ali* (1887) 9 All. 357 ; *Labbi Bibi* v. *Bibbun Bibi* (1874) 6 N W. 159 ; *Muhammad Gulshere Khan* v. *Maryam Begum* (1881) 3 All. 731 ; *Fatima bibi* v. *Ahmad Baksh* (1903) 31 Cal. 319 ; *Ekin Bibi* v. *Ashruf Ali* (1864) 1 W. R. 152. Cf. *n.* 2 above.

[4] Bail. I. 542.

[5] Bail I. 535-536.

[6] Bail. I. 544. It is obvious that the illness cannot be known to be *marz-ul-maut* till after her death.

[7] Hed. 655.

[8] Bail. I. 641.

(5). If A in his death-illness acknowledges himself to be indebted to an heir, and there is no other proof of the debt, it cannot (except according to Shiah 'Ithna 'ashari' law) take effect as against the other heirs, unless they consent to it.[1] As according to Shiah 'Ithna 'ashari' law it is valid to the extent of a third of the estate without the consent of the heirs, but their consent is required for validating it so as to make it payable out of more than the third.[2]

(6). The release of a debt during death-illness is valid only to the extent of a third of the estate of the deceased.[3]

(7). A 'waqf' made in death-illness is valid only to the extent of a third of the estate of the deceased, unless the heirs consent.[4]

(8). Where a marriage is made in death-illness, and the 'mahr' (or dower) is more than the 'mahr-ul-mithl' (usual dower) the excess is void, unless the heirs consent.[5]

(9). T purports to bequeath more than one-third of his estate. H, one of T's heirs, being in death-illness, assents to T's said bequest. The assent of H, operates as though he had left a legacy, and is valid only if H's share in the excess of T's said bequest over one-third of T's estate is less than a third of H's estate.[6]

(10) T leaves a legacy to one of his heirs, L; the other heir of T, H, consents while in 'marz-ul-maut' to the bequest, and then dies, leaving as his heirs L, and HA. Under Shiah law H's consent to T's bequest in favour of L, validates that legacy to the extent of one-third of H's estate. Under the Sunni law it is not valid to any extent unless HA consents to the legacy, because L and HA are both heirs of H.[6]

(11). T dies leaving as his heirs his sons S, SA, SB and SC. T's estate is worth Rs. 6,000 but he purports to leave Rs. 5,000 to L. S, consents to the legacy. If S's consent is given in health, the legacy takes effect to the extent not only of the bequeathable third (i. e. Rs. 2,000) but also as against S's share in T's estate (i. e. another Rs, 1,000 making up Rs. 3,000 in all). If S's consent is given by him on his death-bed, it is operative if S leaves estate worth Rs. 2,000 besides his share in T's estate (i. e. if S had testamentary power over Rs 1,000 which was his share in T's estate); otherwise itwill abate proportionately.

(12) T directs his executor E to sell certain portions of the estate, and purports to give to E a commission of three per cent on the proceeds of the sale of the said properties. *Held* that this is a mere legacy payable out of one-third of the estate, which passed by the will; it is not a debt.[7]

[1] Hed. 437.

[2] Hed. 437, 684. It will be remembered that according to strict Muhammadan law the acknowledgment of a debt in favour of a stranger (though there be no other evidence of it) establishes the debt to the extent of the whole of the estate but that debts which can be proved by other evidence have priority over debts of which there is no proof other than the acknowledgment.

[3] Bail. II. 209; Cf. Bail. I. 112 (*ll.* 27-28.)

[4] Bail. I. 601, II. 212; cf *Khajooroonissa* v. *Roushen Jehan* (1876) 2 Cal. 184, 3 I. A. 291, 26 W. R. 36 (legacy to heir under colour of charitable bequest held invalid.)

[5] *Radd-ul-Mukhtar Kitab-ul-Iqrar*. Ch. on acknowledgements in death-illness, *ad init.*

[6] Bail. I. 615.

[7] *Aga Mahomed Jaffer Bindanim* v. *Koolsom Bibi* (1897) 25 Cal. 9; 24 I. A. 196.

CHAPTER XIV.

INHERITANCE AND SUCCESSION.

1.—Dual basis of Muhammadan law of Succession

1. Amendments by Islam.
2. Pre-Islamic customs.

601. The Muhammadan law of succession consists of (1) the rules relating thereto in the Quran or inculcated by the Prophet in his teachings ;[1] and (2) the customs and usages prevailing amongst the Arab tribes near Mecca and Madina at the time of the Prophet in so far as they have not been altered or abrogated by the said rules and teachings.[2]

Law of inheritance and forms which the family assumes

"All laws of inheritance" says Sir Henry Maine, "are made up of the debris of the various forms which the family has assumed ;"[3] and in Muhammadan law, the importance of the pre-Islamic customary rules of succession consists mainly in that we have to turn to them for discovering the fundamental notions of kinship and proximity underlying the law. Those notions were originally based on the blood-feud: the blood-feud seems, partially at least, to have been replaced by comradeship in arms, and became synonymous with agnatic male relationship, for which Islam substituted blood relationship of any kind whatsoever. Similarly, the customary law alone can explain the reason why different classes of rights are given to the various relations, and why some who might be supposed to be equally entitled to similar rights are debarred from them. Thus in the first (and in some respects the most important group of heirs)—the sharers,[4] no place is given to sons, though daughters,

[1] All amendments introduced by Islam are referred to hereafter as "Quranic," even though they may be the result of wide interpretation, or extension, of the principles contained or indicated in the Quran.

[2] This two-fold basis of Muhammadan law has been frequently alluded to above, but in the law of succession it is most important to bear it in mind : See the Introductory chapter, and those on the family relations. The customs and usages have no effect or force in themselves, but have become incorporated in the law of Islam by the tacit approval of the Prophet. See above pp. 3, 4, 8-9 (*sunnat-ul-taqrir*) 19, 20.

[3] "Early Institutions," 219. For the early Arabs the tie of war, or rather of joint plunder or revenge, was more important than that of the family. See Smith's "Kinship and Marriage in Ancient Arabia," (1907) 67, *cf. ib.*, 25-27, 41, 65, 69, 285.

[4] See s. 610 below for definition.

daughters of sons, and even sisters are included in it. This might seem puzzling unless it is borne in mind that the sharers consist of those who (under the circumstances in which they become entitled to their respective shares) were not entitled to succeed under the customary law. As the son was always entitled to succeed under the customary law, he can never be a sharer. SECTION 601

The debris of the customary law (to use Sir H. Maine's expression) will be encountered throughout the law of succession, and will often simplify the seeming complexity of the law: a point or two may be noted here to illustrate this: The title to succession previous to Islam was that of comradeship in arms; it was for this reason that women and children who were unable to bear arms were excluded.[1] Blood-feud the "family" tie amongst the Arabs.

The law was not amended on this point for the first two or three years during which the Prophet preached, and consequently the 'muhajirun' (or those who aided the Prophet in his earliest years) succeeded to each other when any of them fell in battle.[2] Later this rule was abrogated by the Quran and it was laid down that nothing could furnish so strong a claim to inheritance as blood relationship. This was indeed only a part of the general scheme of the new religion to strengthen the family tie.[3] A curious instance of the survival of pre-Islam customary law is that in Shiah law though the whole of the inheritance is taken by agnates and cognates males and females alike yet in regard to the 'diyăt' or "price of blood," which has or had to be paid by one who kills another, the old rule prevails, and the 'diyăt' is still to be divided amongst the ''asaba' or male agnates alone, the "mother's relations" having no share in it.[4] The blood money still taken even amongst the Shiahs by the ''asaba'

§ 2.—The Pre-Islamic Customary Rules of Succession in Arabia.

602. According to the pre-Islamic customary law— Pre-Islamic customary rules of succession nearest male agnate succeeded—

(1) The nearest male agnate or agnates succeeded to the entire estate of the deceased. 1. descendants,

(2) Females and cognates were excluded.[5] 2. ascendants,

(3) Descendants were preferred to ascendants and ascendants to collaterals [6] 3. collaterals.

(4) When more male agnates than one were equally distant to the deceased, (being nearer than any other male agnates) they together shared the estate amongst themselves 'per capita.' 'Per capita.'

[1] See below pp. 573, 574; cf. Smith's "Marriage and Kinship" 56-66, 60-61. Sir R. Wilson seems to have overlooked this point in his "Anglo-Muhammadan Law," (3rd ed.) 278, 501.

[2] See the commentaries on the verses of the Quran dealing with the laws of inheritance, and cf. *Mishcat-ul-Masabih* XII, XIX 1, 2, *et passim*, e.g. case of Sa'ad ibn Rabii and his brother and widow and daughters.

[3] For other instances see above, *passim*, pp. 109 (s. 92), 171 (s. 213) etc.

[4] Bail. II. 267, (*third*), 370.

[5] See pp. 560, 573 below; also the commentaries on the verses of the Quran cited below. For the changes in the position of women in Arabia under Islam, cf. e.g., Caussin de Perceval *L'Histoire des Arabes* III. 302, 303, 336-337; *Mishcat-ul-Masabih*, XII, XIX. 1, 2.

[6] See ss. 622, 627 below: The "residuaries by themselves or in their own rights" (Bail. I. 691) are the customary heirs, and the priorities amongst them are regulated by the principles of the customary law. Cf. ss. 61, 239.

CTION 603

§ 3.—Principles underlying the Quranic Alterations in the law.

(1) Persons Newly Entitled to Inherit under Islam.

Husband and wife, females and cognates made competent to inherit.

603. By the Islamic amendments of the law of succession—

(1) The husband or wife, and females as well as cognates are recognised as competent to inherit.

Ascendants placed on footing of equality as regards right to inherit.

(2) Parents and ascendants are given a right to inherit even when there are [male] descendants.

(2) Nature of the Rights given to the Newly Entitled Heirs.

Sunni interpretation of Quran.

604. (1) According to the Sunni interpretation of the Quran, the provisions in favour of the newly entitled heirs [1] take the following forms,—

Shares to those who are nearer than nearest male agnate.

(*a*) Where the newly entitled heir is a nearer relation of the deceased than the customary heir (i.e., than the nearest male agnate) a share of the estate consisting of a definite fraction thereof, is to be taken by the newly entitled heir in priority to the (male agnate or) customary heir.[2] A person entitled to such a fraction of the estate is called a "(Quranic) sharer." [3]

(Sunni law.)

1. Quranic sharers having claims to fractions of estate in priority to customary heir

2. Female agnates as residuaries (co-heirs) with customary heir.

(*b*) Where the newly entitled heir is related to the deceased in the same manner and degree of proximity as the customary heir, but was (under the customary law) disqualified from inheriting owing to her being a female,—

(i) she ranks equally with the customary heir in taking the residue of the estate left after the prior claims of the "sharers" are satisfied, but—

(ii) she takes half as large a portion of the said residue as the male agnate or customary heir.[4]

[1] See below s. 605 (14).

[2] E.g., if the survivors are daughter and son's son. The latter is the customary heir and the daughter newly entitled. The daughter being nearer than the son's son they each take half of the estate. If there were two daughters and son's son they would each take one-third.

[3] The epithet *Quranic* is frequently added in this work to the term "sharer," merely to draw attention to the fact that the right arises under the Quran. The Arabic term for "sharer" is *zû farz*. *zû* means "possessor of," and *farz* means "ordinance, (contained in the Quran)," referring in this connection to the allotted shares.

[4] E.g., if a man dies leaving S, a son, and *D*, a daughter, then S is the customary heir. *D*, though related in the same manner as S, would have been excluded because of her sex. *D* is, therefore, made a co-heir with S, but she gets ⅓ of the estate, and he takes ⅔.

A female so entitled is referred to as "a residuary by another." [1]

(c) The rules above referred to are restricted in their operation (with a few exceptions) [2] to agnates, and are not extended to any collaterals remoter than sisters. — Operation of Quranic innovations in Sunni law.

(d) The customary heir's rights to inherit in accordance with the customary law is generally [3] not abrogated, but the quantum taken by him is in many cases diminished, owing first to the prior claims of the Quranic sharers, and secondly to the fact that he has to divide with the Quranic residuaries, the residue of the estate left over after the Quranic shares have been allotted. — Right of male agnates (customary heirs) preserved.

(e) Subject to section 603 (2) above, no person who was entitled to inherit under the customary law has any new rights given to him by the Islamic amendments of the law.[4] — How far safeguarded.

(2) According to the Shiah interpretation of the Quran— (Shiah law)

(a) The distinction made in the customary law, between agnates and cognates, and males and females is (so far as priority of the right to inheritance is affected) abrogated, so that the nearest relations whether male or female, and whether agnate or cognate, succeed. — Males and females agnates and cognates placed on same basis as to right to inherit.

(b) Descendants and ascendants, or ascendants and collaterals, become entitled to inherit with each other within certain limits.

(c) The distribution is not 'per capita,' but 'per stirpes.' — 'Per stirpes.'

1. SUNNI AND SHIAH INTERPRETATIONS OF THE QURAN COMPARED.

The Quran did not (according to the interpretation of either the Sunnis or the Shiahs) sweep away the existing laws of succession, but made a great — Characteristic features of and distinction between Sunni and Shiah interpretation.

[1] Bail. I. 696. "The residuary by another is everyfemale who becomes, or is made, a residuary by a male who is parallel to her." In this work such heirs are often distinguished by being called "Quranic residuaries," or "co-residuaries" in allusion to the origin or nature of their rights.

[2] The exceptions refer to (*a*) certain female ancestors (*b*) uterine brothers and sisters. See below ss. 616, 618.

[3] The only case of displacement or exclusion *eo nomine* of the customary heir by a newly entitled heir seems to be that in which a sister excludes a remoter customary heir, when a sister and a female descendant coexist. In other cases the rights of the customary heir are encroached upon but not openly disregarded or abrogated. This applies only to the Sunni exposition of the law.

[4] Thus sons have no new rights: a striking illustration is furnished by the case of the uterine and consanguine half brothers. The former being cognates, were unknown to the customary law, but the latter being agnates, ranked immediately after the full brothers. Hence the uterine brothers (and sisters) are made Quranic sharers, and when they co-exist with full brothers, they succeed with them, but the consanguine brothers and sisters are excluded. See below s. 618, 622 (4)(*c*) and table preceding p. 573.

SECTION 604 number of amendments based on a few common principles. These amendments have been differently interpreted by the Sunnis and the Shiahs. The leading differences in their interpretations may be stated as follows :—

I.—The Sunnis allow the principles of the pre-Islamic customs to stand, and they add or alter those rules in the specific manner mentioned in the Quran, and by the Prophet.

II.—The Shiahs deduce certain principles which they consider to underlie the amendments mentioned in the Quran, and fuse these principles with the principles of the pre-existing customary law, thus raising up a completely altered set of rules.

2. GENERAL PRINCIPLES OF THE SUNNI INTERPRETATION.

The agnates continue to be preferred to cognates in Sunni law, as there is no general statement in the Quran altering that rule.

The principle underlying the arrangement about the quantum of the rights taken by the various heirs under the Sunni interpretation of the law seems to be as follows : The customary heir is not absolutely displaced—the Quranic innovations are not interpreted so as to take away his rights, but rather to provide for those who were unfairly treated by the customary law (i.e., females and cognates). Now the basic painciple of the customary law, that agnates should be preferred over cognates is not altered by the Quran (according to its Sunni interpretation). Hence, agnates continue to have priority over cognates ; whilst among agnates themselves, if there is a female related to the deceased through fewer links [1] than the customary heir (i) her claims are superior so far as proximity is concerned, but (ii) the customary heir has old established rights and is 'prior tempore' and thus 'potior jure' in that regard, so that the estate is divided equally between him and the nearer female.[2] Where, on the other hand, the newly entitled heir is in the same line with the customary heir both being equal in proximity and the latter being superior on the score of antiquity, he takes twice as much as the former.[3] The newly entitled heirs necessarily consisted only of the classes ignored by the customary law, i.e., females and cognates, and all new rights necessarily encroached on the rights of the male agnates : So that the spirit of the innovations may be expressed in the formula [4] "unto her that hath not, and unto the relations of her, shall be given ; and from him that hath shall be taken a little (or may be the whole) of what he seemeth to retain." [5]

3 GENERAL PRINCIPLES OF THE SHIAH INTERPRETATION.

The Shiah interpretation of the Quran deduces principles from the specific amendments.

It follows from what has been said that from the historical point of view the basis of the Shiah law of inheritence as of the Sunni law is the customary law of the Arabs, as it prevailed near Mecca and Madina before the spread of Islam. Both systems alter the customary law in accordance with the Quran. But whereasthe Sunnis interpret the Quran strictly, and, keeping the substratum

[1] Of course if she is removed by a greater number of links or degrees, she is remoter than the customary heir, and no injustice is done to her if she is excluded by one who is nearer than herself.

[2] Hence the daughter takes half, leaving half to the remoter customary heir (such as son's son) who is *prior tempore*.

[3] Hence when the daughter and son co-exist, or the brother and sister, the females being newly entitled take half as much as the males.

[4] Cf. Matt. XXV, 29 ; Luke VIII, 18.

[5] In one instance he does not even seem to retain, cf. s. 621 (4) (*b*) and *explanation*.

of the customary law intact, superimpose thereon the provisions of the Quran, the Shiahs interpret the Quran in a wider sense, as altering the old principles themselves, and as giving rise to a new set of principles. Each case mentioned in the Quran is taken by the Sunnis as a specific amendment of that particular incident of the customary law; by the Shiahs it is interpreted as an illustration from which a total change of the principle involved may be deduced, an instance, in other words, which has to be generalised and applied wherever the same or similar circumstances occur.[1] SECTION 604

This difference between the interpretations of the innovation introduced by the Prophet will become more evident when the general results of the Sunni and Shiah law are compared, and the variation of each system traced as a development of the customary law on the main questions with which the Quran deals a detailed comparison of the two systems is therefore reserved till the close of the Chapter.

4. QUANTUM OF INTEREST TAKEN BY THE VARIOUS HEIRS.

Principles of distribution. I. SUNNI LAW.

I. According to the Sunni interpretation of the law the estate is distributed amongst the various persons entitled to inherit, in accordance with the following general principles:—

1. Male agnates.
2. Female agnate when co residuary with customary heir takes half as much as male.
3. New heir who is nearer than customary heir takes equally with him.
4. New heirs take equally amongst themselves: males and females alike.

(*a*) The nearest male agnate (or customary heir)[2] is not disinherited,[3] but his rights are liable to be affected by the rights below referred to.

(*b*) Where a newly entitled heir is related to the deceased in exactly the same mode as the customary heir,[4] the newly entitled heir takes by way of inheritance half as much as the customary heir. As the newly entitled heirs are generally females, in most instances the males take twice as much as females.[5]

(*c*) Where the newly entitled heir is nearer than the customary heir, the estate is divided equally between them.[6]

(*d*) Where newly entitled heirs of the same class differ amongst each other in their sexes they take equally: the males do not take more than females.[7]

[1] A significant illustration of the statement made above is supplied by the fact that in the Sunni law the term *'asaba* still finds place. This was the Pre-Islamic name for such relations as custom recognised (the agnates). In the Shiah law that word is absolutely discarded, and we may say discredited (cf. Bail. II 400. line 11 of para. 2) and its place is taken by the phrase *zu qarabat*, literally one possessed of a relationship or proximity. The change of the word has not merely a verbal significance. But it is an important indication of the similarities and the distinctions of the two systems of law; the rights taken by the *'asaba* and *zu qarabat* are so similar that the most usual rendering of both terms in English is "residuary" (see Bail. II. 377).

[2] As the rights of the customary heir or nearest agnate now consist in taking the *residue* after those whom the Quran gives shares have taken their shares, he is called the "residuary."

[3] Except in one case. See s.

[4] I.e., the Quranic co-residuary with the customary heir, referred to as "residuary by another," Bail. I. 692.

[5] This principle, of Sunni law however, is not that a male *as such* should take twice the share of a female, but that the newly entitled heir should get half as much as the old established heir. All the old established heirs are males: the newly entitled heirs are generally females, but not always so; thus the uterine brother is a newly entitled heir, so is the father or grandfather when he co-exists with male descendants.

[6] See p. 558 *n*. 2.

[7] E.g., uterine brother and sister are both of the same class, and they each take one-sixth of the estate—so also the father and mother, when they co-exist with descendants are both newly entitled, and they also take one-sixth each.

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Illustrations:
1. Daughter takes half leaving half to customary heir (if latter remoter than herself).
2. The parents take together a third leaving two-thirds to descendants.
3. The father and mother divide the parents' third in equal shares.

Thus under Sunni law one daughter takes half of the estate, and two daughters take two-thirds, on the the principle of dividing the estate equally with the customary heir, when the latter is remoter than the daughter. It need hardly be pointed out that the operation of the principle is greatly disturbed or altered by the existence of other heirs. But the present section is concerned merely with the general principles underlying the original allotment of shares. It does not deal with the ultimate result of all the rules, but only explains how the rules were framed in their existing form. To take other instances,—where there are both descendants and ascendants, the latter would have been excluded under the customary law, hence the rights given to them must be as newly entitled heirs; and we find that a third of the estate is taken by the ancestors conjointly leaving (nominally) the rest to the descendants, i.e., the newly entitled heirs take half as much as the old established. It will be noticed that the ascendants in this case are placed on a footing of equality (so far as proximity is concerned) with the descendants for.—"Ye know not whether your parents be nearer to you or your children"—(Quran IV). Had they been considered to be nearer, they would have taken shares similar to that of the daughter, in competition with remoter customary heirs. Then again the parents divide the one-third allotted to them as above, equally; for the father and mother are both newly entitled and neither can claim superiority over the other either on the basis of (i) old established rights or (ii) greater proximity: the male sex giving no advantage to the father.

II. SHIAH LAW.

Stirpital distribution amongst nearest relations

II. According to the Shiah interpretation of the law there is no distinction in regard to priority between the agnates and cognates, and the estate devolves (subject to the rights of the husband or wife) upon the nearest blood relations, who divide it amongst themselves 'per stripes', allotting to females half the share allotted to male in each grade.

THE QURAN ON INHERITANCE AND SUCCESSION.

Abrogated provision in favour of 'muhajirun' succeeding.

The following are the chief verses of the Quran dealing with the law of succession, so arranged that the general principles come first, and then the specific provisions. The abrogated verses are important for seeing the development of the law, they are followed by the repealing verses.

> Verily, they who have believed and fled and fought strenuously with their wealth and persons in the cause of God,[1] and they who have given refuge to the Prophet, and help[2]—these shall be the next of kin in the one to the other. And they who have believed, but have not fled their homes, shall have no rights of kindred with you until they too fly (from their homes). Yet if they seek aid from you on account of the faith, your part it is to give them aid, except against a people between whom and yourselves there is an alliance. And God beholdeth your actions.[3]

[1] These are referred to as the *muhajirun* (lit. those who fled—the word *hijra* which is the name of the Muslim era, is from the same root. They were the first converts to Islam, forming a band of devoted followers of the Prophet in his early days of persecution. They were cut off from their relations, and the same rule of succession was laid down for their succeeding to each other, as the customary law (by which companionship in arms gave the title to succession): Cf. the next verse.

[2] Known as *ansars*, or helpers.

[3] Verses 73, and 75, 76 seem to refer to the same matter. They were probably not contemporaneously given, and the later verses supplement or explain the former.

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The infidels are next of kin some of them to the others.[1] Unless ye do the same there will be discord in the land, and great corruption.

Those who believe, and have fled (from their houses), and fought strenuously in the path of God, and given the Prophet an asylum and help, these are the faithful ; mercy is their due and generous provision.

Blood relationship to replace comradeship in war.

And they who have believed, and fled afterwards, and have fought at your side, these are also of you, but those who are united by ties of blood are the nearest of kin[2] to each other, by the book of God. Verily God knoweth all things.[3]

Quran VIII. 73-76.

Blood relationship gives title to succession.

Nearer to the faithful is the Prophet than they are to their own selves, and his wives are their mothers.[4] According to the Book of God they who are related by blood are nearer the one to the other than the believers and those who fled,[5] but whatever kindness ye show to your kindred shall be noted down in the Book.

Quran XXXIII. 6.

(Abrogated-verse): A year's maintenance to widows.

Such of you as die and leave wives, should bequeath their wives maintenance for a year[6] without causing them to be expelled from their home ; but if they quit them [of their own accord] then no blame shall attach to you for any thing that they may do of themselves in a fair way ; but God is mighty, wise.

And for the divorced, let there be a fair maintenance. This is a duty on those that fear (God).

Quran II. 241, 242.

(Abrogated-verse): Legacy to parents and kindred recommended.

It is prescribed to you, when one of you, is face to face with death, if he leave goods, that he bequeath to his parents[7] and kindred in reason.[8] This is a duty on those who fear God.

Quran II. 176.

[1] It will be noticed that there is no mention of succession here,—it being assumed that succession follows this "kinship," as it followed the "kinship" of blood—feuds : See Smith, "Kinship and Marriage in Ancient Arabia," 165-171.

[2] Cf. Quran VIII. 36 : "Verily those who misbelieve,spend their riches to turn men aside from the way of God."

[3] Theselast words abrogatethe earlier verses by which the *ansars* and *muhajirun* were held next of kin to each other. Cf. also Quran, XXXIII. 6, cited on this page.

[4] "It is said that this passage was revealed on some of Muhammad's followers telling him when he summoned them to attend him in the expedition of Tabuq, that they would ask leave of their fathers and mothers."—Sale, citing Beidawi. The second sentence of this verse has nothing to do with inheritance. See the tradition cited at p. 563.

[5] The *muhajirûn*.

[6] This was the earlier provision made in favour of widows : subsequently it was abrogated (cf. Quran IV. 14) by more definite and more extensive rights. Verse II. 241 is included in the list of 20 verses mentioned by Jalaluddin ibn Abdur Rehman ibn Abi Bakr Assuyuti (d. 911 A.H., or 1515 A.C.) in the *Itqan* a commentary on the Quran, as universally acknowledged to be abrogated. This fact was not brought to the notice of the P. C. in *Aga Mahomed Jaffer Bindanim* v. *Koolsoom Beebee* (1897) 25 Cal. 9, 18, 19.

[7] This verse was promulgated before IV. 12, by which parents were made competent to succeed even with descendants. Dealing with circumstances in which parents were excluded by descendants from inheriting, it recommends a legacy to them. Thus explained, it is not opposed to the view of the jurists other than those of the *Ithna 'ashari* school, viz., that a legacy cannot be left to any heir.

[8] Not restricting it to the *'asaba*, or male agnates, who alone were recognised by the Pre-Islamic customary law of Arabia.

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Women also to inherit.

Covet not the grace by which God hath preferred some of you to others: for men there is a portion of what they earn, and for women a portion of what they earn. Of God, therefore, ask his gifts; verily, God knows all.

Kinship.

To every one have we appointed[1] kindred, as heirs of what parents and relatives, and those with whom ye have joined right hands in contract,[2] leave. Give, therefore, to each their portion. Verily, God witnesseth all things.

Quran IV. 36, 37.

FEMALES ought also to inherit.

Men ought to have a part of what their parents and kindred leave; and women[3] a part of what their parents and kindred leave: whether it be little or much, let them have a determinate portion.

Orphans and poor.

And when they who are kin are present at the division, and the orphans[4] and the poor, maintain them out of it; and speak to them with kindly speech.

Quran IV. 9, 10.

DAUGHTERS.

With regard to your children, God commandeth you,—(to give) the male the like of the portion of two females; and if there be females[5] more than two, then they shall have two-thirds of that which (the deceased) leaves: and if there be an only one, she shall have a half; and as to the

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parents, each of them shall have a sixth part of what he leaves, if he has a child,[6] but if he have no child,[6] and his parents inherit, then let his mother have a third: and if he have brethren, let his mother have

Parents and children equally near.

sixth, after paying the bequests he shall have bequeathed, and his debts. As to your fathers or your children, ye know not which of them is nearer to you in the benefit they bring. This is an ordinance of God; verily, God is knowing, wise!

WIVES. HUSBANDS.

Half of what your wives leave shall be yours, if they have no issue: but if they have issue, then a fourth of what they leave shall be yours, after paying the bequests they shall bequeath, and debts.

And your wives shall have a fourth part of what ye leave, if ye have no issue, but if ye have issue, then they shall have an eight part of what ye leave, after paying the bequests ye shall bequeath, and debts.

[1] Viz. new principles of reckoning kinship are promulgated by Islam.

[2] Cf. s. 634 below. "A precept conformable to an old custom of the Arabs that when persons mutually entered into a strict friendship or confederacy, the surviving friend should have a sixth part of the deceased's estate. But this was afterwards abrogated according to Zamukhshari at least as to infidels. The passage may likewise be understood of a private contract whereby the survivor is to inherit in a certain part of the substance of him that dies first," Sale citing Beidawi.

[3] "This law was given to abolish a custom of the pagan Arabs, who suffered not women or children to have any part of their husband's or father's inheritance, on pretence that they only should inherit who were able to go to war," Sale citing at Beidawi. Complaints were first made to the Prophet against this custom by Um Kuha, *Tafsir-i-Raufi*, cited by Wherry. See also *Mischat-ul-Masabih*, XII. xix, 1,2.

[4] Referring perhaps to descendants of predeceased sons, and other relations who are excluded: e.g., a grandson is excluded by a son.

[5] I. e., only daughters without sons.

[6] In the original *walad* which Palmer renders "son," the word seems to be the equivalent of offspring, and before the time of the Quranic changes in the law of succession only male offspring being recognised, *walad*, was no doubt used as synonymous with son;—that is still the first meaning given to the word in Richardson's Dictionary.

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SISTERS and BROTHERS.

If a man or a woman be succeeded by a collateral relation[1] and the deceased have a brother or a sister, each of these two shall have a sixth; but if there are more than this, then let them share in a third, after payment of the bequests he bequeaths and of his debts—

Without loss to anyone. This is an ordinance from God,—and God is knowing, gracious!

Quran IV, 12-16.

SISTERS.

They will consult thee. Say: God instructeth you as to collateral kindred:[1] If a man die childless, but have a sister,[2] half of what he leaves shall be hers, and [i.e., just as] if she die childless, he shall be her heir. But if there be two sisters, let them both have two-thirds of what he leaves, and if there be brethren both males and females the male shall have like the portion of two females. God makes this manifest to you that ye err not: God knoweth all things.

Quran IV, 175.

Debts of deceased paid by the Prophet.

The following tradition explains the first sentence of Quran, XXXIII, 6 "Abu Hurairah said: 'the Apostle of God said: "It is fit for me to be more benevolent to Muslemans than they to each other, therefore any Musleman dying in debt, and not leaving property to discharge it,—it rests with me, and he who leaves property, it is for his heirs.'" (and in one tradition it is thus, 'he who hath left debt and children, let them come to me, I am their patron, I will discharge his debt, and befriend his children')." Later it is related from 'Aisha, "Verily a freed man of the Prophet's died, and left some property, but left no child or relations to inherit; and the Prophet said 'give his effects to a man of his village.'"[3]

The other traditions in the same work about inheritance throw light on the pre-Islamic rules of succession, but do not add anything to the principles of the Muhammadan law, they are therefore not cited.

§ 4.—*Explanation of terms.*

Interpretation.

605. In this chapter unless there is anything repugnant in the subject or context, the following words and expressions with their grammatical variations and cognate expressions have the meanings indicated below,—

The deceased.

(1) "The deceased"[4] means the person whose relatives are to be reckoned for the purpose of distributing his estate in accordance with the law of intestate succession.

Kinship.

(2) "Kinship" is the connexion or relation of persons descended from the same stock, or common ancestor.[5]

[1] *Kalala* in the original: this word means "a kinsman who is neither parent nor child," see Palmer's Quran. Sale and Rodwell render it by "distant kinsman," which is somewhat misleading, especially as that expression has acquired a technical meaning in the law of inheritance.

[2] This provision is restricted in favour of the sisters according to the Sunni interpretation. The Shiahs take it as indicating that all females can be sharers; and in conjunction with the previous verses, it is interpreted as placing females and cognates on a footing of equality with male agnates as regards competence to inherit

[3] *Mishcat-ul-Masabih* XII, XIX, 1, 2.

[4] Or "propositus."

[5] Cf. Bail. I. 684; Succession Act, s 20.

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Lineal relationship.

(3) "Lineal relationship" is that which subsists between two persons one of whom is descended in a direct line from the other.[1] Every generation constitutes a degree, either ascending or descending.[2]

Collateral.

(4) "Collateral"[3] means a person having a common ancestor with the deceased (either on the side of the father or mother and through males, or females); but who is neither a descendant nor an ancestor of the deceased.

(5) "Agnate" means a person whose relation to the deceased can be traced without the intervention of female links.[4]

Cognate

(6) "Cognate" means a person related to the deceased through one or more female links (whether or not there are also male links intervening).[5]

Consanguine relations.

(7) "Consanguine half brothers" or "sisters" (or shortly "consanguine brothers" or "sisters") refers to the children of the same father, but a different mother; the descendants of consanguine half brothers and sisters of the deceased.[6] or an ancestor of the deceased are referred to as his consanguine relations.

Uterine relations.

(8) "Uterine half brothers or sisters" (or shortly "uterine brothers or sisters") refers to the children of the same mother, but a different father; the descendants of uterine half brothers and sisters of the deceased.[7] or an ancestor of the deceased are referred to as his uterine relations.

Estate.

(9) "The estate" means all the heritable property of whatever description owned by the deceased at the time of his death, after his funeral expenses, have been defrayed, his debts discharged, and the legacies validly bequeathed by him paid out.[8]

[1] Succession Act, s. 21: "as between a man and his father, grandfather, and great grandfather, and so upwards, in the direct ascending line; or between a man, his son, grandson, great grandson, and so downwards, in the direct descending line."

[2] *Ib.* "A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great grandfather and great grandson in the third."

[3] E. g., a brother, sister, nephew, niece, uncle, grand uncle and cousin, are collaterals.

[4] E g., a son, son's daughter, son's son, son's son's daughter, father, and father's mother are agnates.

[5] E. g., a daughter's son and daughter's daughter, son's daughter's son, daughter's son's son, mother's father, mother's mother's father, and aunt's son, are cognates.

[6] Thus if CB and CBA are consanguine brothers, and *Cs* is their consanguine sister, then (*a*) CB is (i) the consanguine paternal uncle of the children of CBA, and (ii) the consanguine maternal uncle of the children of *Cs* and (*b*) the sons and daughters of CB and CBA are respectively consanguine paternal cousins of each other. The consanguine relations are agnates. See first table on p. 608.

[7] Cf. the last footnote, *mut. mut.* The uterine relations are cognates.

[8] Bail. I. 683 (para. 2), 684.

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(10) "The customary law" or "the pre-Islamic law" refers to the rules of intestate succession prevailing in Arabia immediately before the promulgation of Islam, in so far as those rules can be ascertained.[1] "Customary heir" (or 'asaba') means the person entitled to succeed in accordance with the customary law, i.e., the nearest male agnate.[2]

Customary law.

Customary heir or nearest male agnate.

(11) "Quranic sharer," or "sharer,"[3] means a person who takes a definite fraction of the estate, under the provisions contained in the Quran.[4]

(Quranic) sharers.

(12) "Residue" means that portion of the estate (if any) which is left over after the (Quranic) sharers have received the shares to which they are respectively entitled; and a "residuary" means a person entitled to take the "residue."[5]

Residuary.

(13) A "Quranic residuary" or "co-residuary" is a female agnate who (under the customary law was disqualified by her

Quranic residuary.

[1] It is assumed in this chapter that the Muhammadan law of succession consists the pre-Islamic customary law, as varied by the Quran, or the precepts of the Prophet. Hence if a rule cannot be traced to Islam, its origin is attributed to pre-Islamic custom. Cf. Smith, "Kinship and Marriage in Ancient Arabia," *passim*, e. g., 71.

[2] Bail. I. 691, where they are also referred to as "residuaries by themselves, or in their own right." *'Asaba* originally means nerve or ligament, then relationship; only agnates being recognised as relations, the two terms were apparently used as synonymous, and in Muhammadan law *'asaba* means nothing different from agnates. The earliest tie was not even blood relationship, but blood—feud: Cf. "*Asaba*, a word which primarily means those who go to battle together, i. e., have a common blood-feud. Similarly in the old law of Medina women were excluded from inheritance on the ground that 'none can be heirs who do not take part in battle, drive booty and protect property' (Beidh. Sur. IV, 8, *Kamil*, 678, 679)" Smith's "Kinship and Marriage in Ancient Arabia," 65, 66. "The key to all divisions and aggregations of Arab groups, lies in the action and reaction of two principles: that the only effective bond is a bond of blood, and that the purpose of Society is to unite men for offence and defence," *ibid*. 69. See also *ibid*. 2, 25-27, 66, 67, 71.

[3] In Arabic *sahib-ul-farz*, or *zavilfuruz*, i. e., master of share, see above p. 556 *n*. The terms *sharer* and *residuary* refer primarily to the nature of the rights of the heirs, viz., whether they take a share or the residue. A treatment of the law of succession based on this distinction is apt to obscure the scheme underlying the principles of succession. What portion any person is entitled to take is no doubt an important question, but it is a result of the general scheme of the law

[4] "Sharers are all those for whom shares have been appointed or ordained in the sacred text (Quran) the traditions, or with general assent."—Bail. I. 686. They owe their rights not to the customary law, but to Islam. The term does not include any customary heir, i. e., the nearest male agnate can never be a sharer. No male agnates (whether near or remote) except the father and grandfather are sharers. These are sharers when they would not have been customary heirs, i. e., when they are not the nearest agnates, viz., when descendants exist.

[5] Cf. "there are three different kinds of heirs—*sharers*, *agnates* and *uterine relations*. The two last have been termed from their position in the inheritance, *residuaries*, and *distant kindred*, by Sir William Jones in his translation of the *Sirajiyyah*,"—Bail. 1. 685 (para. 2 and *n*. 2). Cf Bail. I. 691. Under Sunni law the nearest male (agnate who was the customary heir) is as a rule not ousted from his pre-Islamic right to inherit; but he takes the estate subject to the rights of the sharers and divides the residue with female agnates: See above pp. 556-560, below, 569, *et. seq*. The residuaries, therefore, belong to one of two classes of heirs: (*a*) those who would have been customary heirs according to the pre-Islamic customary law (*b*) those who are made heirs by the law of Islam,—succeeding (i) either as co-residuaries *with* the customary heir or (ii) in lieu of him, as sole Quranic residuaries: The sister is the only female that can inherit as sole Quranic residuary, see p. 557, *n*. 3, 566 *n*. 1.

SECTION 605 sex from inheriting but who) under Muhammadan law inherits the residue of the estate.[1]

Newly entitled heir.

(14) A "newly entitled heir" means a person who (under the circumstances in question) would not have been entitled to inherit any part of the estate in accordance with the customary law, but who is given rights of inheritance in Muhammadan law.[2]

Claimants.

(15) By "claimants" are meant all such relations of a deceased person as are either themselves entitled to inherit any part of his estate, or whose existence affects or might be supposed to affect the rights of those who are entitled to inherit.

Relationship always traced from the deceased.

(16) Where a term of relationship is used without any qualifying words, it must be understood as referring to a person bearing that relationship to the deceased.[3]

In the illustrations in this chapter a common system of referring to the various relations by initial letters is followed, using italics to indicate females see p.

PART II.—SUNNI LAW OF INHERITANCE.

§ 1.—Competence to Inherit.

(1) Exclusion from inheritance.

1. Child before birth.

606. (1) A child in the womb of its mother is competent to inherit, provided that it is born alive.[4]

Exception—When a woman is treated with violence and in consequence thereof she gives premature birth to a still-born child, such child is to be reckoned as having been born alive.[5]

Illegitimate father and paternal relations. Illegitimate mother and her relations not excluded.

(2) An illegitimate child and its father are not related in law, nor competent to inherit from each other,[6] but in Sunni law the mother and its illegitimate offspring are competent so to do.[7]

[1] Referred to in Bail. I. 691, 692 as "residuary by another"—as the Quranic residuaries (generally) inherit with the customary heirs. Where the sister takes the residue even though there is no brother with her, (and consequently when she cannot be called co-residuary with the brother)—see below s. 621 (4)—she is referred to in Bail. I. 691, 693 as residuary with another, because the sister becomes residuary in such circumstances only in case the daughter also exists.

[2] Thus Quranic sharers and Quranic residuaries are newly entitled. The former include, e.g, not only the daughter (who was not competent to inherit under the customary law) but also the father when he co-exists with (male agnatic) descendants. The father was excluded under the pre-Islamic customs if any descendants existed, but in Islam he is made a Quranic sharer under the said circumstances,—he is, therefore, a newly entitled heir in his capacity as sharer.

[3] Thus "the son" means "the son of the deceased."

[4] Bail I. 702, where some instances are given which have reference to the establishment of paternity.

[5] Bail. I. 703.

[6] *Boodhun* v. *Jan Khan* (1870) 13 W. R. 265.

[7] Bail. I. 693; *Mischcat-ul-Masabih* XII, XIX. 2. Cf. s. 215 above. Of course when the child is brought up as a Christian, the Muhammadan law does not apply, and the illegitimate mother is not entitled to succeed: *Nancy* alias *Zuhoorun* v. *Burgess* (1864) 1 W. R. 272.

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The same rules apply to relations through the illegitimate father and mother, respectively.[1]

1. Exclusion from inheritance of one who has killed the deceased.

(3) No portion of the estate of a Sunni Mussulman can be inherited by one who has unlawfully killed the deceased, whether such killing has been intentional or unintentional.[2]

2. Non-Muslim.

(4) According to Sunni law a person who is not a Mussalman cannot inherit from a Mussulman. This rule of law is abrogated in British India [in so far as it affects apostates from Islam.[3]]

'Nemo est haeres viventis.'

(5) Rights of inheritance arise only after the death of the person whose estate is in question ; and no person is the heir of a living Mussulman.[4]

Acknowledgment of kinship of no effect as against others than acknowledger.

(6) Where a person acknowledges another to bear a relationship to him or her other than that of a parent or child or husband or wife,[5] such acknowledgment is of no effect as against those who deny the relationship so acknowledged (provided that their own relationship to the deceased is established); but it is of full effect (unless subsequently retracted) against the person who has made the said acknowledgment.[6] There is no such rule in the Shafi'i school of Sunni law.[7] *Quaere* whether this

[1] Under Shiah law the illegitimate mother also is incompetent to inherit. *Sahebzadi Begum* v. *Mirza Himmut Bahadur* (1869) 4 Ben. L. R. (A.C.) 103; 12 W. R. 512; affirmed on review: (1870) 14 W. R. 125; *Koonari Bibi* v. *Dalim Bibi* (1884) 11 Cal. 14; *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.

[2] Bail. I. 697: e.g., "by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding." But if A digs a well, and B falls into it, or A places a stone on the road, and B stumbles against it, A does not lose his right. Then it is explained that whenever the *diyat* or blood-money is due from the killer, he loses his right to inherit—the pre-Islamic origin of the rule is thus disclosed. Cf. p. 555 above.

[3] *Quaere* whether Act, XXI. of 1850 (see above p. 30) affects other than apostates. Slavery and difference of country prevent rights of inheritance under strict Muhammadan law, Bail. I. 698, 700 : Cf. p. 51 above.

[4] Cf. Bail. I. 583 (*ll.* 7-8), 574 (para. 3), and above pp. 221, 282, *ill.* (1). *Hasan Ali* v. *Nazo* (1889) 11. All. 456, following a dictum of the P. C. in *Abdul Wahid Khan* v. *Nuran Bibi* (1885) 11 Cal. 597; 12 I. A. 91; See also Macnaghten Prec. Inh. case XI. referring to Dig. No. 74, i.e., (1827) 4 S. D. A. (Beng. Rep.) 210.

[5] Acknowledgments relating to parentage and marriage have special rules applying to them. See above ss. 81, 222.

[6] Bail. I. 406 : Thus if A acknowledges B to be his (A's) brother, and A dies leaving other heirs to himself, who deny that A and B are brothers,—then B does not inherit with the other heirs, nor from A's father F (if F denies his parentage of B). But B would have been entitled (i) to maintenance from A during A's lifetime (see s. 333 above); and (ii) if A leaves no heirs [whose right can be proved by satisfactory evidence, other than A's mere acknowledgment] then B would be entitled to inherit "because the acknowledgment comprehends two things—descent, and a right to the acknowledger's property after his death, and though the first cannot be heard as it affects another party, the second is not liable to the same objection, because it is only against himself, and a man has the power of disposing of the whole of his property when he has no creditor nor heir" (*ib.*, see s. 579 above) (iii); and if F is dead and A acknowledges B to be his (A's) brother, B would be entitled to share with A, as A's brother, in the estate of F (though F's parentage of B would not be established). Bail. I. 406, citing *Inayah* III. 612.

[7] Wilson "Anglo-Muhammadan law," 414, citing 2 *Minhaj*, 92.

SECTION 606 rule of law is one merely of evidence, and as such of no effect in British India.[1]

Law governing the estate.

The question as to which system of law must be applied to the property of a deceased person has been dealt with above, at pp. 36-39.[2]

Release of right to inherit.

The point in subsection (5) above, has been before alluded to, mainly with reference to the renunciation of presumptive rights of inheritance.[3] In Madras, however, it was held that where a man had renounced all his claims to the estate of his mother, by a registered document, executed in consideration of Rs. 150 paid to him, he could not afterwards claim to inherit from her.[4]

Slavery difference of country or nationality.

Under strict Muhammadan law slavery and difference of country or nationality also prevents one from succeeding.[5] The former can have no effect in British India [6] and questions affected by the latter consideration must be governed in the Courts of British India by principles of international law,

Insanity Unchastity.

which differ as regards movables and immovables.[7] Insanity is no ground for exclusion from inheritance ; [8] nor want of chastity in a daughter.[9]

Right of co-sharers.

A co-sharer under Muhammadan law has a right to a specific share in each item of property left by the deceased, and can sue to recover that share from any person in possession of that property.[10]

(2) Unborn Person's Rights of Inheritance.

Reserving share of unborn heir.

607. Where any heir of a deceased person is unborn, but competent to inherit under section 606 (1) above, the estate can only be divided amongst the other heirs subject to such a portion thereof being reserved as will ensure that the said unborn person or persons should be able to receive his or their full shares, when born.[11]

Portion of, and period for which, estate to be left undivided.

The portion of the estate to be left undivided depends on the circumstances of the case, and the possible rights of the unborn persons. The period for which it must be left undivided is the longest possible period of gestation. On these points it is unnecessary to refer to the older texts of Muhammadan law.

(3) Missing Person's Rights of Inheritance.

of death until when property not to be tributed.

608. A person who is missing is in British India presumed to be alive until it is proved under the provisions of sections 107 and 108 of the Evidence Act that he is dead.

[1] I.e., the mere acknowledgment has no effect as proof of relationship against others than the acknowledger ; but it is conclusive against him.

[2] See also *Hayat-un-Nissa* v. *Muhammad Ali Khan* (1890) 12 All. 290 ; 17 I. A. 73, *Nancy* alias *Zuhoorun* v. *Burgess* (1864) 1 W. R. 272.

[3] See above p. 282

[4] *Kunhi Mamod* v. *Kunhi Moidin* (1896) 19 Mad. 176. This decision seems to be opposed to principle, and would probably not be followed ; see above p. 282 *ill.* (1), though the *fti* attached to the Zilla Court of Shahabad pronounced in favour of the validity of such renunciation : Macn Prec. Inh. case XI, p. 90 *n.*

[5] Bail. I. 698, 700.

[6] See above p. 51.

[7] Cf Dicey, "Conflict of Laws," (2nd ed., 1908) 504, 664, 678.

[8] Macn. Prec. Inh. Case X *Mahar Ali* v. *Amani* (1869) 2 Ben. L. R (A.C.) 306, S. C. *Khyratun* v. *Amanee*, 11 W. R 212

[9] *Noronarain Roy* v. *Neemaeechand N* (1866) 6 W. R. 303.

[10] *Chandu* v. *Kunhamed* (1891) 14 Mad. 32

[11] Bail. 1, 702 703.

609. So long as a missing person is presumed to be alive, his property cannot be divided amongst his presumptive heirs; and the portion of the estate of a deceased person which a missing person is entitled to inherit must be kept apart for him until he comes and claims it, or until such time as he is presumed to be dead.[1]

SECTION 609 Reservation of share of missing person.

It is stated in the 'Fatawa 'Alamgiri' that a person who is missing must be accounted dead so far as the property of others is concerned,[2] but alive as regards his own property[3] until such a time has elapsed that it is inconceivable that he should be still alive or until his contemporaries are dead.

Missing person loses his right to inherit, but his own property, not to be distributed.

§ 2.—Different Classes of Heirs and Rights of Inheritance.

Scheme of Sunni law of Inheritance.

610. According to Sunni law the estate of a deceased person is inherited as follows,[4]—

(Sunni law) Stages of distribution of estate.

(1) The Quranic sharers are given the shares or fractions of the estate to which they become entitled; provided that where the sharers are such that the fractions of the estate to which they are respectively entitled, when added together exceed unity,[5]—and their shares cannot for the said season be paid out to each of them in full,—the share of each abates rateably,[6]

1. (1) Shares. 'Aul' or increase.

(2) The residue of the estate which is left over after the said shares have been so allotted, is divided amongst the residuaries, i.e. the nearest male agnates[7] and the female agnates in the same line, subject to section 604 (1) clause (*c*) above.

(2) residue to—

(*a*) customary and Quranic heirs, or

[1] *Moolla Cassim* v. *Moolla Abdul Rahim* (1905) 33 Cal. 173; 33 I. A. 177; but see also *Mazhar Ali* v *Budh Singh* (1884) 7 All. 297. All. W. N. 333. *Girdhari Lall* v. *Lado Begum* [1882] All. W. N. 105; (*Musst.*) *Dowlut Khatoon* v. *Khaja Ali Jan* (1867) 2 N. W. 59.

[2] Bail. I. 703; *Imam Ali Khan* v. *Abdool Ali Khan* (1867) 2 N. W. 28.

[3] Bail. I. 703. In *Hosseini Khanum* v. *Tipun Lall* (1870) 14 W. R. 293, the view was alluded to that at least 90 years must (under Muhammadan law) elapse before a missing person's property can be dealt with by his presumptive heirs,—but the plaintiff was a stranger, and the question could not be decided in that case. See also (*Musst.*) *Mani Bibi* v. (*Musst.*) *Sahibzadi* (1831) 5 Sel. Rep 108; *Durvesh* v. *Shekhun* (1820) 2 Borr 20: Vo'. No. Morl., 218 (*Musst.*) *Rukhi Bibi* v. (*Musst.*) *Rahut Bibi* (1875) 7 N. W 191. *Kalee Khan* v. (*Mussumat*) *Jadee* (1873) 5 N W 62: suit by sisters of person missing for 25 years, to obtain possession as managers and trustees of $\frac{2}{3}$ of his property from nephews of the missing person, dismissed—*sed quaere*.

[4] Bail. I. 685; *Gujadhur Pershad* v. *Shaikh Abdoollah* (1869) 11 W. R. 220.

[5] E.g., if a husband and two sisters exist, they are entitled to $\frac{1}{2}$ and $\frac{2}{3}$ respectively: They cannot all get their full shares. Cf. *n.* 6 below.

[6] Bail I. 713. This process of abatement is called in Arabic *'aul* or "increase" because the common denominator has to be increased to make a rateable reduction. E. g., if a lady dies leaving two daughters, both parents, and husband, the shares are $\frac{3}{4}$, $\frac{1}{6}$, $\frac{1}{3}$, and $\frac{1}{4}$ respectively, making a total of $\frac{25}{12}$. The common denominator has to be increased to 16 in each case, and the daughters take $\frac{9}{16}$, instead of $\frac{3}{4}$ etc. See below pp. 584, 590 *ill.* (7) 591 *ill.* (13), (14), (15), *ill.*

[7] In only one case is the title of the nearest male agnate taken away—when he is remoter than a brother and the sister is living, see s. 621.

SECTION 610 (*b*) sharers.

(3) In the absence of residuaries, the Quranic sharers (other than husband or wife) take the residue. The right of the sharers so to take the residue is referred to as the right to the "return,"

"Return"

II. "Distant kindred" take whole failing sharers and

(4) In the absence of the said sharers and residuaries the estate is divisible amongst the other blood relations of the deceased, whether cognates or female agnates; these are collectively referred to as the "distant kindred,"[1]

1. ONLY TWO ALTERNATIVE MODES OF DISTRIBUTION.

(Sunni law). Scheme of distribution.

I. If there is any sharer or residuary,—
   1. the sharers take their shares, then—
   2. the residue is taken by
      (*a*) the residuaries if any; or failing them,
      (*b*) the sharers.

II. If there are no sharers or residuaries the whole estate is taken by the other blood relations (distant kindred).

2. THE SHARERS ENUMERATED AND CONSIDERED.

Sharers enumerated.

1. Husband. 2. Wife. 3. Daughter. 4. Daughter of son howlowsoever.[2] 5. Father. 6. Paternal grandfather. (referred to as true[3] grandfather). 7. Mother. 8. True[3] grandmother. 9. Full sister. 10. Consanguine half sister. 11. Uterine sister. 12. Uterine brother.

Quranic sharers are those who could not succeed under the customary law being either incompetent to do so, or being excluded by prior rights of the others.

It will be noticed that of these only the father and true grandfather found any recognition in the customary law of inheritance. The Quran remedied the injustice done to the husband and wife, and to females and uterine relations[3] by specially providing for them; as for the male ancestors they were under certain circumstances (viz., the absence of the descendants) heirs according to the customary law. The changes introduced by Islam in regard to the ancestors will be more fully explained later but the basis of the changes was that: (1) Female ancestors should also have a portion of the estate. (2) Even in competition with descendants, the ancestors (female as well as male) should have a share in the estate.[4]

3. CLASSIFICATION SHOWING PRINCIPLES OF QURANIC RIGHTS.

Principle on a right—

I. to Quranic share given.

I. The Quranic sharers consist of those relations who (according to the customary law) were excluded in favour of the customary heir, but whose

[1] A very misappropriate translation of the Arabic term: A daughter's son is classed amongst the "distant kindred," but an agnatic male cousin ten degrees removed is a residuary; see s. 626 below, and cf. "our son's sons are our sons, but the sons of our daughters are sons of foreigners"—*Hamasa* 260, 3,—Smith, "Kinship and Marriage," 184.

[2] I. e., agnatic female descendant.

[3] *Sahih*, in Arabic. The true grandfather is the agnatic male ascendant. The true grandmother is not so easily described: see below s. 616.

[4] Though according to the Sunni interpretation of the law only the uterine brother and sister can succeed as long as there is any male agnate, all the remoter uterine relations being postponed to all male agnates.

SECTION 610

claims on the score of proximity are not inferior to his. They may be grouped under the following heads :

(1) husband or wife,

(2) female agnatic descendants (provided they are nearer than the customary heir),

(3) such ancestors as are not customary heirs, viz.—

(*a*) male agnatic ancestors, when the customary heir is a descendant,[1]

(*b*) female ancestors,[2]

(4) collaterals : these are however restricted so far as the right to a share[3] is concerned to,—

(*a*) the following agnates,—

(i) full sister, when she is not (Quranic) residuary, i. e., when the full brother is not the customary heir—because he does not survive, and there survives no male agnatic descendant or ascendant (who, being nearer, is the customary heir), and when the sister is not sole residuary under the cirumstances mentioned on p. 557 *n.* 3 above,

(ii) consanguine sister under either of the said circumstances,

(*b*) and the following cognates, viz., uterine sisters and brothers.

The effect of the conditions on which they are entitled to shares is this that no person remoter than the residuary (the customary heir) succeeds as a sharer.[4] There is only one exception to this: the anomalous case of some female ascendants.[5]

1. Husband or wife.
2. Daughter or son's daughter.
3. Male ancestors when there are descendants.
4. Female ancestors.
5. Sisters and uterine brother.

Shares taken only when nearer than customary heir

II. The Quranic or newly introduced residuaries are those females who are related to the deceased in exactly the same way as the customary heir, but were excluded, owing to their sex. Under the Sunni exposition of the law, however, descendants and sisters are the only females to take as residuaries. The rights of the female ancestors to become residuaries is either obscured or merged in other rights; and collaterals remoter than the sisters are entirely cut off from rights of this class—the principle of which is, however, clear when we consider the case of the son and daughter surviving: The son would have been the sole heir, excluding the daughter under the customary law. He is allowed to remain heir, but the daughter is added as (Quranic) residuary, and the two take the estate jointly though in unequal proportions.

II. Quranic right (of females) to be residuaries.

III. Finally those relations by blood who do not fall within the descriptions above referred to, are called 'zavil arham' (plural, of 'zu rahm'), literally meaning "master of relationship" (the "distant kindred" of English authors), and these succeed in the absence of the former. These consist mainly of cognates and female agnates remoter than sisters.

III. Quranic rights of 'zu rahm' or distant kindred.

[1] Only in that case was it necessary for them to be given rights by Islam: In the absence of male descendants, the ascendants were the customary heirs. Such simultaneous succession is a new principle introduced in the law: for previous to Islam only one class of heirs succeeded at a time, viz., the nearest or next of kin. The Quranic basis for this pinciple is the verse, "Ye know not whether your children are nearer to you or your parents"—Quran IV. 12. See p. 562 above.

[2] These had no rights at all under the customary law of succession.

[3] The rest of the female collaterals come in with the cognates, being classed as "distant kindred."

[4] E. g., the daughter becomes sharer only if the customary heir, is a son's son, or some remoter agnate; the sister only when the customary heir is neither a descendant nor an ascendant.

[5] The exception only holds in regard to such female ascendants as are cognates. See s. 616 below.

(1) Where there are two or more sharers of the same class (i.e., falling within one of the 12 descriptions given below) they take the share collectively, each taking an equal portion (notwithstanding that in cases 7 and 8 they differ in sex). (2) The shares mentioned below are liable to abatement by ''aul' or increase (see s. 610 (1)) (3) The sharers take the whole estate if there are no "residuaries." (see ss. 610, 625)

	SHARER.	Conditions for becoming sharer.	SHARES. Where one.	SHARES. Where two or more.	Circumstances (if any) varying share.	SHARE so varied
		I. Relations by affinity.				
	Wife,	Shares in every case. Two or more wives take the same share.			If there is any agnatic descendant she takes—	
					If there is no agnatic descendant she takes—	
	Husband,	Shares in every case.			If there is any agnatic descendant he takes—	
					If there is no agnatic descendant he takes—	
		II. Blood relations.				
		Female agnatic descendants and collaterals.				
	Daughter,	Shares only 'when no son' [1]			When there is a single daughter (or female agnate in a higher line), son's daughter (or other female agnate) takes [3] –	
	Son's daughter, (or other female agnatic descendant),	Shares only 'when no son, nor son's son, (nor other male agnate in the same or higher line), [1] and when no daughter (nor other female agnate in a higher line).[2]				
	Full sister,	Shares only 'where no male agnatic descendant, or ascendant, nor full brother', [1] nor female agnatic descendant.[2]		½	[When there is a female agnatic descendant, the sister (full, and failing her, consanguine) becomes residuary].	
	Consanguine sister,	Shares only 'where no male agnatic descendant or ascendant, nor full or consanguine brother' [1] nor female agnatic descendant, nor full sister.[2]			See above. If the consanguine sisters (one or more) co-exist with a single full sister, there being no nearer male agnate nor female agnatic descendant, the former takes—	
	Uterine sister,	Share only 'where no male agnatic descendant, or ascendant' [1] nor female agnatic descendant.[2]				
8	Uterine brother,					
		(2) *Ascendants.* (a) *Females.*				
	Mother,	Shares in every case: 1. When there are agnatic descendants she takes -- 2. When no agnatic descendants, but father co-existing with two or more brothers or sisters she takes — 3. When co-existing with father, but neither agnatic descendants, nor two or more brothers and sisters she takes ⅓ of residue after husband or wife (if any) has taken his or her share. 4. With neither father nor agnatic descendants, nor two or more sisters and brothers, she takes ⅓ of the whole estate.				
10	True grandmother,	The nearest is a sharer, provided the mother [2] and all the links between herself and the deceased are dead.[1]				
		(b) *Male*				
11	Father,	Shares in every case.[4]			[When there are two or more brothers or sisters, some authorities make the grandfather co-residuary with them].	
12	True grandfather,	Shares in every case, provided all the links between himself and the deceased are dead.[1]		⅓		

[1] The words enclosed in ' ' may be thus paraphrased: "when the claimant is nearer than the nearest male agnate."

[2] The conditions following those referred to in *n.* 1, generally provide for priorities (amongst those whose claims are similar as regards the nature of their kinship to the deceased viz.,) where more claimants than one are nearer to the deceased than the customary heir, and some claimants are nearer than others.

the claims of several are similar, but the claims of those having priority do not exhaust the whole share allotted to them all as a class.

[4] Where there are no male agnatic descendants the father (and failing him the grandfather) is the residuary, and his rights as sharer are merged in his rights to take the residue, which is never less than ⅓—except where there are sole daughters or female agnatic descendants,—in which case his right as sharer gives him a claim to rank with the other sharers.

§ 3.—*The Sharers: The First Class of Heirs in Sunni law.*

(1) *Relations by affinity: Husband or Wife.*

611. (1) The husband[1] takes ¼ of the estate of his deceased wife, if she leaves any agnatic descendant surviving her, and ½ if she dies without leaving any such descendant.

Husband ¼, wife ¼; if no descendants. Descendants reduce shares. by half.

(2) The wife[1] takes ⅛ of the estate of her deceased husband, if he leaves any agnatic descendant surviving him, and ¼ if he dies without leaving any such descendant. If there are more wives than one, they divide the ⅛ or ¼ equally amongst themselves.[2]

It is convenient to deal with the husband and wife first, because their rights are simplest and they always succeed—and only as sharers. On principle however it would probably be more correct to consider their rights after the rights of all the blood relations (as Quranic sharers) had been dealt with.

The husband and wife are the only heirs by affinity recognised in the law:[3] they took no recognised interest in each other's estate under the pre-Islamic customary law. The widow was liable to be considered a part of the estate, and to devolve as such on the heirs.[4] The Quran prohibited this, and enjoined at first that she should be allowed, as of right, to live in the house of the deceased for a year.[5] Later, this injunction was replaced by a law that the widow should get a definite portion of the estate as legacy or "share."[6]

Widow's position before Islam

There is a parallel to this development of the law, in the case of the parents, in regard to whom it at first recommended (without being a rule of positive law) that a legacy should be left to them. Later this recommendation of a legacy was altered into a rule that they should take a definite share of the estate. If the expression "Quranic legacy" could be allowed, it would well indicate the nature and origin of the "Quranic share."

Right to "share" development of recommendation to legacy.

A species of "Quranic legacy."

POSITION OF WOMEN IN ARABIA PREVIOUS TO ISLAM.

"At Medina," says Professor Smith, "as we are told by the commentators on Sura 4, women could not inherit [before Islam]. So far as the widow of the deceased is concerned, this is almost self-evident; she could not inherit because she was herself—not indeed absolutely, but 'quâ' wife—part of her husband's estate, whose freedom and hand were at the disposal of the heir, if he chose to claim them, while if he did not do so, she was thrown back on her own people. But further, there is an explicit statement, confirmed by the words of the Sura (verse 126) that the men of Medina protested against the

Position of widow in pre-Islamic times.

[1] I.e., the regularly married husband and wife: not if the marriage is irregular, nor after *mut'a*, Bail. I. 684 (para. 3) citing (*n.* 2) *Durr-ul-Mukhtar*, 852, "from which it appears that with regard to this effect of an invalid (i.e. irregular) marriage, there is no difference of opinion between Aboo Huneefa and his two disciples." As to irregular marriages, see above p. 102. Cf. *Mulka Jehan Sahiba* v *Mahomed Ushkurree Khan* (1873) I. A. (SUPP. VOL.), 192; 26 W. R. 26. As to *mut'a* see above pp. 64, 177.

[2] Bail. I. 689; *Sirajia* 17, 18. (*Sheik*) *Musseeollah* v. (*Mussamut Beebee*) *Sherifun* (1864) 1 W. R. 122.

[3] Cf. *Ekin Bebee* v. *Ashruf Ali* (1864) 1 W. R. 152.

[4] See the quotation from Prof. Smith's "Kinship" in the comment.

[5] Quran, II. 241, above p. 561.

[6] Quran, IV. 15, 16 above pp. 562, 563.

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Of women as to rights of inheritance and to hold land.

new rule, introduced by the prophet, which gave a share of inheritance to a sister or a daughter. We have seen above, that this was based on the broad principle that none should inherit save warriors, and that this principle was applied in the most absolute way, is made plain by the story of Cais ibn al-Khatim who when he went forth to avenge his father's death provided for his mother, by handing over to one of his kinsmen a palm garden near Medina, which was to be his if Cais fell in his enterprise, subject to the condition that he would 'nourish this old woman from it all his life.' Where the mother of a man of substance could only be provided for in this round-about way the incapacity of women not only to inherit but to hold property—at least lands—must have been absolute ('Aghani' 2. 160)[1]" The fact above alluded to (that she could herself be inherited) is thus explained by Professor Smith:"

Widows were themselves the subject of inheritance.

The Coran (IV. 23) forbids men 'to inherit women against their will,' and verse 26 forbids them to have their step-mothers in marriage, 'except what has passed;' i.e., marriages of this kind had been allowed before, and existing unions of this kind are not cancelled, but the thing is not to be done any more. Both passages, according to the commentators, refer to the same practice, and their explanation is certainly authentic, for they support it by numerous historical examples. From the mass of traditional accounts of the matter, I select, as full and clear, one of those preserved in Tabari's great commentary (MS. of the Viceregal Library in Cairo). 'In the jahiliya when a man's father or brother or son died, and left a widow, the dead man's heir, if he came at once and threw his garment over her, had the right to marry her under the dowry ('mahr') of [i e., already paid by] her [deceased] lord ('sahib') or to give her in marriage, and take her dowry. But if she anticipated him and went off to her own people, then the disposal of her hand belonged to herself.' The symbolical act here spoken of is the same as that we find in the book of Ruth (III. 9) where the young widow asks her husband's kinsman Boaz 'to spread his skirt over his handmaid,' and so claim her as his wife."[2]

(2) Relations by blood as Quranic Sharers.

(a) Descendants: Female Agnates.

(i) Daughters: Female agnatic Descendants in the first line.

Daughter when sharer.

612. Where the deceased dies leaving one or more daughters, but no son or sons,[3]—

One daughter takes ½.

(1) if there is a single daughter she takes ½ of the estate as Quranic sharer;[4]

[1] Smith's "Kinship and Marriage" 117. See also *ib.*, 294, citing *Kamil* p. 679, 678, 15.

[2] *Ib.* 104, 105.

[3] Bail. I. 687, 690. In order that the daughter may be a sharer there must be no sons surviving the deceased. If there is any son then he, as the nearest male agnate, is the customary heir, and the daughter is not nearer than him, but in the same line: she, therefore, cannot, in that case, get a prior claim to the estate (as Quranic sharer), but can only rank as a co-residuary with him see s. 621 (2) (*a*).

[4] Quran IV. 12, above p. 562; Bail. I 687, 690. Being nearer than the nearest male agnate, her claims are superior to his on the ground of proximity; but this is counterbalanced by his rights being more ancient (based as they are on custom), and hers newly established—giving him priority in point of time. Hence the daughter takes a moiety of the estate, leaving the other moiety to the male agnate or customary heir.

(2) if there are two or more daughters they take collectively $\frac{2}{3}$ of the estate dividing it equally amongst themselves.[1]

SECTION 612
Two or more take $\frac{2}{3}$.

The rights of daughters are summarised under s. 623 below ; cf table on p. 572 *et seq.*

The daughters constitute the first[2] of those sharers who are blood relations, and it will be observed that they become sharers not in every case, but only under certain specified conditions, viz., if there are no sons of the deceased. Conditions of a similar nature are annexed to the rights of all the sharers :

Conditions on which daughters and other sharers become entitled to take a share.

PRINCIPLES UNDERLYING CONDITIONS FOR INHERITING AS SHARER.

1. The nearest male agnate (or customary heir) is given no right to take a Quranic share : he is already heir, and there is no necessity for giving him any rights. Exception to rule 1 :—
   The father or true grandfather is customary heir when there are no male agnatic descendants ; still he takes a Quranic share for reasons explained under s. 614.
2. As a rule, no person is entitled to be a sharer who is remoter to the deceased than the nearest male agnate (or customary heir);[3] proximity being reckoned in accordance with s. 622.
   Modifications and exceptions of rule 2 :—
   (i) Ascendants cannot in Islam be considered to be necessarily remoter than decendants (Quran, II. 12) ;[4]
   (ii) nor all cognates necessarily remoter than all agnates;[5]
   (iii) a true grandmother may succeed though she is remoter[6] than the nearest male agnate.

Most of the sharers are agnates.

Since (*a*) no person remoter than the nearest male agnate is to be a sharer, and (*b*) all cognates are considered remoter than all agnates [with the exception of the anomalous cases of the grandmother and uterine brother and sister] it follows that the sharers must generally[5] be agnates—and female agnates, because males would in most cases be excluded under rule 1 or 2.

Now as to the daughter, rule 1 does not affect her, as she is not a male agnate, nor can rule 2 apply, as she is in the first line of descent, i.e., the nearest possible relation; but rule 2 applies to daughters of sons—who get neither a Quranic share (nor take any other kind of right of inheritance in the estate) if any nearer male agnatic descendant survives.

[1] See last note. Two daughters take each $\frac{1}{3}$, leaving $\frac{1}{3}$ to the customary heir. According to the Sunni interpretation of the law, this principle of division is not followed where more daughters than two exist, so that 3 or 4 daughters take no more than $\frac{2}{3}$. The explanation, no doubt, being that the encroachments on the customary heir's rights had to be restricted within certain limits ; perhaps the prevalence of female infanticide rendered it unusual for a man to have more than two daughters.

[2] Being descendants, and in the first line, they would according to the principles of kinship recognised in Muhammadan law, be the first to be considered.

[3] As regards descendants it would be more accurate to say that no person can succeed as sharer unless she is *nearer* than the customary heir ; for those in the same degree of proximity become co-residuaries, and not sharers ; cf. s. 621 (2) (*a*).

[4] See p 562 above

[5] Though under the Sunni law the cognates are allowed to share with agnates, or to compete with them only in two cases : (*a*) the uterine brother and sister shares with the full or consanguine sister (*b*) amongst true grandmothers—cognates and agnates compete against, and if necessary, share with, each other These exceptional cases are explained below under ss. 616, 618.

[6] I.e., removed by greater number of links.

SECTION 613

(ii) *Daughter of Son or lower Female Agnatic Descendant.*

Son's daughter when sharer.

613. Where the deceased leaves neither a daughter,[1] nor a son[2] surviving him,—

(1) The daughters of his predeceased sons[3] become Quranic sharers, and become entitled to ½ of the estate if there is one such grand-daughter of the deceased, and ⅔ if there are two or more; provided that there is no son's son co-existing with them.[4]

Where daughters of a son co-exist with a single daughter (the residuary being remoter than both).

(2) Where the deceased leaves a daughter and a son's daughter surviving him, but no son, nor son's son, [the daughter takes ½ of the estate[5] and] the son's daughter takes ⅙ of the estate as Quranic sharer.[6] The said ⅙ is divided equally amongst the daughters of sons where there are two or more such daughters of sons[7] surviving, together with a single daughter.

Female agnates lower than son's daughter.

(3) In the absence of the daughter and the son's daughter, the nearest agnatic female descendants take the said share of ½ or ⅔ in the manner above referred to, and those in the next grade take ⅙ if there is only one in the first grade.

Daughters and female agnatic descendants inherit sometimes as sharers and sometimes as residuaries. A full statement of their rights in both these capacities will be found under s. 623 cf. tables on and following p. 572.

(*b*) *Ascendants as Quranic Sharers.*

(i) *Male agnates: Father and True (or paternal) Grandfather.*

1. FATHER takes ⅙ as sharer if there are descendants.

614. (1) The father of the deceased takes ⅙ of the estate, as a Quranic sharer, provided that there is any agnatic descendant surviving.[8]

[1] Bail. I, 687, 690. If there is any daughter, the daughter would become the sharer.

[2] If there is a son, he is nearer than a son's daughter, and the latter becomes disqualified, on the ground of being remoter than the customary heir; see rule 2 on p. 575.

[3] Not the daughter of a daughter, i.e., only agnatic famale descendants are entitled to be sharers: the term "daughters" or "female descendants" being referred like all terms of kinship to agnatic relationship; cf. ss. e.g., son's daughter; son's son's daughter; son's son's son's daughter, etc. descended always through male links. The cognates come much lower in the Sunni system of inheritance, in which (cf. ss. 604, 610 above) the customary law is preserved in so far as the priority of agnates is concerned,—though the sharers expressly mentioned in the Quran, i. e., the nearer female agnates (as far as the sister), come in at an early stage; see also p. 575.

[4] If there is any son's son, the son's daughters become co-residuaries with him, Macn., Prec. Inh., XVI, XXXIII, pp. 94, 110.

[5] Bail. I. 687. This is merely in accordance with s. 612 above,—the daughter's rights cannot on principle be affected by a person remoter than herself—though they may be indirectly affected by the doctrine of "increase;" see ss. 610, 620

[6] *Ib.* The ⅙ may be called the remnant of the daughters' shares—it is arrived at as follows: 2 daughters would have taken ⅔, i.e., the share of two or more female descendants when they are nearer than the customary heir, consists of ⅔ of the estate. This ⅔ is divided between the daughter and granddaughter, but so that the daughter (being the nearest) gets her full ½ leaving ⅙ for the granddaughter.

[7] It makes no difference whether they are all the daughters of one son, or of different sons.

[8] Bail. I. 686, 696. See comment, and Macn. Prec., Inh., LXIII, p. 132.

(2) In the absence of the father, the nearest agnatic [1] or paternal grandfather (called the true [2] grandfather) is entitled to take $\frac{1}{6}$ of the estate as sharer,[3] provided that there is any agnatic descendant surviving.

SECTION 614
2. TRUE GRANDFATHER takes the father's place as sharer.

Explanation—A male ancestor who is not an agnate (i. e., between whom and the deceased a female intervenes) is referred to as a "false grandfather"[4] and he cannot inherit as a sharer.

"False grandfather."

FATHER AND GRANDFATHER INHERIT IN ONE OF THREE WAYS.

(1) If there is no agnatic descendant, then the father is himself the customary heir (i. e., residuary) and he does not require any Quranic share,—except in the case where (2) the newly created rights are so extensive as to leave no residue for him, or less than the $\frac{1}{6}$ to which the Quran entitles him even when he co-exists with male descendants : The newly created rights cannot be so extensive except when there are female descendants. (3) If there is a male agnatic descendant, the father would be excluded by the customary law, whereas according to the Quran, IV. 12 descendants are not to be considered as any nearer than ascendants : hence ascendants are given a share.

1. If no agnatic descendant, father is customary heir.
2. No share required unless there are female descendants.
3. Whenever there is any male agnatic descendant, share necessary.

The grandfather takes similar interests in the estate as the father with the necessary changes, viz., (1) The grandfather does not (like the father) reduce the mother's share from $\frac{1}{3}$ of the estate to $\frac{1}{3}$ of residue. The reason of this is obvious. The mother is in the same line as the father, and her rights are analogous to those of a co-residuary with the father, but she is nearer than the grandfather, and takes her share, in priority to him. (2) For obvious reasons the grandfather does not like the father, exclude the true grandmother (3) The father is clearly nearer than the brothers and sisters; but in the case of the grandfather there is room for doubt and different opinions are expressed on the point. See ss. 615, 616, 620.

Father's and grandfather's rights compared.

See table of true grandparents below p. 581. Cf. "At the time of the Prophet there was inside the Arab tribal system a family system in which the centre of the family was a paterfamilias—not a Roman father with despotic authority over his wife and children 'in manu,' but still a male head who by contract or capture had the right to have all his wives' children as his own sons.

Arab family before Islam.

(ii) Female Ancestors as Quranic Sharers.

615. (1) The mother of the deceased is entitled (*a*) to $\frac{1}{6}$ of the estate as sharer if there is any agnatic descendant surviving ;[6] (*b*) if there is no such descendant she is entitled to $\frac{1}{3}$ of the estate, except as provided in this section.

MOTHER takes $\frac{1}{3}$ or of whole—

[1] Only agnates being entitled to this share. Here the customary notions about kinship are not altered. Cf. ss.

[2] *Sahih* in Arabic. The expression refers to such grandfathers as were recognised without question, i.e., from pre-Islamic times, when only agnatic relationship was recognised.

[3] Bail. I. 686, 690.

[4] *Ib.* The Arabic expression has no such disagreeable connotation as "false" has.

[5] Smith, "Marriage and Kinship," 203.

[6] Thus the mother gets the same Quranic share as the father, viz., $\frac{1}{6}$. The male is not preferred to the female, inasmuch as both are equal in proximity, and the father when he inherits as sharer, is no less newly entitled than the mother is. Cf. p. 559, I. (*d*), and *ib.* *n.* 7.

SECTION 615 or ⅓ of residue.

(2) Where with the mother there are surviving the father[1] and also the husband or wife (as the case may be) and thereare no other heirs,[2] then subject to sub-section (3) below, the mother takes ⅓ not of the whole estate, but of the residue, after the husband or wife has taken his or her Quranic share,

Two brothers or sisters reduce her share.

(3) Where there are two or more brothers or sisters (full, consanguine, or uterine) co-existing with the mother, she takes only ⅙ of the estate, notwithstanding that there may be no agnatic descendants.[3]

The mother's right to take ⅓ compared—

The mother being a female did not inherit under the customary law. She can, therefore, inherit only either as a sharer, or as Quranic residuary. It is generally stated that her rights are those of a sharer only, and that she is never a residuary. But it will be observed that under subs. (2) of the present section she is to all intents and purposes a Quranic co-residuary with the father, for when she co-exists with him and the husband or wife (there being no descendants), the father is the customary heir (being the nearest male agnate), the husband or wife first takes his or her share, and then out of the residue the mother takes ⅓, leaving to the father ⅔,—in other words she shares the residue with the father in the proportion of a double share to a male, just as the estate would have been inherited had there been a daughter, and son, (or other agnatic descendants in the same line) instead of father and mother. Still it would not be quite accurate to say that the mother's rights are those of a Quranic residuary, inasmuch as the rule contained in s. 615 (3) affects the mother's rights in a manner which has no parallel in the rules relating to the rights of the other Quranic residuaries.

(i) to that of a (Quranic) residuary.

(ii) to that of other Quranic sharers.

It may appear at first sight that in the case of the mother's ⅓ share[4] the analogy of the rule fixing the shares of the other female agnates (when they are nearer then the ''asaba' or nearest male agnate) is not followed, for a daughter or sister(in the said circumstances) takes ½ of the estate,and a mother (in a similar event) takes ⅓. But it must be borne in mind that the mother's ⅓ is always taken by a single individual, whereas the daughters or sisters may be two and in that case they each take ⅓ ; and if more than two, the share of each is smaller. It is evident that the rules relating to ascendants could not be exactly parallel to those relating to collaterals, for the rights of the ascendants overlap those of the descendants. They have besides less occasion to be developed fully as they come into operation more seldom.

Reason why brothers and sisters reduce mother's share.

The rule by which the mother's share is reduced to ⅓ when the (i) mother co-exists with the (ii) father and (iii) brothers or sisters, is anomalous, and must be considered, as a special case; where, however, it is the (i) grandfather (and not the father) who co-exists with the (ii) mother and (iii) brothers or

[1] Not the grandfather, though it is mentioned in the *Sirajia* that Abu Yusuf placed the grandfather in the same position as the father in this regard.

[2] I. e., there are no agnatic descendants—who are the only other heirs that can inherit with the father. If there are agnatic descendants then subs. (1) clause (*a*) applies.

[3] Bail. I. 688, 690, 695 The *Sirajia* (with the *Sharifia*) Jones's transl., paras 10, 15 ; Macn. Prec. Inh., cases, 23, 24, 41, 54.

[4] I. e,, where there are no descendants nor the father.

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sisters, some authorities [1] hold that the grandfather does not exclude the brothers and sisters, but that they all inherit as sharers or residuaries, and the mother's share may in that case have been necessarily reduced ; and it may have been considered that if the mother's share is reduced to ⅓ when she co-exists with the grandfather (and brothers and sisters), much more should her share be so reduced when she co-exists with the father (and brothers and sisters). The principles are liable to be blurred here owing to the differences of opinion referring to the rights of the brothers and sisters ; and in all cases of doubt the position of the newly entitled heirs would naturally gravitate towards their original position under the customary law.[2]

True grandmothers come into place of mother.

616. (1) In the absence of the mother, the nearest from amongst the grandmothers answering to any of the following three descriptions is or are entitled to a ⅙ share of the estate [2] (subject to subsection (4) below)—

The three groups of female ancestors who are entitled

(*a*) agnatic grandmothers [3] of the deceased,

(*b*) grandmothers of the deceased related entirely through female links,[4]

(*c*) grandmothers of the father or true grandfather of the deceased related [5] entirely through female links.[6]

"True grandmother" described.

(2) The three groups of female ancestors above enumerated are collectively referred to as "true"[7] grandmothers; and may be described as grandmothers between whom and the deceased no

[1] Bail. I. 687.

[2] In referring hereinafter to the ancestors, F="father" or "father's"; *M*="mother" or "mother's." Thus F*MM*F = father's mother's mother's father. See table on p. 581.

[3] Or paternal grandmothers, e.g., F*M* or FF*M* or FFF*M*—agnatic relationship being the only kind recognised by the customary law. See s. 602 above.

[4] E. g., *MM* or *MMM*. These are the counterpart of the first group. The one (*a*) being pure agnates, the other (*b*) pure cognates. This is the first time when the customary law of kinship and proximity is departed from even in regard to rights so obviously new as those of the Quranic sharers. The rights of the female ancestors under the Quran are so novel and various that it is not surprising that guidance for interpreting the Quran was not consciously sought from the old pre-Islamic rules. The unconscious influence, however, of ideas taken from those rules is distinctly traceable. The *Sirajia* refers, e. g., to the case, when a paternal grandmother said to the Khalif 'Umar : "'My claim to the deceased's property is superior to that of the mother's mother, because if she dies her grandson does not inherit (from her) : whereas if I die my grandson would inherit.' But he said 'take this sixth, and if both of you are living still the same (must be divided) between you, and if there is but one of you two, the sixth is for her'" Though the old lady did not carry her point with the great statesman, yet her argument illustrates the ineradicable nature of the pre-Islamic notions of kinship and also explains the recognition of the third group of true grandmothers. Cf. ss. 602, 613, 614.

[5] I.e. to the said father or grandfather.

[6] E. g., F*MM* or FF*M* or FFF*MMM* ; the relationship here begins with male links (agnates), in the first instance, and then continues through female links—The process cannot be reversed so that *MFM*, or *MM*FF*M* is not a true grandmother but a "false" one. Class (*c*) illustrates the strength of the old mode of reckoning kinship : the male agnatic ancestors (FF, FFF) are considered to take the place of the deceased so entirely that all the intermediate links are considered capable of being eleminated : Thus F, or FF is considered so exactly to take the place of the propositus, that F*MM* or FF*MM* rank as regards competence with *MM* i.e., the maternal grandmother of a paternal ancestor of the deceased is ranked (as regards competence) with the maternal grandmother of the deceased himself.

[7] *Sahih* in Arabic ; see above p. 577 n. 2.

SECTION 616 false grandfather [1] intervenes ; grandmothers other than "true" are referred to as "false" grandmothers.[2]

Relative proximity.

(3) The true grandmother who is related to the deceased through the fewest generations is considered to be the nearest, and excludes one who is remoter than herself.

Exclusion by existence of intermediate male agnate.

(4) A true grandmother who is related to the deceased through one or more male ancestors [3] is excluded if any of the said ancestors [4] survives the deceased; and those grandmothers are also excluded who are remoter than one who is excluded for the said reason.[5]

Distribution amongst true grandmothers.

(5) Where, in any case, more grandmothers than one are in the same degree of proximity to the deceased, and are all entitled to be sharers, they take the $\frac{1}{6}$ share collectively ; according to Abu Yusuf (and apparently also Abu Hanifa)[6] the said grandmothers divide their said collective share equally, notwithstanding that one of them may bear the relationship of true grandmother to the deceased in more ways than one;[7] but accord-

Equal.

[1] See above p. 577 *n.* 4.

[2] Bail. I. 688, 690. It will be observed that whereas the devolution of the father's $\frac{1}{6}$ share is restricted to the one line of agnatic grandfathers, that of the mother may be taken by a female ascendant in one of three lines—so that far more female ancestors have the chance of succeeding as Quranic sharers than male ancestors. As the female ancestors were absolutely excluded under the old law, the rights under the new law of all female ancestors can develop more easily than the rights of male ancestors, some of whom (i.e., the agnates) were recognised in the old law, and whose prestige gives them an advantage over the others. A similar result occurs amongst the brothers and sisters. The uterine brother and sister who were absolutely excluded by the customary law succeed equally with the full brothers and sisters and the consanguine brothers and sisters, whereas the consanguine are excluded by the full. See ss. 618, 622 (4) (*c*).

[3] E.g. F*M*, or FF*M*.

[4] E.g. F*M* is excluded by the existence of F, and FF*M* by the existence of F, or FF.

[5] This rule may also be stated as follows : "No female ancestor can take any share of the estate if any link (whether male or female) between herself and the deceased is surviving." The link, if consisting of a female, will represent a nearer true grandmother,—if a male, it will represent a male agnate (or possible customary heir). E.g., if F*M* and *MMM* co-exist with F, then *MMM* is excluded by F*M*, because the atter is nearer, but F*M* is herself excluded by F. The reason of this is that F is the customary heir, and no relation remoter than him as a rule inherits (cf. p. 570). The explanation of why F does not exclude *MMM* or *MM* unless F*M* is also living, seems to be that though the existing rules about kinship provided a means for comparing the relative proximity of F and F*M*, there seemed no means for comparing the relative proximity of a male agnate and a female cognate,—the rules for comparing agnates with cognates amongst the grandmothers being still of too novel a description to find place in the general law, or to be applied except *pro hac vice*; while at the same time the customary law which preferred all agnates to cognates could furnish no criterion when it was evident that a cognate might be considered nearer than an agnate.

[6] Bail. I. 688, where Abu Yusuf's opinion is alone referred to, with the remark : "there is one report to the same effect from Aboo Huneefa."

[7] This may happen in a case like the following : If a lady *X* has a son and a daughter, FF and *MM*, who have respectively a son and daughter *M* and F, who (being cousins) are married to each other, and give birth to the propositus, then *X* will be *MMM* and also FF*M* of the propositus, i.e., she will be true grandmother in two ways. If this then there is another true grandmother, F*MM*, surviving who is related to the deceased in only one such way, then according to Imam Muhammad *X* who is both *MMM*, and FF*M*, will take $\frac{2}{3}$ of the $\frac{1}{6}$; and F*MM* will take $\frac{1}{3}$ of the $\frac{1}{6}$ but according to Abu Yusuf, they will take equally. See Rumsey's *Sirajia*, 22 for Imam Muhammad's view.

ing to Imam Muhammad a grandmother bearing the relationship of true grandmother to the deceased in more ways than one, is entitled to claim a proportionate part of the said Quranic share in respect of each such relationship.[1]

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Except according to Imam Muhammad.

TABLE ILLUSTRATING TRUE GRANDPARENTS.

N. B. { The letters referring to the false grandparents are enclosed in [ ]
In the highest generation only the true grandparents are given.

MMMM				*FMMM*	*FFMM*	*FFFM*	FFFF
MOTHER'S				FATHER'S	FATHER'S	FATHER'S	FATHER'S
MOTHER'S				MOTHER'S	FATHER'S	FATHER'S	FATHER'S
MOTHER'S				MOTHER'S	MOTHER'S	FATHER'S	FATHER'S
MOTHER				MOTHER	MOTHER	MOTHER	FATHER.
MMM	[*MMF*]		[*MFF*]	*FMM*	[*FMF*]	*FFM*	FFF
MOTHER'S MOTHER'S MOTHER.	MOTHER'S MOTHER'S FATHER	MOTHER'S FATHER'S MOTHER	MOTHER'S FATHER'S FATHER	FATHER'S MOTHER'S MOTHER	FATHER'S MOTHER'S FATHER	FATHER'S FATHER'S MOTHER	FATHER'S FATHER'S FATHER
MM		[*MF*]		*FM*		FF	
MOTHER'S MOTHER		MOTHER'S FATHER		FATHER'S MOTHER		FATHER'S FATHER	
M				F			
MOTHER				FATHER			

THE DECEASED.

Explanation—Under sub-section (4) above, a paternal grandmother may be excluded by the existence of a male ancestor through whom she is related to the deceased; and a maternal grandmother might then be excluded by the existence of the said paternal grandmother, so that neither can succeed, notwithstanding that if the said paternal grandmother had not been surviving, and if the maternal grandmother had alone survived with the male ancestor, the said maternal grandmother would not have been excluded.[2]

How true grandmother may be excluded by a male.

[1] See p. 580, *n.* 7.

[2] E.g., If F, *FM* and *MMM* are surviving: *MMM* is excluded by *FM*, for the latter is the nearer of the two, and *FM* is herself excluded by F, because she is related through him. If however there had been only F and *MMM*, the latter could not have been excluded by F. The reason, as stated above, is that the relative proximity if F and *FM* could be compared according to the existing criteria, and also of *FM* and *MMM*, but not of *MMM* and F. Cf. "A person excluded may, as all the learned agree exclude others," Sir W. Jones's *Sirajia*, para. 16.

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The reason why the paternal grandmother excluded by a male relation through whom she traces her relationship to the deceased.

The exclusion of a grandmother by a male ancestor (who does not himself take the grandmother's ⅓ share) is apt to be considered as an anomaly. It is however in strict accordance with the principle that no one inherits who is remoter than the customary heir (i.e., the nearest male agnate). The only male ancestor through whom a true grandmother can be related to the deceased is a true grandfather who, being a male agnate, is either himself the customary heir (as the nearest male agnate), or there is some male agnate nearer than him. In either case a true grandmother related through him is remoter than the customary heir, and it is no part of the Quranic alterations in the law to provide for relations remoter than the customary heir.[1] It will thus be seen that it is no anomaly that the true grandmother is excluded by a true grandfather, i.e., a nearer male agnatic ascendant, than is it an anomaly that the son excludes the daughter of a son, or the sister ; cf. pp. 556,558.

(c) *Collaterals as Quranic Sharers.*

(i) *Agnates: Full and Consanguine Sisters.*

Sister as sharer when no male agnatic descendant or ascendant.

617. (1) Subject to sub-section (2) below, where there is neither a male agnatic descendant[2] nor such ascendant[3] surviving[4]—

Full sister.

(*a*) the full sister becomes entitled as to ½ of the estate as a sharer, where there is only one full sister surviving ; where there are two or more full sisters they become entitled to ⅔ of the estate as sharers.[5]

Consanguine sister.

(*b*) where there is no full sister, the consanguine sister or sisters become entitled to the said share of ½ or ⅔ respectively.

(*c*) where there is a single full sister, the consanguine sister or sisters become entitled to ⅙ of the estate, dividing it equally amongst themselves if there are more than one.[6]

Sisters when not sharers (but residuaries).

(2) The full or consanguine sister does not become a Quranic sharer when she co-exists with any—

[1] This is subject to the principle that "ye know not whether your parents be nearer or your children." Quran IV, 12 ; see p. 562.

[2] I.e., son or son's son how lowsoever, referred to below as S, or SS, etc.

[3] I.e., father or father's father how high soever, referred to below as F, or FF, etc.

[4] I.e., neither S, SS, SSS, etc. nor F, FF, FFF, etc. must be surviving. It is only when none of these are surviving that a collateral (e.g., a brother) would be the nearest male agnate or customary heir; and only in that case that a collateral (e g., a sister) could be given any right to inherit, consistently with the general principle that no relation remoter than the customary heir (*'asaba* or nearest male agnate) inherits. See pp. 556,558 above. In accordance therefore with the accepted Hanafi theory that the true grandfather is nearer than the brother, no collateral can succeed if any true grandfather is living.

[5] Bail. I. 688, 690.

[6] Bail. I. 689, (*l.* 1.) Macn., Prec., Inh., cases 33, 46,72 (1), 81 (2) ; cf. the case of daughter and son's daughter s. 613. When there are two or more full sisters, then the consanguine sisters do not get any share, and they can only be residuaries—which they are, provided the consanguine brother is the nearest male agnate. But if the nearest male agnate is remoter than the consanguine sister, the latter does not become co-residuary, Bail. I. 689.

(*a*) full or consanguine brother respectively,[1] or any — SECTION 617
(*b*) female agnatic descendant.[2]

The rights of the sisters are fully stated under s. 621 below, *q.v.*; and cf. Quran, IV. 15, 16, 175, cited at p. 563 above.

(ii) *Cognates: Uterine Sisters and Brothers as Sharers.*

618. Where there is no (male or female) agnatic descendant, nor a male agnatic ascendant surviving, the uterine sister or brother is entitled to a $\frac{1}{6}$ share, if there is only one; if there are two or more uterine sisters and brothers, or either, they take $\frac{1}{3}$ of the estate collectively, and divide it amongst themselves males and females sharing in equal proportion.[3] **Uterine sisters and brothers as sharers.**

See the footnotes to the last section.

The uterine sister and brother share alike because they are both newly entitled: the brother's rights are not older than the sister's, and he cannot therefore claim to share in a larger proportion, as a male agnate can when he has a female agnate placed on a footing of equality with him (as co-residuary).

RIGHTS OF UTERINE BROTHERS AND SISTERS.

Rights of uterine brothers sisters.

1. Neither the uterine brother nor sister takes any portion of the estate if the customary heir is an ascendant or descendant, or if there are any female descendants.
2. If the customary heir is a collateral then—provided that there are no female descendants—the uterine brothers and sisters become Quranic sharers, and
   (*a*) if there is only one of them, he or she takes one-sixth of the estate;
   (*b*) if there are two or more they divide one-third of the estate amongst themselves equally irrespective of the sex.[4]

The uterine brothers and sisters were never eligible for succession under the customary law.[5] Both being introduced for the first time by the **equally.**

[1] I.e., when the full sister and the full brother co-exist, the full sister becomes not Quranic sharer, but co-residuary with the brother (who is the customary heir). Cf. the case of the daughter and son co-existing; of course when the full sister and consanguine brother co-exist, the full sister is nearer than the consanguine brother, hence she becomes in that case a sharer, and the consanguine sister co-residuary with the consanguine brother. In case the full sister co-exists with a female agnatic descendant, the former becomes residuary, excluding the consanguine brother.

[2] Bail. I. 688. When she co-exists with a female agnatic descendant, she becomes (Quranic) residuary, ousting a male agnate remoter than herself; see s. 621, (4) (*b*).

[3] Bail. I. 689, 690. Macn., Inh. Prec. case 73. The uterine relations cannot succeed unless they are nearer than the customary heir, or nearest male agnate, i.e., there must be no male agnate amongst either the descendants or ascendants. They are also excluded by female agnatic descendants apparently because then the share allotted to females nearer than the customary heir is taken up by the female descendants, and none is left for the uterine sister and brother. So where there was a daughter and a uterine sister, the latter was held to be excluded: *Mothooranauth Mozoomdar* v. *Eusuff Ali Khan* (1870) 14 W. R. 356.

[4] *Sirajia*, 16.

[5] In England by the old law the half blood could not inherit but now it is provided by the Inheritance Act, (1833) 3 & 4 Will IV c.106, s. 9 "that any person from whom descent is to be traced by the half blood shall be capable of being his heir," Goodeve, "Real Property" (1897, 4th ed.) 149.

SECTION 618 Quran, they divide the Quranic shares allotted to them equally in accordance with the principle to which reference has already been made,[1] viz., that the difference (if any) between the quantum of the estate taken by males and females has reference not to their sex, but to the fact that the males had old established rights, and the females were newly introduced.

(iii) *No Collateral remoter than Sisters is a Sharer.*

Sister remotest sharer.

619. No female collateral[2] remoter than a sister or brother inherits under Sunni law as a sharer.[3]

Niece does not inherit as sharer or residuary.

Such females can inherit only as "distant kindred" and only in the absence of all such blood relations as can be sharers or residuaries.[4] Thus a niece, or any other female relation remoter than a niece, or any uterine relation remoter than a uterine brother or sister, is excluded from inheritance if there is any male agnate how remote so ever. In this regard, however, the niece, etc., are on the same footing as the nearest cognate e.g., the son of a daughter,

Son's daughter

who is similarly excluded.

(d) Anomalous or Exceptional Cases.

Grandfathers brothers and sisters: Anomalous rights.

620. The grandfather and the sisters and brothers under certain circumstances take rights which are neither those of pure sharers nor of pure residuaries.[5]

THE INCREASE OR "AUL."

It will be remembered that the sharers take each of them their respective fraction of the estate, and if all the fractions added together exceed unity, and therefore cannot be satisfied in full, the fraction to which each sharer is entitled must abate rateably, and that this process is called "increase" or "aul" in Arabic.[6] As for instance[7] if a man dies leaving his widow, two daughters, father and mother, the shares are $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{6}$, $\frac{1}{6}$ respectively, making up a sum total of twenty-seven upon twenty-four; and the common denominator has to be "increased" from 24 to 27, so that they take respectively $\frac{3}{27}$, $\frac{16}{27}$, $\frac{4}{27}$ and $\frac{4}{27}$.

Sections 621 to 625 deal with cases where not only do the shares not exceed unity, but where after satisfying the sharers in full, some residue is left, or where there are no sharers at all.

[1] See p. 559, cf. also p. 577.

[2] No male collateral except the uterine brother is a sharer. Nor are any male agnates sharers, with the sole exception of the father or true grandfather who is a sharer when he is not the nearest agnate (or customary heir) i.e., where he co-exists with descendants. cf. p. 577.

[3] Nor do they become co residuaries with the nearest male agnate (or customary heir).

[4] Which terms together include (*a*) all male agnates, (*b*) female agnates not remoter than the sister (see last note), (*c*) some cognates viz., (i) true grandmothers, (ii) uterine sisters and brothers.

[5] These cases are referred to in detail under s. 623 *ill.* (20) (the case of *Himariyya*) and see s. 624.

[6] Bail. I. 713, above s. 610 (1).

[7] The Khalif 'Ali had, to decide a case where the survivors were as above stated, and the case is referred to as the *mimbariya*, *mimbar* means pulpit. See also s. 623 *ill.* (12) to (15).

§ 5—*The Residuaries: The Second Class of Heirs.* SECTION 621

(1) *Persons who inherit as Residuaries.*

621. The residue of the estate (if any) left after the Quranic sharers have been allotted their shares, devolves upon the following persons,— Residuaries.

(1) the nearest [1] male agnate or agnates,[2] subject to clause (*b*) of subsection (4) below ; I. Male agnates.

(2) female agnatic descendants who are— II. Female agnates, descendants.

(*a*) in the same line as the nearest male agnate, or

(*b*) intermediate between the nearest male agnate, and the nearest female agnates, provided that the nearest male agnate is a descendant;

(3) [the mother to the extent referred to in section 615 above ;] [3] ascendants.

(4) full or consanguine sisters when— collaterals.

(*a*) the brother (full or consanguine respectively) is the nearest male agnate, or Sister as residuary.

(*b*) the nearest male agnate is remoter than the brother, full or consanguine, (as the case may be) and there co-exists with the sister any female agnatic descendant.[4]

Explanation—A male agnate however remote can become the residuary,[5] provided that there is no one surviving who is nearer than him ; and provided that a sister does not co-exist with a daughter (or other female agnatic descendant). Females remoter than the sister are not residuaries. The whole estate is taken by the residuaries if there is no sharer. Remote male agnates. Absence of sharers.

[1] See s. 622 as to the order of priority.

[2] I.e., the customary heir, e.g., the paternal uncle's son is a residuary, but not the maternal half uncle : *Syed Ali* v. *Nyaz Ali* [1885] All. W. N. 276. As only the nearest succeed, a pre-deceased son's son is excluded by a son. (*Moolla*) *Kasim* v. (*Moolla*) *Abdul Rahim* (1905) 33 Cal. 173 ; 32 I.A. 177.

[3] A mother is not strictly a residuary. She is included here to complete the three divisions of relations—descendants, ascendants and collaterals. The law is completely developed only in the case of descendants. See p. 578.

[4] *Meherjan Begam* v. (*Nawab Mir*) *Nuruddin* (1899) 24 Bom. 112. This is the only circumstance in which the customary heir (i.e., the nearest male agnate) is deprived of the right to succeed to (the residue of) the estate, in order that he might make room for another relation. In all other cases he is allowed to remain the nominal residuary, though in many cases there may be no residue left. See p. 557 *n.* 3, p. 569 (s. 610).

[5] Thus see *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1, (the father's paternal cousin,) *Mohidin Ahmid Khan* v. *Muhammad* (1862) 1 Mad. H. C. R. 92; 1 Ind. Jur. (*O. S.*) 132(agnatic descendant of paternal great grandfather); *Syud Showkut Ali* v. *Ahmud Ali*, (1867) 8 W. R. 39 (descendants of paternal grandfather's brother are residuaries, and thus exclude such grand daughters as are cognates); *Mahomed Haneef* v. *Mahomed* (1874) 21 W. R. 371.

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Sister when residuary.

With reference to the provision contained in s. 621 (4) (*b*) it should be remarked that the sister must on principle[1] be given some portion of the inheritance in cases where the customary heir (or the nearest male agnate) is remoter than herself. For the principle underlying the Quranic amendments of the customary law is to provide for those who are nearer than the customary heir: Such provision may take one of three forms (1) the sister might be given a Quranic share, or (2) she might be made co-residuary with the customary heir notwithstanding that the latter is remoter than herself,[2] or (3) she might replace the customary heir, excluding him even from the residue. The last course is the one actually adopted in order to provide for the sister when she co-exists with a female agnatic descendant: If this course had not been adopted and the sister had been made a Quranic sharer, then she would have ranked 'pari passu' with the descendants, and might have been the means of abating the daughter's share by 'aul'. The second alternative of making the sister co-residuary with a remoter male agnate was also rejected, though following it would have made the sister's rights analogous to those of the son's daughter, but the rights of the male descendants were probably considered too important and well established to be ousted;[3] whereas a collateral could be excluded more easily, to make room for a nearer claimant, it is at the same time less likely that the law should develope harmoniously in regard to collaterals, than in regard to descendants, who must succeed in the far greater number of cases; while the necessity for providing for a large number of claimants must also necessitate new modes of succession when the collaterals succeed.

She may have been made co-residuary with remoter agnate.

Summary of sister's rights.

The sister's rights are summarised below, pp. 596, 597.

(2) Priorities amongst the Residuaries.

Priority.

622. For the purpose of inheriting as a residuary priority amongst male[4] agnates is given in accordance with the following rules,[5]—

1. Descendants.

(1) Descendants are preferred to both ascendants and collaterals.[6]

2. Ascendants.

(2) Ascendants are (subject to section 624 below) preferred to collaterals.[7]

3. Collaterals.

(3) Amongst descendants and ascendants respectively those between whom and the deceased the fewest degrees intervene are preferred to the others.[8]

[1] See p. 556, 558.

[2] As happens when a nearer female descendant becomes co-residuary with a remoter female descendant. See s. 623 and comment thereto.

[3] The Sunni interpretation of the law is here referred to; in Shiah law the nearer female whether agnate or cognate excludes the remoter male agnate or cognate.

[4] As regards females see comment.

[5] Cf. Bail. I. 686 (*ll.* 4-5), 695, 696.

[6] E.g. a great grandson is preferred to, and excludes, the father, from the residue.

[7] E.g., the great grandfather is preferred to a brother. On this point there may have been some difference in the various pre-Islamic customs, according to some the brother (as the son of the grandfather) was, it seems, preferred to the great grandfather. The combinations must have existed so seldom that there can be little to surprise us in the customs not being quite uniform.

[8] E.g. a son is preferred to a grandson; and the father to the grandfather.

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(4) Amongst collaterals,—

Descendant of nearest common ancestor preferred.

(*a*) The descendant how lowsoever of a nearer common ancestor[1] is preferred to the nearest descendant of a remoter ascendant.[2]

Descendant of same common ancestor preferred if he is nearer to him.

(*b*) When two or more collateral relations of the deceased are descended from the same common ancestor, he is preferred who is nearest to the said common ancestor.[3]

Full blood preferred to consanguine relations in the same line.

(*c*) The full blood relations are preferred to the consanguine relations in the same line, i.e., where two or more collateral relations of the deceased are descended from the same common ancestor, and are removed by the same number of degrees from the said common ancestor,[4] and one of them has both the male and the female ancestors in common with the deceased, while another has only the male ancestor in common with the deceased,—then the former is preferred.[5]

Pre deceased relations not represented by their descendants.

Explanation—In every case the nearer excludes the more remote, so that the son excludes a predeceased son's son (i.e., grandson of the propositus), and the father excludes the grandfather, the brother excludes the nephew, or uncle.[6]

[1] By "common ancestor" is meant the nearest paternal ancestor of the propositus from whom the claimant can also trace descent.

[2] E.g., F, the father of the propositus, is the common ancestor of the propositus, and of B, his brother, and also of all descendants of B, as, for instance, of B's son's son (BSS). On the other hand, the ancestor who is common to the propositus and his uncle, is the grandfather of the propositus (FF). So BSS is preferred to the uncle. See Macn., Prec., Inh., cases 2, 26, 29, 35, 38, 83.

[3] E. g., the brother is preferred to the nephew, as the brother is one degree from the father (the common ancestor); and the nephew is two degrees from him, being the father's son's son, Macn., Inh , Prec., case 26.

[4] I.e., if the claimants are, all of them, either sons, or grandsons, or great grandsons, etc., of the common ancestor. (1817) East's Notes, Case 65 SUP. COURT, CAL: Macn., Dig., Inh., No. 5.

[5] In other words the descendant of a full brother of the deceased is preferred to the descendant of consanguine half brother of the deceased (both being in the same line), and the descendant of a full brother of an ancestor of the deceased, is preferred to a descendant of a consanguine brother of the same ancestor of the deceased (both being in the same line). E.g., the full brother is preferred to the consanguine half brother; see above p. 93 *n*. 1. One who has only a female ancestor in common is not an agnate at all, and so cannot compete with agnates.

[6] See table of residuaries p. 588. Sir R. Wilson points out that in not recognising representation Muhammadan law differs from Roman and Hindu law and from systems allied to the former. He also quotes an interesting anecdote from Jenk's "Law and Politics in the Middle Ages" p. 9 in which it is stated from the Saxon Annalist Widerkind that Otto the Great of Germany had to adjudicate in the 10th. century after Christ, upon the point whether grandchildren should inherit with their uncles or be excluded by them. "It was proposed that the matter should be examined by a general assembly convoked for the purpose. But the king was unwilling that a question concerning the difference of laws should be settled by an appeal to numbers. So he ordered a battle by champions and victory declaring itself for the party which represented the claim of the grandchildren, the law was solemnly declared in that sense."

appear from the following statement of the conditions on which female agnates succeed as residuaries : SECTION 622

No female (agnate[1]) inherits as a residuary except—

Statement of rights of females to be residuaries

1. When she is in the same line with the nearest male agnate (she is then a residuary.[2]) or
2. When being a descendant, she is in a nearer line than the nearest male agnate, provided first that the said nearest male agnate is a descendant,[3] and secondly that there are other female descendants nearer than the claimant who are Quranic sharers.[4]
3. The full (or failing her, the consanguine) sister may be residuary by herself provided that there is a female descendant and no male agnate as near as or nearer than herself.

Hence there are no rules referring to the relative priorities of females as residuaries.

(3) Distribution of Estate amongst Residuaries.

623. The residue of the estate (which is left after giving to the Quranic sharers) their respective shares is divided amongst the nearest[5] residuaries 'per capita' (and not 'per stripes')[6] in such proportions that each male receives twice as large a portion of the residue as that received by each female.[7]

male much as female.

Illustrations.

N. B. { The claimant being as stated in the first lines of each illustration below, the estate will be divided as follows :—

(1) Two daughters,
one son's son, and
one daughter of a son,—

The two daughters will take ⅔ together as sharers, the ⅓ residue will be divided between the son's son and son's daughter so that they take 2/9 and 1/9, respectively.[8]

[1] Cognates (whether male or female) do not inherit as *residuaries* in any case. They take, either (*a*) by "return" [which can occur with those alone who are sharers, viz, (i) true grandmothers and (ii) uterine brothers and sisters], or (*b*) as distant kindred, sec. s. 626.

[2] Except in the case provided by s. 621 (4) (*b*) above.

[3] If the nearest male agnate is other than a descendant, the female descendants may be sharers, but cannot be residuaries.

[4] If there are no female descendants in a higher line she may be (*a*) residuary with a male agnatic descendant, in her own line (provided he is the nearest male agnate), or (*b*) sharer, provided the male agnate is remoter than herself, whether he is a descendant or not.

[5] See s. 622, also p. 588.

[6] "As, e.g., if there is a son of one brother and ten sons of another, or the son of one paternal uncle, and ten sons of another, the property is to be divided into 11 parts of which each takes one part"—Bail. I. 692. Here the customary rule seems to be left unaltered.

[7] Bail. I. 687 (para. 2). The females take only half as much as the males since (i) on the ground of proximity both are alike (ii) on the ground of old established rights the male is *potior jure*. Macn., Prec., Inh., cases 37, 86; (1804) 1 S. D. A. (BENG.) 83.

[8] Macn., Prec., Inh., case 53; see further instances on. pp. 594, 595 below.

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(2) Widow,
son,
daughter,
two brothers,—

The widow takes $\frac{1}{8}$, and the residual $\frac{7}{8}$ is divided between the son and daughter so that the son takes, 14/24 the daughter 7/24; the brothers being excluded.[1]

(3) Widow,
six full brothers,
three full sisters,—

The widow takes $\frac{1}{4}$, and the $\frac{3}{4}$ residue is divided into 15 parts of which each brother takes two, and each sister one, i.e., the brothers get 1/10 and the sisters 1/20 of the estate each.[2]

(4) Full sister,
uterine brother,
uterine sister,
consanguine brother,
consanguine sister,—

Full sister $\frac{1}{2}$, uterine brother $\frac{1}{6}$, uterine sister $\frac{1}{6}$ as sharers;—consanguine brother and sister the residual $\frac{1}{3}$, the consanguine brother taking 1/9 and the consanguine sister 1/18 of the estate.

(5) Three uncles,
three daughters,—

The daughters take $\frac{2}{3}$ together, and the uncles 1/9 each.[2]

(6) Five grandmothers,
five full sisters,
one paternal uncle,—

The grandmothers take together $\frac{1}{3}$, i.e., 1/30 each, the full sisters divide the $\frac{2}{3}$ amongst themselves leaving the residue of $\frac{1}{6}$ to the uncle.[3]

(7) Six grandmothers,
six full sisters,
nine uterine sisters,—

Here the shares are $\frac{1}{6}$, $\frac{2}{3}$, and $\frac{1}{3}$, i.e., the shares have to abate by the common denominator being "increased" to 7, and the shares ultimately become: grandmother 1/7, full sisters 4/7, and uterine sisters 2/7.[3]

(8) Daughter,
six grandmothers,
four daughters of a son,
paternal uncle,—

The daughter takes $\frac{1}{2}$, the six grandmothers together take $\frac{1}{6}$; the four son's daughters together $\frac{1}{6}$, and the residue of $\frac{1}{6}$ to the uncle.[4]

(9) Four wives,
three grandmothers,
twelve paternal uncles,—

The wives take $\frac{1}{17}$ each, the grandmothers 1/18 each, and the residue $(1-\frac{1}{4}-\frac{1}{6}=)$ $\frac{7}{17}$ is taken by the uncles.[3]

[1] (1803) 1 S. D. A. (BEN.) 68 (Macn. Dig. Inh. 21).
[2] Bail. I. 709.
[3] Bail. I. 710.

(10) Six grandmothers,
nine daughters,
fifteen paternal uncles,—
The grandmothers take 1/36 each, the daughters 2/27 each, and leave the residue $(1-\frac{2}{3}-\frac{1}{6}=)\frac{1}{6}$ to the uncles who take 1/90 each [1]

(11) Husband,
two full sisters,
mother,—
The original shares are $\frac{1}{2}$, $\frac{2}{3}$, $\frac{1}{6}$, totalling 8/6 and the denominator has, therefore, to be increased to 8 giving to the husband $\frac{3}{8}$, to the two full sisters together 4/8 and to the mother $\frac{1}{8}$, respectively.[2]

(12) Grandmother,
full sister,
two uterine sisters,
consanguine sister,--
The original shares are $\frac{1}{6}$, $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{6}$, the denominator has to be increased to 7 giving, 1/7, 3/7, 2/7, 1/7, respectively.[3]

(13) Husband,
mother,
two full sisters,—
The orignal shares are $\frac{1}{2}$, $\frac{1}{6}$, $\frac{2}{3}$, (the mother takes $\frac{1}{6}$, and not $\frac{1}{3}$, there being two sisters). The denominator has to be increased to 8 giving, 3/8, 1/8, and 4/8, respectively.[3]

(14) Husband,
mother,
full sister,
consanguine sister, and
uterine sister,—
The original shares are $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{6}$. The common denominator has to be increased to 9 giving, respectively, 3/9, 1/9, 3/9, 1/9, 1/9.

(15) Husband,
two full sisters,
two consanguine sisters,
two uterine sisters,—
Husband takes $\frac{1}{2}$, the full sisters $\frac{2}{3}$, the uterine sisters $\frac{1}{3}$ (the consanguine sisters being excluded). By ''aul' or "increase" of the denominator from 6 to 9 there is an abatement of the shares, which ultimately become $\frac{1}{2}\times\frac{3}{3}$, $\frac{2}{3}\times\frac{3}{3}$, $\frac{1}{3}\times\frac{3}{3}$ i.e., 3/9, 4/9, 2/9, respectively.[4]

(16) Three grandmothers,
grandfather,
full sister,
consanguine sister,
uterine sister,—
(*a*) According to Abu Bakr and Ibn 'Abbas, the grandmothers take $\frac{1}{6}$, collectively, and the grandfather $\frac{5}{6}$, the sisters being excluded.

[1] Bail. I. 710.
[2] Bail. I. 718.
[3] Bail. I. 719.
[4] Bail. I. 724: this case is called the *Merwaniyah*, having occurred in the time of Merwan.

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(*b*) According to 'Ali, the full sister takes $\frac{1}{2}$, the consanguine sister $\frac{1}{6}$, the grandmother $\frac{1}{6}$ and the grandfather the residual $\frac{1}{6}$.

(*c*) According to Zaid, the grandmother takes $\frac{1}{6}$ and the $\frac{5}{6}$ is divided amongst the rest.[1]

(17) Wife,
grandmother,
two daughters
twelve brothers,
full sister,—

The estate consisting of 600 dinars, the wife takes 75, the grandmother 100, the two daughters 400, and each brother 2 and the sister 1 dinar.[2]

(18) Four wives,
five grandmothers,
seven daughters,
nine consanguine sisters,—

Shares: wives $\frac{1}{8}$, grandmothers $\frac{1}{6}$, daughters $\frac{2}{3}$, sisters the residue of 1/24.[3]

(19) The deceased X dies leaving the father F, the mother, M, and two daughters *D*, and *D*A; and then *D*A dies. X's estate would first be divided so as to give to the F and *M* $\frac{1}{6}$ each, and to *D* and *D*A $\frac{2}{3}$ each. Then the division of the estate of *D*A depends upon whether X was a male or a female—viz., if

(*a*) X was a male, his father F, would be the true grandfather of *D*A, and would (i) according to Abu Bakr exclude *D*A's sister, *D*, from the estate; (ii) according to Zaid, the grandmother would take $\frac{1}{6}$ and the residue be divided between the grandfather F, and the sister *D*, in the proportion of 2 : 1.

(*b*) if X was a female, then F would be a false grandfather of *D*A, and he would be excluded by *M* and *D* (viz., by *D*A's true grandmother and sister, respectively, who would take first $\frac{1}{6}$ and $\frac{1}{2}$, respectively, and again the $\frac{1}{3}$ residue by "return").[4]

(20) If a woman dies leaving her surviving,—

husband, mother, uterine brothers, sisters, and full brothers and sisters—the shares being: husband $\frac{1}{2}$, mother $\frac{1}{6}$, uterine brother and sister $\frac{1}{3}$, there is no residue left for the full brothers and sisters, and Abu Bakr and Ibn 'Abbas and the Hanafi authorities apparently hold that the full brothers and sisters take nothing. But Ibn Mas'ud and Zaid ibn Thabit and 'Umar hold that the full and uterine brothers and sisters should all participate in the $\frac{2}{3}$ share of the estate after the husband and mother have taken their sharers.[5]

[1] This case is called *Hamziyah* from Hamza "who being questioned regarding it gave these answers."—Bail. I. 724.

[2] Bail. I. 724: This case is called the *Dinariya*, from the the single dinar taken by the sister: also *Da'udia* from Da'ud-ut-Taj who pronounced the decision.

[3] Bail. I. 725: This case is called *Imtihan* or examination.

[4] Bail. I. 725-726. This case is called *Mamûniah* the Khalif Mamun having put it to Yahya Ibn Aktum having a low opinion of him. But Yahya enquired the sex of X, thus showing that he knew the law, and was selected for the appointment.

[5] Bail. I. 723. This case is called the *Mashraka* (from participation), or *Himariyya* (from *himar* an ass), because the full brothers in arguing that they should be entitled to succeed with (and not be excluded in favour of) their uterine brothers and sisters, said to 'Umar: "Oh Commander of the Faithful, grant that our father was an ass, still we had one mother." Cf. Wilson, "Anglo-Muhammadan

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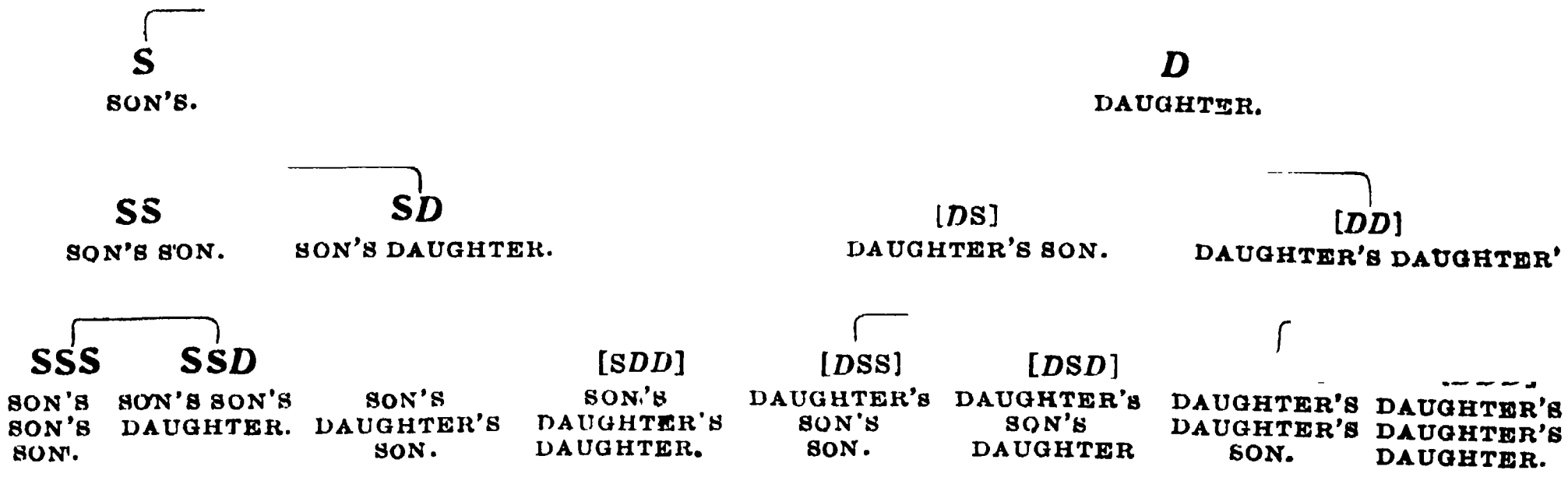
(21) If a person dies leaving his mother and grandfather and a sister the opinions as to the inheritance of the estate are greatly divided, being as follows—

(*a*) Abu Bakr : mother $\frac{1}{3}$, grandfather $\frac{2}{3}$.
(*b*) Zaid : mother $\frac{1}{3}$, grandfather $\frac{2}{3}$, sister $\frac{2}{3}$.
(*c*) 'Ali : mother $\frac{1}{3}$, sister $\frac{1}{2}$, grandfather $\frac{1}{6}$.
(*d*) Ibn 'Abbas : (i) mother $\frac{1}{3}$, sister $\frac{1}{2}$, grandfather $\frac{1}{6}$.
(*e*) do. (ii) mother $\frac{1}{3}$, sister $\frac{1}{3}$, grandfather $\frac{1}{3}$.
'Umar agreed with Ibn 'Abbas (see (*d*) above).[1]

TABLE OF DESCENDANTS SHOWING RESIDUARIES, SHARERS AND DISTANT KINDRED (IN SUNNI LAW).

N.B.—The sharers and residuaries are indicated by black type letters, e. g., ***S***, ***SSD***. All the rest (enclosed in [ ]) are "distant kindred." Italic letters are used to refer to females

PROPOSITUS.



SUMMARY of DAUGHTER'S rights.

Ss. 612, 613, 617, 618 state the rights of female descendants and the sisters as Quranic sharers. Their rights as (Quranic) residuaries are included in the present section.

1. RIGHTS OF DAUGHTERS AND FEMALE AGNATIC DESCENDANTS.

1. Where there are female descendants[2] in the same line as the nearest male agnate or customary heir (and this implies that the customary heir is a descendant), they always become Quranic co-residuaries with him, taking the residue (if any)[3] so that the males get twice as much as the females ;

1. When equal in proximity to customary heir, she is co-residuary with him.

2. Where there are female descendants[2] who are nearer than the customary heir—which may happen by the customary heir being either (i)

2. When nearer than customary heir she is sharer—

Law," 413: "The *Minhaj* does not state explicitly that the participation is to be equal, the full brother counting simply as a uterine brother, but this is placed beyond a doubt by Luciani—'Successions Musulmanes' (Paris, 890) p. 318."

[1] Bail. I. 724. Owing to the difference of opinions this case is referred to as the *Kharqa* which means unsettled point.

[2] Only agnates are referred to.

[3] There may be no residue, e.g. if there are father, mother, two daughters, a son's son, and a son's daughter,-in which case the parents take one-sixth each and the daughters two-thirds leaving nothing for the rest ; cf. p. 591 *ill.* 11-15.

SECTION 623 a lower descendant, or (ii) an ancestor or (iii) collateral, (there being in cases (ii) and (iii) no male agnatic descendant), their rights are as follows:

(*a*) The female descendant or descendants[1] in the generation nearest to the deceased[2] becomes or become Quranic sharer or sharers (taking ½ or ⅔ of the estate according as there is only one or more than one).

(*b*) If there are such female descendants in more lines than one then—

—unless where share of daughters exhausted—

(i) those in the generation nearest to the deceased take the Quranic share,

(ii) if there is only one in the first grade then she takes ½, leaving ⅙ to those in the generation next in proximity to the deceased,

(iii) if there is any in a grade intermediate between the grade of those who are entitled to the Quranic share and of the customary heir—

—in which case she becomes co-residuary with a lower male agnatic descendant.

then she becomes Quranic co-heir with the customary heir. provided that the customary heir is a descendant.[3]

The rules may be re-stated in the following terms—

1. The nearest female descendants[1] become Quranic sharers; provided that they are nearer than the customary heir.
2. Those female descendants[1] who are in the same generation as the customary heir, become not sharers, but co-residuaries with him.
3. Female descendants[1] intermediate between the two classes above referred to, become co-residuaries with the nearest male agnate, provided that he is a descendant.[4]

ILLUSTRATIONS:

These rules will become clear through illustrations:

Thus if P dies leaving,—

1. Daughter and son.

1. S[5] and *D*,[6] S is the customary heir, and *D*, being in the same line as S will be (Quranic heir, or) residuary with S, *D* taking ⅓ and S. ⅔.

2. Daughter and son's son.

2. If there are *D* and SS[5] then *D* is nearer than SS the customary heir, and will take ½ as Quranic sharer, leaving ½ to SS.

3. Daughter, son's son and son's daughter.

3. If there are *D* and SS and *SD*, *D* will take ½, and SS and *SD* will take the other half in the proportion of a double share to a male and a single share to a female; i. e., SS will take ⅓ and SD ⅙.

4. Two daughters, son's son and son's daughter

4. Again if there are SS and two daughters *D* and *D*A with *SD*,—*D* and *D*A will take ⅔ between them (⅓ each) leaving ⅓ to be divided by SS and *SD* (i. e., SS will take 2/9 and *SD* 1/9).

5. Daughter son's daughter, son's son's son.

5. If there are *D*, *SD* and SSS, *D* takes ½ as Quranic sharer, leaving ½ as the Quranic share to *SD*, and the residue of ½ to SSS.

[1] Only agnates are referred to.

[2] I.e., the daughter, or failing her, the daughter of a son, then the daughter of a son's son, and so on.

[3] It is only when the nearest male agnate (or customary heir) is a descendant, that her intermediate position becomes clear. If, e.g., there are two daughters, *D* and *Da*, with S*D*, and SSS, then *D* and *Da* take their ⅔ and SSS takes the residue, making S*D* (who is clearly nearer than himself, and ought to inherit as much as he) co-residuary with himself. But if instead of SSS there were F a father or even B a brother, the intermediate position of is lost sight of, and she does not inherit.

Bail. I. 687.

[4] S stands for "son" or "son's" thus SS means son's son.

[5] *D* stands for "daughter" or "daughter's" e.g., *DD* means daughter's daughter, *DS*, daughter's son, *DD*SS daughter's daughter's son's son.

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6. The same daughters.

6. So that if with *D*, *SD* and SSS there are other daughters of a son's son, viz., *SSD*, *SSD*A *SSD*B then *D* and *SD* will take $\frac{2}{3}$ between them (i. e., *D* $\frac{1}{2}$ and *SD* $\frac{1}{6}$) and the residue of $\frac{1}{3}$ will be divided amongst SSS, *SSD*, *SSD*A, *SSD*B and SSS will take 2/15 the other three taking 1/15 each.

7. Daughter, son's daughter, son's son's daughter, son's son's son's son and his sister.

7. If there are *D*, *SD*, *SSD*, SSSS, and *SSSD*, then the last becomes Quranic co-heir with SSS, and takes the residue with him, *D* and *SD* take their Quranic shares aggregating to $\frac{2}{3}$; but there is no Quranic share for *SSD* in the third generation, though *SSSD* in the fourth generation succeeds as residuary (Quranic co-heir) : To remedy the exclusion of *SSSD*, she is made Quranic residuary (co-heir) with SSSS who is not in the same line, but in a lower grade than herself.

8. Two same.

8. In the same manner if there were two daughters *D*, and *D*A with *SD*, *SSD*, SSSS, *SSSD* then D, and *D*A take the $\frac{2}{3}$, SSSS is the customary heir with whom not only *SSSD* (who is in the same grade as himself but *SD*, and *SSD* in the higher grade, become residuaries or Quranic heirs).

Intermediate female descendants become co-residuaries with lower male agnates.

A learned author[1] draws attention to the rule illustrated by the last two cases mentioned above, referring to it as anomalous, and suggesting enquiry whether it really represents the deliberate intention of the Hanafi lawyers, —being, according to him, the solitary exception to the rule that amongst claimants of the same description, the nearer excludes the more remote. He then says that though a male in a lower generation may succeed with a female in a higher, but that the case of "females in different generations being equalised with each other, merely because they are all potentially equalised with a male in a still lower degree, is a different matter." This criticism, is based on the assumption of there being only one principle governing these rights, viz., that the nearer claimants of the same description (viz such as claim Quranic shares) exclude the remoter,—but in reality there seems to be another, perhaps even more important, principle, based on a consideration of the fact that the proximity which the claimants bear to the deceased, is greater than that borne by the customary heir. In other words the customary heir (or the nearest male agnate) being recognised as having the right to inherit, it is provided that those who are nearer than the customary heir should inherit a portion: on this principle *all* those female descendants who are nearer than the customary heir ought to inherit, notwithstanding that some of them may be nearer than others. It is only on this last principle that when a daughter, mother and sister co-exist with a brother or remoter male agnate, all the three females are entitled to succeed, although the daughter is nearer than the mother,[2] and they are both nearer than the sister. An exception to the principle so stated may no doubt be found in the case of the mother and true grandmother, only the nearest of whom can be the sharer, and the remoter does not participate in the estate in any form. The case must, however, be extremely rare when a deceased person (old enough to leave any estate) dies leaving him surviving such a combination of ancestors as would require a comparison of their relative priorities, and it is not to such unusual cases that we must turn for discovering the principles of the law. In the case of the female descendants,

Principle that females nearer than customary heir should be provided for

[1] Wilson, "Anglo-Muhammadan Law," 268 [2] Subject of course to Quran, IV. 12, above, p. 562.

SECTION 623 the law has most scope for being frequently called into operation, and for being developed in accordance with principles.

Anomaly of excluding females who are nearer than the customary heir.

These remarks are, however, not made so much to minimize the interest attaching to the criticism above referred to, but rather to show the ground on which the existing law is based, and the anology it bears to other rules, though the analogy may not have been strictly followed in every case. In any case, when the whole scheme of the Quranic law is considered—which is to provide for those who were unfairly excluded by the customary law—the anomaly seems to lie not in that portion of the interpretation of the Quran which provides that female descendants who are nearer than the nearest male agnate should succeed with him, but in the absence of such a provision in the case of female ancestors and collaterals, and in the restriction of this principle (even in the case of female descendants) to cases where the nearest male agnate is also a descendant.

Explanation suggested.

The explanation of the restriction last referred to seems to be that though when the claimant and the customary heir are both descendants, the greater or lesser relative proximity of each to the deceased can be perceived immediately, yet it is no longer easy to say that a female descendant is nearer than an ancestor; and if the relative proximity of a female descendant and an ancestor is doubtful, the same seems to apply when she has to compete with a collateral.[1]

FULL SISTERS

2. SUMMARY OF FULL SISTER'S RIGHTS.

1. As co-residuaries with brothers.

1 When the nearest male agnate is a brother[2] the sister becomes co-residuary with him.[3]

2. As sharers.

2 When he is remoter than the brother, then the sisters become entitled to succeed as sharers, provided that there are no daughters who have a prior claim to take the share allotted for such female agnates as are nearer than the customary heir: so that the sister cannot claim the Quranic share if the daughter or other female agnatic descendant is present[4]; but—

3. As residuaries without brother, (when there is any daughter or son's daughter)

3 the sister (even in the absence of a brother) becomes residuary by herself when she co-exists with female descendants.

4. Priorities between full and consanguine sisters for Quranic shares.

4 As regards the Quranic share taken by the sisters (when the customary heir is remoter than a brother, and there are no female descendants) there are priorities similar to those amongst the female descendants. The full sister, if there is only one, takes her ½ share, and leaves ½ to the consanguine sister, whereas the uterine sister takes her share equally with the full sister as well as with the consanguine sister.[4]

[1] Cf. Quran IV. 12, p. penult. sentence (above p. 562), and the extensive rights of the ancestors both males and females, showing, that the old simple priorities (of descendants over ascendants) can no more be a guiding principle. It might be argued that this applies as between descendants and ascendants alone, and that where there is competition between a descendant and a collateral the greater proximity of descendant is not doubtful: but the old system of reckoning proximity was assumed, it seems, to have been altogether discarded.

[2] Of course, if a male agnate nearer than the brother exists, such person must be nearer also than the sister, and she cannot then succeed to any part of the estate.

[3] When collaterals succeed, the husband or wife, daughter, and mother, are all entitled to take shares if any of them exists.

[4] See *nn.* 2, 3, above.

3. SUMMARY OF THE CONSANGUINE SISTERS RIGHTS.

SECTION 623 CONSANGUINE SISTER'S RIGHTS.
1. Excluded if nearest male agnate nearer than herself.
2. As residuary.

1. The consanguine sister takes no part of the estate if the customary heir (or nearest male agnate) is nearer than herself, i.e., is a descendant or ascendant or a full brother, or if the full sister or sisters are residuaries by themselves, see ss. 621,622.
2. The consanguine sister becomes Quranic co-residuary when the consanguine brother is the nearest agnate, and when he is not excluded from the residue by the full sister in the manner above referred to.
3. When the customary heir is remoter than the consanguine brother and the consanguine sister.—
   (*a*) They become Quranic sharers provided there is no female descendant nor full sister—
      (i) a single consanguine sister taking ½ of the estate,
      (ii) two or more consanguine sisters taking ⅔ of the estate in equal shares.
   (*b*) If there is no female descendant and there is one full sister– the consanguine sisters become Quranic sharers, and—
      (i) the full sister takes ½ as sharer, and
      (ii) the consanguine sister or sisters take ⅓ of the estate as Quranic sharers, and divide it equally amongst themselves, if there are two or more.
   (*c*) If there are female descendants but no full sisters the consanguine sisters become (Quranic) residuaries by themselves, in which case they take the residue excluding the sons of full brothers, and all remoter agnates (who would have been the customary heirs) from any participation in the estate.[1]

4. RULES DETERMINING PRIORITIES AMONGST FEMALES FOR BEING SHARERS.

The rules of priority as Quranic sharers are similar in the case of female agnatic descendants and sisters; though the mother and other female ascendants are kept in a category of their own:

1.	Daughter,[2]	(being the nearest female agnate) is entitled to a share of ½; two or more taking ⅔,
2.	Son's daughter,[2]	her rights liable to be reduced to ⅔ by presence of 1,
3.	Son's son's daughter,[2]	bears same relation to 2 as 2 bears to 1,
4.	Mother, ...	her share liable to be reduced by existence (*a*) of 1, 2, or 3, or— (*b*) of two or more of 5, 6, or 7,
5.	Full sister,[2]	becomes residuary if 1, 2, or 3 exists.
6.	Consanguine sister,[2]	bears same relation to 5, as 2 bears to 1,
	.....	their rights depend on 1, 2, 3.

[1] *Sirajia*, 21. Macn. Prec. Inh., 73; *Ameerun* v. *Ruheemun* (1867) 2 Agra, 362.

[2] It is assumed in these cases that the nearest male agnate (or customary heir) is remoter.

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Rights of female descendants ascendants and collaterals bear on each other.

The female descendants, ascendants and collaterals it will thus be seen really form one series, and their rights depend on each other's, notwithstanding that the rules relating to the female ascendant and collaterals do not follow exactly the analogy of those relating to descendants.

Special Rules applying to Grandfather co-existing with Brothers or Sisters.

Grandfather co-existing with brothers or sisters may elect.

624. According to the Shafi'i and Maliki [1] schools of Sunni law [2], where the true grandfather co-exists, with one or more full or consanguine sisters [3] or brother the grandfather does not exclude the agnatic [4] sisters or brothers from inheritance, but he may elect any one out of the following four options, viz.—

1. To be pure sharer.

(1) to take $\frac{1}{6}$ of the estate as Quranic sharer (leaving the residue to the sisters and brothers), *or*

2. To take $\frac{1}{3}$ of residue.

(2) to take $\frac{1}{3}$ of the residue (leaving $\frac{2}{3}$ of the residue to the sisters and brothers), *or*

3. To participate in residue with brothers and sisters in which case.—

(3) to participate in the residue with the brothers and sisters. Such participation is called 'muqasimat' or division, and is given effect to in the following manner—

(*a*) First allotment as between the grandfather and the collaterals.

(*a*) the estate is in the first instance notionally apportioned amongst the grandfather and the brothers and sisters

[1] Abu Yusuf's and Imam Muhammad's view of Hanafi law seems to be to the same effect as provided in this section, but Abu Hanifa's view prevails—according to which the grandfather excludes brothers and sisters.

[2] The main principle underlying this section is that the grandfather does not exclude the brother (and sister), but they share simultaneously. This view does not prevail under the Hanafi school of Sunni law, though it was adopted by the two disciples of Abu Hanifa against his view, and against the view of Abu Bakr the first Khalif. The simultaneous succession by the grandfather and brothers prevails also in the Shiah system, and is based on the Quran IV, 12, and on the analogy of the rule by which F, the father of the propositus succeeds simultaneously with S, the son of the propositus. F is the grandfather of S. In the same way it is held (by all except Abu Hanifa and Abu Bakr,) that FF (the grandfather of the propositus) succeeds with his own grandson B, (the brother of the propositus),—FF being the grandfather of B just as F is the grandfather of S. Sir W. Jones remarks that the chapter of the *Sirajia* dealing with this view "will be useful to us if this question should arise in a family of Shiahs who follow, no doubt, the opinions of Ali and Zaid." But this remark according to Sir R. Wilson "merely shows that Sir William had not given much attention to the Shiah law, which regulates on a wholly different and much broader principle the competition between ancestors and collaterals." "(Anglo—Muhammadan Law," 271). It is subimtted however that Sir William's conjecture shows much insight: "The wholly different principle" to which Sir Roland refers is merely the acceptance and application of the view that grandparents do not exclude, but share simultaneously with brothers and sisters and their children, (that the sister is in the same position as the brother is in accordance with the general Shiah law).

[3] The sister is excluded by the grandfather unless she co-exists with a brother, except in the case referred to in s. 624 (4) (the *Aqdaria*) which is prefaced by the author of the *Sirajia*: "know that Zaid the son of Thabit (on whom be God's grace) has not placed the sister full or consanguine as entitled to a share (*farz*) with the grandfather except in the case named *Aqdaria*."

[4] The uterine sisters or brothers, who can be only sharers, are always excluded from their share by the grandfather, "according to Abu Hanifa" (Bail. I. 689, *l.* 13),—which would imply, as might seem likely, that the other authorities take a different view. The *Fatawa 'Alamgiri* gives only Abu Hanifa's view, except that the *Aqdaria* case is stated and explained. It is stated, however, in the *Sirajia*: "the mother's children are excluded by the grandfather, as all the learned agree."

(full as well as consanguine) [1] so that each male is allotted twice as large a share as each female ; SECTION 624

then of the portions so allotted—

(b) Then the collaterals distribute amongst themselves (with due priorities).

(i) the grandfather takes the portion allotted to himself, but—

(ii) the portions allotted to the brothers and sisters are consolidated, and re-divided amongst the full brothers and sisters alone, to the exclusion of the consanguine brothers and sisters,[1] provided that—

(iii) if in such a case there is only one full sister with one or more consanguine brothers and sisters, but no full brother, and the shares so consolidated amount to more than ½ of the estate,[2] then the full sister takes only ½ of the estate, and the consanguine sisters and brothers take the excess over the ½, dividing it amongst themselves in such proportions that each male gets twice as much as each female.[3]

(4) Where there co-exists with the grandfather only one sister,[4] (and neither a brother [5] nor a daughter, nor other female agnatic descendant, is surviving [6]) in that case the grandfather has the further option to have a sixth share allotted to himself, and a half to the sister, and to have the two shares consolidated (forming together two-thirds of the estate), and then to participate in the said consolidated portion with the sister in the proportion of two-thirds to himself and one-third to the sister.[7]

4. To participate in Quranic share of single sister. ('Aqdariya').

Illustrations.

All the illustrations are taken from the chapter in the *Sirajia* entitled "Division of the Paternal Grandfather."

A connecting bracket implies that the shares are either to be consolidated for the purposes of the final division, or to be taken jointly by the persons referred to.

[1] It being considered that the brothers (consanguine as well as full) are not excluded by the grandfather, the consanguine brothers inherit as against the grandfather, though not as against the full brothers.

[2] One half of the estate is the full Quranic share of the full sister.

[3] *Sirajia*, Jones, VIII. 238-239. This proviso follows the analogy of the consanguine sister getting ⅓ of the estate as sharer where there is only one full sister, See s, 617 (1) (*c*)

[4] Either full, or consanguine.

[5] Full if the sister is full, consanguine if she is consanguine.

[6] The sister may be a residuary (but not a sharer) if a brother or a female descendant co-exists with her.

[7] This course is a species of *muqasimat*, and is beneficial to the true grandfather only in the case given as *ill* (8) to this section—which is termed '*Aqdariya*, as it occurred on the death of a woman belonging to the tribe of '.

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	CLAIMANTS,	SHARES— in preliminary division :	in final division :
	surviving the deceased:		
	Full brother ..... *residue* $\frac{1}{3}$	.....	$\frac{2}{3}$
	Consanguine brother ..... *residue* $\frac{1}{3}$	.....	*nil.*
	Father's father ..... *residue* $\frac{1}{3}$	.....	$\frac{1}{3}$
(2)	Full sister ..... *residue* $\frac{1}{6}$	..... $\frac{1}{2}$	$\frac{1}{2}$
	Consanguine sister ..... *residue* $\frac{1}{6}$		$\frac{1}{10}$
	Another consanguine sister *residue* $\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{10}$
	Father's father ..... *residue* $\frac{2}{6}$	.....	$\frac{2}{6}$
(3)	Full sister ..... *residue* $\frac{1}{2}$	.....	$\frac{1}{3}$
	Consanguine sister ..... *residue* $\frac{1}{6}$	.....	*nil.*
	Father's father ..... *residue* $\frac{1}{2}$	.....	$\frac{1}{3}$
(4)	Husband ..... *share* $\frac{1}{2}$		
	Brother..... } Father's father..... }	.....*residue* $\frac{1}{2}$	
(5)	Brother..... } Another brother .... } Sister..... }	.....*residue* $\frac{2}{3}$ of $\frac{5}{6}$	
	Father's father .....*residue* $\frac{1}{3}$ of $\frac{5}{6}$		
	Father's mother ..... *share* $\frac{1}{6}$		
(6)	Brother ..... } Another Brother.... }	.....*residue* $\frac{1}{6}$	
	Father's father .....*residue* $\frac{1}{6}$		
	Father's mother ..... *share* $\frac{1}{6}$		
	Daughter [1] ..... *share* $\frac{1}{2}$		
(7)	Husband ..... *share* $\frac{1}{4}$=		
	Mother ..... *share* $\frac{1}{6}$= or $\frac{1}{12}$	reduced by increase to	$\frac{2}{13}$
	Daughter ..... *share* $\frac{6}{12}$		
	Full or consanguine sister, *residue nil*		
	Father's father ..... *share* $\frac{1}{6}$=or $\frac{2}{12}$ as sharer		
	Husband [2] ..... *share* $\frac{1}{2}$=or $\frac{3}{11}$	reduced by increase to	
	Mother ..... *share* $\frac{1}{3}$=or $\frac{2}{11}$		
	Full or consanguine sister.. *share* $\frac{1}{2}$=or $\frac{3}{11}$		$\frac{3}{9}$
	Father's father ..... *share* $\frac{1}{11}$	..... $\frac{1}{9}$	$\frac{4}{9}$ or $\frac{4}{27}$ / $\frac{8}{27}$

[1] Here the father's mother and the daughter being necessarily only sharers, the residue is $\frac{1}{2}$, and if the grandfather chose to be residuary he would take $\frac{1}{2}$ of $\frac{1}{3}$ (i.e., $\frac{1}{6}$) having also the two brothers as residuaries; by electing to be Quranic sharer he can get $\frac{1}{3}$.

[2] This case is called the *Aqdaria* see p. 599 *n.*7 and it is very special: (*a*) were there no husband, then the residue would be $\frac{2}{3}$, and it would be more beneficial to the grandfather to elect the option in s. 624(3), i.e., to take $\frac{2}{3}$ of the residue which would give him $\frac{4}{9}$; (*b*) again "if instead of the sister there be a brother or two sisters, there is no increase, nor is that case an *Aqdaria*," *Sirajia*, (VIII, 240) for; (i) if there be a brother (instead of, or with, a sister) he is a residuary, and the husband and mother having taken $\frac{1}{2}$ and $\frac{1}{3}$ respectively, would leave only $\frac{1}{6}$ as residue, so it would be better for the grandfather to claim such $\frac{1}{6}$ in his own right as sharer, than to participate in the residual $\frac{1}{3}$ with the brother. But if (ii) there are two sisters (instead of one) they are entitled to a share of $\frac{2}{3}$, so that by "increase," the common denominator of each share would have to be raised to from 6 to 9 and the collective share (by *muqasimat*) of the grandfather and sisters would be $\frac{2}{3}+\frac{1}{3}=\frac{3}{3}$ of which the grandfather would take a moiety, i.e., $\frac{3}{6}$ of the estate, and this would be better for than any of the other alternatives [Note

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This section exemplifies the difficulty about adjusting the relative priorities between collaterals and ancestors remoter than the father. The law of succession is not the only subject where this difficulty arises.[1]

§ 6.—Return: Residue taken by Sharers.

In absence of residuaries the residue "returns" to sharers other than husband or wife.

625. Where no person can establish his or her claim to succeed as residuary,[2] the residue is divided amongst such blood relations[3] of the deceased as are entitled to be Quranic sharers, in the proportion of their respective Quranic shares.[4] The right of the sharers so to take the residue (in the absence of the residuaries) is referred to as right to take by "return."[5]

Illustrations.

N. B. {The claimants being those whose names are given in the first lines below, the estate will be divided as stated in each case—

(1) Husband, 3 daughters,—

Original shares, $\frac{1}{4}$, $\frac{2}{3}$. The residual 1/12 returns to the daughters alone, and they take $\frac{3}{4}$ ultimately i. e. $\frac{1}{4}$ each.[6]

(2) Wife, grandmother, 2 uterine sisters—

Original shares, $\frac{1}{4}$, $\frac{1}{6}$, $\frac{1}{3}$. The residual 3/12 returns only to the grandmother and the uterine sisters each taking 3/12 of it, i.e., ultimately the wife gets $\frac{1}{4}$, the grandmother $\frac{1}{4}$, and the two sisters jointly $\frac{1}{2}$.

(3) 4 Wives, 9 daughters, 6 grandmothers—

Original shares, $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{6}$. Return of residue 1/24 to daughters and grandmothers. Ultimate shares, wives 5/40, daughters 28/40 grandmothers. 7/40.[7]

that the presence of two sisters reduces the mother's claim from $\frac{1}{3}$ to $\frac{1}{6}$]. The *Sirajia* (*ubi supra*) however excludes the applicability of the *'Aqdaria* ruling when there are more sisters than one.

[1] Cf. e. g., p. 243, ss. 324-326 above. The Quran IV. 12 disturbed the absolute priority of descendants over ancestors (see above p. 562) The bearing of that verse on the priority between the brothers and grandfather of the deceased arises in this way, that the grandfather of the deceased bears the same relation to the brother of the deceased, as the father of the deceased bears to the son of the deceased. See above p. 598 *n.* 2.

[2] Since the remotest male agnate is entitled to succeed as residuary, it can never happen that there should exist no person entitled to succeed as such; but he may be too remote to be known, or to be able to establish his claim.

[3] Hence the husband or wife do not take by return under s. 625 (but see s. 633 below,) *Gujadhur Pershad* v. (*Shaikh*) *Abdoolah* (1869) 11 W. R. 220; (*Sheik*) *Musseeoollah* v. (*Mussamut Beebee*) *Sherifun* (1864) 1 W. R. 122, (widow not entitled to return); (*Moonshee*) *Mahomed Noor Buksh* v. (*Moulvie*) *Mahomed Hameedool Huq* (1866) 5 W. R. 23; *Koonari Bibi* v. *Dalim Bibi* (1884) 11 Cal. 14.

[4] The Quranic sharers are given precedence over the "distant kindred" as to the residue, for this reason that the title of the latter is based on the general statements in the Quran (IV. 36, VIII. 76, IV 36, XXXIII, 6,) that blood relationship of any degree gives a right to succession, whereas the sharers (viz such as are blood relations) are included not only in the said general statements, but are also specifically mentioned in the Quran; the husband or wife, not being blood relations, cannot come within the general statements, but they succeed under this head (if at all) on an analogical extension from those statements—hence they are postponed to all. This is the Sunni interpretation of the Quran: The Shiahs interpret it so as to place cognates and agnates on the same footing as regards priority. See below ss. 638-640.

[5] The return (in Arabic, *radd*) is the converse of the "increase." See above s. 610 (1).

[6] Bail. I. 716, cf. *Rahimkhan* v. *Fatu Bibi* (1895) 21 Bom. 118.

[7] Bail. I. 717.

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(4) Grandmother, uterine sister—

Each takes $\frac{1}{6}$ as share and the residual $\frac{2}{3}$ returns to them in equal shares, i.e., they take $\frac{1}{3}$ more each, or each takes $\frac{1}{2}$ of the estate.[1]

(5) Grandmother, 2 uterine sisters—

The shares are $\frac{1}{6}$ and $\frac{1}{3}$, respectively, and the residual $\frac{1}{2}$ returns to them, so that the grandmother gets another $\frac{1}{3}$ and the 2 sisters another $\frac{1}{3}$.[1]

(6) Daughter, mother—

The original shares are $\frac{1}{2}$ and $\frac{1}{6}$, respectively, the residual $\frac{1}{3}$ returns to them, and they ultimately get $\frac{3}{4}$ and $\frac{1}{4}$, respectively.[1]

(7) Mother, 4 daughters—

They take originally $\frac{1}{6}$ and $\frac{2}{3}$, ultimately by return $\frac{1}{8}$ and $\frac{6}{8}$, respectively.[2]

(8) Mother, daughter, wife—

The original shares are $\frac{1}{8}$, $\frac{1}{2}$, $\frac{1}{8}$. The residual 3/24 "returns" to the mother and daughter in the proportion of $\frac{1}{3}$ and $\frac{1}{2}$, i.e., of the residue the mother takes 5/96, and the daughter 15/96; ultimately the wife will have $\frac{1}{8}$, and the residual $\frac{7}{8}$ is divided in the proportion of $\frac{1}{3} : \frac{1}{2}$ (or 1 ; 3) between the mother and daughter.

1. EFFECT OF THE RULES AS TO RETURN.

Effect of return:
1. **Mother or true grandmother shares with**
2. **daughters or sisters.**

When 1. the nearest male agnate (customary heir) is absent, *and*
2. the two following are not co-existing[3] viz.—
   (*a*) daughter or other female agnatic descendant, *and*
   (*b*) full or consanguine sister[3]—

then the estate is divided amongst,[1]—

mother *or* true grandmother } *and* { (i) the daughter, *or* other the (ii) nearest female agnatic descendant, *or* the (iii) full sister, *or* the (iv) consanguine sister } together with the { uterine sister or brother.

in other words, (1) the mother (or grandmother) *and* (2) the daughter (or son's daughter) *or* the sister take the residue on failure of male agnates.

This it will be seen includes all the 12 sharers except the (1) husband, (2) wife (3) father and (4) grandfather. The first two are excluded from the return, as they are not blood relations, and the last two do not take the return because they are competent to be residuaries, and when either of them exists there is no "return."

How sharers and residuaries may succeed.
1. **Sharers and residuaries or**
2. **Sharers alone or**
3. **Residuaries alone.**

This brings to a close the rules relating to the first alternative mode of succession: viz., succession by the sharers and residuaries. They may succeed (1) jointly or (2) only the sharers may succeed, either (*a*) because the shares exhaust the estate or (*b*) because there are no residuaries, and they take by return, or (3) only the residuaries may succeed, because there are no sharers. It will be observed that the existence of some relations who are themselves only residuaries, prevents other relations from being sharers, either excluding them altogether (if they are remoter) or rendering them co-residuaries with themselves, if they are in the same line.

[1] Bail. I. 715.
[2] Bail. I. 716.
[3] If they co-exist, the sister becomes residuary.

2. ALTERNATIVE GROUPS OF HEIRS SUCCEEDING SIMULTANEOUSLY.

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A. The husband takes ¼, or the wife ⅛, of the estate if there are agnatic descendants, and twice as much if there are none, and the nearest male agnate takes the residue (if any) unless otherwise stated below :

Groups in which the arrangements differ according as there are any sharers or residuaries.

B. Subject to the husband's or wife's rights—

I. If the nearest male agnate (or the customary heir) is a descendant,—

I. Male agnatic descendants succeed with female agnatic descendants in the same and higher lines.

1. the nearest female agnatic descendant (provided she is nearer than the customary heir) takes ½, if there are more than one, they take ⅔,
2. female agnatic descendants in the same line as the nearest male agnate take the residue with him the proportion of 1 to 2,
3. the intermediate female agnatic descendants (i.e., those who are between the nearest female descendants and the customary heir) for whom no portion of the ⅔ Quranic share is left, take the residue of the estate with the customary heir,
4. the father and mother take ⅓ each as Quranic sharers ; in their absence true grandfathers and true grandmothers take ⅓, respectively.

Father and mother.

II. If the nearest male agnate is an ascendant (i.e., there is no male agnatic descendant),

II. Male agnatic ascendants with female descendants and

1. the female agnatic descendants take ½ if one, and ⅔ if more than one.
2. the mother takes ⅓ or ⅓ of the estate, or of the residue ;[1] failing the mother, the true grandmother takes ⅓ of the estate.

III. If the nearest male agnate is a collateral (i.e., if there is no male agnatic descendant or ascendant),—

III. natic collaterals with female agnatic descendants and ascendants and sisters.

1. female agnatic descendants take ½ if one, and ⅔ if more than one.
2. the mother takes ⅓ or ⅓ of the estate, and failing the mother, the grandmother takes ⅓ of the estate.
3. the sister—
   (*a*) becomes co-residuary with the brother if he is the nearest male agnate.
   (*b*) in the absence of the brother,—
      (i) if there is any female descendant, the sister becomes by herself the sole residuary, ousting a remoter male agnate (who would have been the customary heir),—
      (ii) if there are no female descendants one sister takes ½ of the estate and more than one take ⅔.

Unless the male collateral is excluded by the sister

IV. In the absence of male agnates the estate is inherited in the manner referred to at the beginning of this comment, and failing them,—

Failing male agnates return to sharers.

V. By the distant kindred as explained in ss. 626-632.

Distant kindred.

§ 7.—Distant Kindred : Third Class of Heirs.

(1) Persons who are classed as Distant Kindred.

626. (1) Those blood relations who are not competent to be either sharers, or residuaries are called "distant kindred," or 'zavil-arham,'[2]

"Distant kindred."

[1] See s. 615 above.

[2] I.e., possessors of relationship. *Arham* is the plural of *rahm* which means "womb," and represents blood relationship. Cf. "The bonds of kinship are expressed alike in Arabic and Hebrew by the words *rehem*,

SECTION 626
Distant kindred succeed in absence of sharers and residuaries.

(2) The nearest[1] of the distant kindred succeed to the whole of the estate in the absence of such sharers and residuaries[2] as are blood relations.[3]

The distant kindred bear a relationship to the deceased which is not necessarily distant, unless it is accepted that all cognates are remoter than the remotest agnate. The distant kindred, it will be seen include—

I. All cognates except (1) such as are true grandmothers (ii) uterine sisters and brothers.

II. Female agnates remoter than the sisters :[4]

They may be classified in detail as follows.[5]

1. Of the descendants all cognates, and no others.[6]
2. Of the ascendants all false grandfathers (i. e. all male ascendants who are cognates), and all false grandmothers.[7]
3. Of the collaterals,
   (*a*) All cognates except the uterine brother and sister.
   (*b*) All female agnates except the sisters.

As to the place of the distant kindred in the table of priorities, see above pp. 570, 603.

(2) Priorities amongst the Distant Kindred.

Priority amongst distant kindred:
1. Descendants.

627. (1) Amongst distant kindred, descendants are preferred to both ascendants and collaterals. Amongst each of the said three classes (subject to the rules given below) the one who is related to the deceased through the fewest degrees is preferred.

2. Ascendants.

(2) Amongst descendants in the same generation, the children of female[8] agnates[9] are preferred to the children of cognates,[10]

rahim, the womb ; Amos I. 11 . . . does not mean 'he cast off all pity,' but 'he burst the bonds of kinship'"—Smith, "Kinship and Marriage," 32. The distant kindred consist of cognates and females. See comment. The remotest relations inherit under this head : e.g., the son of the granddaughter of the brother of the grandfather, *Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.

[1] For the relative proximities amongst distant kindred, see s. 627.

[2] Bail. I. 705.

[3] I.e., they succeed *with* the husband or wife, taking what is left over, after the husband or wife has taken his or her share.—But the term "residuary" is never applied to the "distant kindred."

[4] The Quranic provisions in favour of the collaterals are interpreted by the Sunnis as being restricted to the persons named, i.e. the full, consanguine, and uterine sisters, and the uterine brothers; the Shiahs on the other hand, interpret those provisions as single instances representing general principles, and give similar rights to nieces, and remoter female agnates and uterine relations.

[5] Bail. I 705.

[7] E.g. the following are distant kindred amongst descendants (*D* = daughter S = son) *DS*, *DD*, *DSS*, *DDS*, S*DS*, S*DS*. SS*DS*, SS*DD*, etc.

[7] I.e. the distant kindred amongst the ascendants are all cognate grand parents except (*a*) *MM*, or *MMM* or *MMMM* and (*b*) F*M*, or or FFF*M*, or FF*M*, F*MM*, or F*MMM* &c.

[8] The children of male agnates would of course be themselves agnates, and would be either sharers or residuaries.

[9] Bail. I 705-707. Cf. s. 622, and p. 93 *n.* 1 above.

[10] Agnates are throughout preferred by Sunni law to cognates. Female agnates being Quranic sharers or residuaries, there is additional reason for this preference, E.g.,

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(3) Amongst ascendants in the same generation, the parents of true grandmothers [1] are, according to the 'Sirajia' preferred to the parents of false grand parents; but according to the 'Fatawa' Alamgiri' there is no such preference.[2]

Amongst descendants child of share or residuary preferred to others. Parents of true grand-parents preferred to parents of false grand-parents.

(4) Amongst collaterals [3]—

(*a*) the descendant of a nearer common ancestor is preferred to the descendant of a remoter common ancestor,

(*b*) where the claimants are the descendants of full or consanguine brothers or sisters,—

(i) the nearest is preferred to the more remoter,

(ii) when two or more are in the same generation, the descendant of the full brother or sister is preferred to the descendant of the consanguine brother or sister,

(iii) when the claimants are in the same generation, and are either all full or consanguine relations, then the child of a sharer or residuary [4] is preferred to one who is not the child of a sharer or residuary; [5]

(*c*) when the claimants are the descendants of uterine brothers and sisters,—

(i) according to Imam Muhammad, they rank with either the full blood or the half-blood relations (as the case may be) in the same

Uterines rank with full or consanguine.

would be preferred to *DDS*. Bail. I. 706 words agnates.

the rule contained in s. 627 (2) as follows:— "When there is an equality in degree, i.e. in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred."

[1] The parents of true grandfathers are themselves true grandparents, and as such sharers.

[2] *Fatawa Alamgiri, Faraiz*, Ch. VII where the point is thus illustrated: *MMF*, (mother's mother's father), and *MFF* (mother's father's father) will both succeed. According to the *Sirajia MMF* (being the father of *MM* a true grandmother) will have preference over *MFF* (the father of a false grandfather).

[3] Of course only those are contemplated who fall within the description of distant kindred, and full and consanguine brothers of the father or true grandfather of the deceased, would be male agnates, and be classed as residuaries, and would exclude all distant kindred. See s. 626. The only sharers amongst collaterals are sisters, and the residuaries include all male

[4] *Sirajia*, Jones VIII. 253; see Table of distant kindred, and s. 631, *ill.* (5).

[5] *Fatawa Alamgiri, Faraiz*, ch. VII: Thus the brother's son's daughter will exclude the brother's daughter's daughter, as the brother's son is a residuary, but the brother's daughter is neither residuary nor sharer; *Sirajia*, Jones, VIII. 252: the full brother's daughter will exclude the consanguine brother's daughter, and also the uterine brother's daughter, "by the unanimous opinion of the learned, since she is the child of a residuary, and has also the strength of consanguinity." *Ibid.* 254: thus the son of a full paternal aunt will be excluded by the daughter of a full paternal uncle, and similarly the son of a consanguine paternal aunt will be excluded by the daughter of a consanguine paternal uncle, but the son of the full paternal aunt, will exclude the daughter of a consanguine paternal uncle. See comment.

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generation, neither excluding nor being excluded by either of them,[1]

(ii) according toAbu Yusuf the full-blood relations exclude the consanguine, and the consanguine exclude the uterine [in each line of descent][2]

(*d*) Where the claimants consist of the paternal or maternal uncles or aunts of the deceased, or such uncles or aunts of an ancestor of the deceased, or where they consist of the descendants of such uncles or aunts,—

(i) amongst the descendants of the same, or of equally distant common ancestors, the one who is nearer to the common ancestor is preferred to one who is remoter, whether both of them are paternal or maternal relations of the deceased, or one is paternal, and the other maternal.

(ii) Subject to the above the full blood relations are preferred to the consanguine, and the consanguine to the uterine, on the paternal and maternal sides, respectively.[3]

TABLE OF DISTANT KINDERED IN ORDER OF PRIORITY.

N.B. =“‘daughter,” or “daughter's” S= “son” or “sons”
=“mother” or “mother's” F= “father” or “father's”

1. *D*S, and *DD*, ... i. e., daughter's children
2. S*DD*, and S*D*S,[4] ..... i. e., son's daughter's children
3. *D*SS, *DSD DD*S, and *DDD*,[1] .... i. e., grand-children of daughters.
4. SS*D*S, and SS*DD*,[4]..... i. e , son's son's daughter's children.
5. *D*SSS, *DSSD*, *DSD*S, *DSDD*, *DDD*S, *DDDD*, *DDS*S, *DDSD*, SDSS, SDSD, SDDS, SDDD,[1] i. e., daughter's great grand-children, and son's daughter's grand-children

and so on, with other descendants,

[1] I.e. the descendants of a uterine half-brother or sister of the deceased (or of an ancestor of the deceased) rank equally with the descendants of either the full or consanguine brother of the deceased, (or of the said ancestor of the deceased, as the case may be). E.g., a uterine brother's daughter (UB*D*), will rank *with* the full brother's daughter or consanguine brother's daughter (CB*D* or FB*D*) and will not be excluded by either, though FB*D* will exclude CB*D*. This is the result of the fact that by the customary law full blood relations excluded consanguine relations, but both were competent to inherit; so no new rights were given to CB, he being left in possession of his original rights. On the other hand UB was entirely incompetent to inherit—his existence was ignored, and he had therefore to be given rights altogether new. According to Abu Yusuf he is postponed to the consanguine brother, taking the third place, but Imam Muhammad follows the analogy of the full consanguine and uterine brothers and sisters, and in no line allows the full or consanguine to exclude the uterine relations.

[2] *Sirajia*, Jones, VIII. 251, See below, s. 631 *ill.* (4).

[3] I.e., the nearest, on whichever side he be succeeds, but if two are equally near, and one of them is on the paternal side and the other on the maternal side, then though one of them is of the full blood, and other of the half blood, that does not gives to the former any preference.

[4] Though 2 and 3 are in the same generation, still 2 have priority, being the children of female agnates. Similarly as regards 4 and 5.

6. *MF*, ... i. e., mother's father,
7. *FMF*, *MMF*,[1] ..... i. e., parents' maternal grandfathers,
8. *MFF*, *MFM*.[1] ..... i. e., parents' paternal grandparents,

and so on.

9. Full brothers' daughters,[2] and full sisters' children,[3]
10. Consanguine brothers' daughters,[2] and consanguine sisters' children,

} with { uterine brothers' and sisters' children.[4]

11. Full brothers' sons' daughters.[5]
12. Consanguine brothers' sons' daugters,[5]
13. Full brothers' daughters' children, and full sisters' grandchildren.
14. Consanguine brothers' daughters' children, and consanguine sisters' grandchildren,

} with { uterine brothers' and sisters' grandchildren.[6]

15 Lower descendants of brothers and sisters in the same order,

16. Father's full sister,[7] and mother's full brother and sister.
17. Father's consanguine sister, and mother's consanguine brother and sister.
18. Uterine brothers and sisters of father and mother.[8]

See the table of half blood relationship on p. 608; though it mentions only the brothers and sisters of the propositus, it can be made applicable to the paternal uncles and aunts, by supposing P to be the father of the propositus; and to maternal uncles and aunts by supposing P to be the mother of the propositus; and adding the words "of the father" or "of the mother" as the case may be in each place.

[1] Though 7 and 8 are in the same generation, 7 have priority being the parents of true grandparents, and 8 are postponed as being the parents of false grandparents.

[2] Sons of brothers are residuaries.

[3] (*Moonshi*) *Mahomed Noor Buksh* v. *Mahomed Hameedool Huq* (1866) 5 W. R., 23.

[4] This is according to Imam Muhammad: according to Abu Yusuf the uterine brother'sandsister's children follow 10,and precede 11, whereas Imam Muhammad makes them succeed concurrently with 9 or 10. See below s. 631 *ill.* (4).

[5] 11 and 12 are the children of heirs (agnates) hence preferred to 13 and 14, respectively.

[6] The uterine brother's and sister's grand children follow 14 according to Abu Yusuf. Imam Muhammad makes them share concurrently with 13, or 14.

[7] The father's brothers are residuaries.

[8] Here the uterine relations do not succeed *with* the full or consanguine, but follow them. Cf. "The fourth sort (of distant kindred) are descended from the two grandfathers and two grandmothers of the deceased; and they are (i) paternal aunts and (ii) [paternal] uncles by the same mother only, and (iii) maternal uncles and aunts . . . and when there are several, then the stronger of them in consanguinity is preferred, by general assent; I mean they who are related by father and mother are preferred to those who are related by the father only, and they who are related by the father are preferred to those who are related by the mother only, whether they be males or females: and if there be males and females, and their relation be equal, then the male has the allotment of two females"—*Sirajia* Jones, VIII. 243, 253. See pp. 608 *et seq.*

[9] Though these are the children of a sharer, viz., of the mother's mother, who is a true grandmother, they have no priority over those who are not thechildren of sharers, viz., the consanguine, brother's children: for the tie of blood is first to be considered; if within the full, consanguine and uterine group, one is the child of a sharer, and another not, the former has priority.

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TABLE ILLUSTRATING HALF BLOOD RELATIONSHIP.

Father's other wife. FATHER — M MOTHER — Mother's other husband

C'B	C Si	FB		F Si	UB	
CONSANGUINE BROTHER.	CONSANGUINE SISTER.	FULL BROTHER.	PROPOSITUS.	FULL SISTER.	UTERINE BROTHER.	UTERINE SISTER.

TABLE OF PRIORITIES BETWEEN DISTANT KINDRED WHEN THE CLAIMANTS ARE UNCLES AND AUNTS.

In the first generation the distribution of the shares is also indicated (see s. 631 below); it is unnecessary to state it in the later generations, in which the same principle is followed, viz., (1) within the same generation no claimant on the paternal side excludes any claimant on the maternal side, nor 'vice versa,' but (2) the groups of persons (unless bracketed together) within each square (divided from each other by dotted lines [.....]), have priority in the order in which they precede each other below.

	Paternal side: AGGREGATE SHARE $\frac{2}{3}$.	Share taken by each.	Maternal side AGGREGATE SHARE	Share taken by each.
1st Generation.	1. Father's full sister		[Mother's full brother.....	
			,, ,, sister.....	$\frac{1}{3}\times\frac{1}{3}$
	2. ,, Consanguine sister.		2. ,, consanguine brother	
			,, sister....	
	3. ,, Uterine ,,		3. [Mother's uterine brother.[1]	
	,, ,, brother	$\frac{1}{3}\times\frac{2}{3}$	[,, ,, sister	
2nd Generation.	1. Father's full brother's daughter.[2]		1. {Mother's full brother's children.	
	2. ,, sister's children.		,, ,, sister's ,,	
			.....	
	3. consanguine brother's daughter.[2]		2. { ,, consanguine brother's and sister's children.	
	4. ,, sister's children.			
	5. ,, uterine brother's children.		{ ,, uterine brother's and sister's children.	
	,, ,, sister's ,,			

[1] See p. 607 *n.* 9.

[2] Being the child of a residuary, she has priority over the next, who is not such.

The same process is followed when the claimants belong to more distant generations. After the division has already been made between the paternal and maternal sides, respectively, the share of each side is divided amongst the claimants on that side in the same manner as the whole estate is divided amongst the descendants: So that Abu Yusuf distributes it with reference merely to the sex of the claimant, and Imam Muhammad in the manner referred to in s. 629 below.

SECTION 627
Distribution amongst collateral distant kindred.

In the case of descendants of the brothers and sisters of the grandparents of the deceased, the two columns given above would have to be redivided each into two, for a fresh division of the ⅔ on the father's and mother's side thus—

Descendants of brothers and sisters.

Paternal side		Maternal side	
Father's father's side ⅔×⅔	Father's mother's side ⅔×⅓	Mother's father's side	Mother's Mother's side ⅓×⅔

and similarly the columns have to be redivided for each higher generation in which the common ancestor is. Then after the common ancestors on both sides have been reached, the portions allotted to them are redivided amongst their descendants respectively.[15]

(3) Distribution of Estate amongst Distant Kindred.

(a) Where the Claimants are Descendants.

(i) *Abu Yusuf's System.*

628. The division of the estate amongst the nearest of the distant kindred when they consist of descendants is, according to Abu Yusuf, always so made that (subject to section 632 below) each male gets twice as large a portion as each female, the distribution being 'per capita' not 'per stirpes.'[2]

Abu double portions to males.

(ii) *Imam Muhammad's System.*

629. According to Imam Muhammad, subject to section 632 below,—

According to Imam Muhammad.

(1) The estate is divided as provided in section 628 above only where the intermediate[3] ancestors of each claimant are, in each generation, of the same sex as the intermediate

Re-distribution at each generation where intermediate ancestors differ in sex—Giving to each male intermediate ancestor two shares for each descendant

[1] *Sirajia*, Jones VIII. 253.

[2] Bail. I. 706; e.g., if the deceased has ren by two predeceased daughters *D*, *D*A, and *D* leaves 3 sons and 5 daughters, and *D*A one son and one daughter, there are 4 grandsons and 6 granddaughters; and the estate will according to Abu Yusuf be divided into 14 parts each granddaughter taking 1/14 and each grandson 2/14. As the intermediate ancestors of the claimants (see next note) *D* and *D*A are both females, so the division will be the same according to Imam Muhammad as according to Abu Yusuf.

[3] Intermediate ancestor—one intervening between the claimant and the propositus.

SECTION 629

ancestors (in the corresponding generation) of every other claimant;[1] but

from himself and to each female intermediate ancestor one share.

(2) Where in one generation the intermediate ancestor of a claimant is not of the same sex as the intermediate ancestor (in the corresponding generation) of every other claimant,[2] —

(*a*) The estate is in the first instance (notionally) divided as though the said intermediate ancestors of the claimants (in the generation in which they differ in several sex from each other) were the actual claimants,[3] but so that,—

(i) each such male ancestor is allotted a double share on behalf of each of the claimants[4] who is descended from him,[5] and,

(ii) each such female ancestress is allotted a single share on behalf each of the claimants[4] who is descended from her.[5]

Theer shares of male and female intermediate ancestors, respectively consolidated and divided amongst descendants respectively of males and of females.

(*b*) Secondly the portions so allotted to each of the said male intermediate ancestors are all consolidated or added together; and the total so consolidated or added together is distributed amongst the descendants of the said male intermediate ancestors in such proportions as to give (out of the said consolidated portions) to each male claimant twice as large a share as to each female.

(*c*) Thirdly the portions so allotted to each of the female intermediate ancestresses is similarly consolidated, or added together, and similary[6] distributed amongst the claimants descended from themselves.

This process repeated at each stage.

(3) Where the intermediate ancestors of the claimants differ in sex from each other in more generations than one, the process referred to subs. (2) above has to be repeated, in each such generation.

[1] See p. 609, *n.* 2.

[2] E.g., if the claimants are *DSD*, and *DDS*, the intermediate ancestors in the first generation are females in the case of both, but in the next generation *DSD* has a male ancestor, and *DDS* a female ancesterss.

[3] Thus when the claimants are *DSD* and *DDS*, the estate has to be first divided as though *DS* and *DD* were the claimants.

[4] Whether the claimant's own sex be male or female.

[5] So that when the claimants are *DSD* and *DDS*.—*DS* being a male, and having one claimant descended from him, gets a double share allotted to him, and *DD* being a female gets a single share allotted to herself although the claimant descended from herself is a male: Hence *DS* is allotted $\frac{2}{3}$ and *DD* $\frac{1}{3}$,—which shares are then taken by their respective descendants i.e., *DSD* takes $\frac{2}{3}$, and *DDS* takes $\frac{1}{3}$, though the latter is a male: See *ill.* to this section.

[6] I.e., so that each male gets twice as much as each female.

Illustrations.

N.B. { *D*="daughter." or "daughter's." S="son" or
The claimants are given in the first line of each illustration :

(1) *DSD* and *DDD*,

(*a*) Abu Yusuf : they will both take equally, being both females;

(*b*) Imam Muhammad : *DSD* will take $\frac{2}{3}$ and *DDD* $\frac{1}{3}$, as there will be a division in the second generation (i.e. between *DS* and *DD*) and the double share allotted in such division to *DS* (as a male) will devolve on his daughter *DSD*.[1]

(2) *DSS*, *DSD* } and { *DDS*, *DDD*,

(*a*) Abu Yusuf : the estate will be divided according to the sexes of the claimants thus : *DSS* $\frac{2}{6}$, *DSD* $\frac{1}{6}$, *DDS* $\frac{2}{6}$, *DDD* $\frac{1}{6}$.

(*b*) Imam Muhammad : the estate will be divided (i) in the second generation i. e., between *DS* and *DD*, and *DS* will be allotted $\frac{2}{3}$ and *DD* $\frac{1}{3}$, (ii) then the $\frac{2}{3}$ of *DS* will be divided between *DSS* and *DSD*, so that *DSS* gets four-ninths and *DSD* two-ninths, and (iii) the share of *DD* (viz., $\frac{1}{3}$) will similarly be divided between *DDS* and *DDD* the former getting two-ninths and the latter one-ninth.[1]

(3) *DSD*

According to Imam Muhammad (i) the estate will be first divided in the second generation (i. e., between *DS*, and *DD*, so that *DS* is allotted a double share for each of his two daughters (viz , *DSD* and *DSD*A) and *DD* is allotted a single share for her son, viz., *DS* will get four-fifth and *DD* one-fifth (ii) Then *DS*'s four-fifth will be divided equally between *DSD* and *DSD*A each taking two-fifth and *DDS* will get his mother's one-fifth.[1]

(4) (*a*) *DDDS*, (*b*) *DDDS*A } (*c*) *DDSD* { (*d*) *DSDD*, (*e*) *DSDD*

According to Abu Yusuf the estate will be divided into 7 parts, allotting to them 2, 2, 1, 1, 1, of such parts, respectively ; (*b*) according to Imam Muhammad : (i) in the second generation the first division will take place, i.e., between *DD* and *DS*,—*DD* getting three-seventh and *DS* four-seventh i.e., the former getting a single share in respect of each of her descendants, and *DS* a double share in respect of each of his descendants), (ii) the four-seventh share of *DS* will be divided between *DSDD* and *DSDD*A, equally, each getting 2/7 (iii) then the three-seventh of *DD* will be re-divided at the next generation, i.e. between *DDD* and *DDS* and as *DDD* has two descendants (amongst the claimants) she will be allotted a single share in respect of each of them and *DDS* has one descendant who will be allotted one double share i.e., the three-seventh will be divided equally between *DDD* and *DDS*, each getting three-fourteenth (iv) *DDD*'s three-fourteenth will be divided equally between *DDDS* and *DDDS*A, i.e. each taking three-twenty-eighth and *DDSD* will take three-fourteenth from her father.[2]

[1] *Alamgiri*. Book on *Faraiz*, Ch. VII. on *Zavil Arham*,

SECTION 629 Imam Muhammad's complicated system of distribution amongst the distant kindred is an attempt to give priority to males and agnates [1] over females and cognates, without adopting a stirpital division. Until the distant kindred are reached there are only the agnates to be dealt with, and the intermediate ancestors are all males.[2]

ABU HANIFA AND OTHERS ON DISTRIBUTION AMONGST DISTANT KINDRED.

(i) Abu Hanifa (apparently) agrees with Imam Muhammad.
(ii) Shaikh Asbijabi with Abu Yusuf.
(iii) Also Shaikhs of Bukhara.

Cf. "Be it known (i) that there are two reports about Abu Hanifa's view as regards this, and of the two the better known report is that as regards all the rights of the 'zavil arham' (distant kindred) he agrees with Imam Muhammad, and the 'fatwa' is upon the same view, but (ii) Shaikh Asbijabi has said in the 'Mabsut' that the view of Imam Abu Yusuf is more correct, inasmuch as it is more easy of application, and (iii) the author of the 'Muhit' states that the Shaikhs of Bukhara have adopted in such questions the opinion of Imam Abu Yusuf." [3]

(*b*) *Distribution: when Distant Kindred are Ascendants.*

Ascendants on father's side take ⅔ and on mother's ⅓.

630. Where the distant kindred who are entitled to inherit are ascendants, some being ancestors of the father, of the deceased and others of his mother, in that case ⅔ of the estate is first allotted to the ancestors of the father, and ⅓ to the ancestors of the mother, the said ancestors dividing the said ⅔ and ⅓, respectively, amongst themselves in such proportions that according to Abu Yusuf each male receives twice as large a portion as each female, and according to Imam Muhammad in the same manner as if the relationship of the claimants were at each step in the descending, instead of the ascending, line. [4]

Illustration.

F = "Father" or father's M = "Mother" or "mother's."

The claimants being,—

(*a*) } father's ancestors (*c*) *MFMF* } mother's ancestors,—
(*b*) *FMFF* } (*d*) *MMFF* }

the estate will be first divided so that the father's ancestors get ⅔, and the mother's ⅓, then (*a*) and (*b*) will each take ⅓ and (*c*) and (*d*) 1/6 each.[4]

1. Preference to nearest. Parent of sharer preferred.

Cf. 1. "The degrees in this case are either equal or unequal—
(*a*) "if unequal the nearer is preferred;
(*b*) "if equal, the preference is given to the person claiming through a sharer.

[1] Or rather partial agnates.

[2] Except in the case of the true grandmothers and uterine brothers and sisters. In the case of the latter there is no difficulty about the intermediate ancestors differing in sex, as they are both descended from the mother of the deceased. In the case of the grandmothers the intermediate ancestors may occasionally differ in sex, but the claimants are always females.

[3] *Fatawa Alamgiri*, Book on *Faraiz*, Ch. VII on *Zavil Arham*.

[4] *Sirajia*, Jones, VIII. 219.

2. "If there be equality in that respect, the sides must be the same or different—

(*a*) "if different, the distribution must be made in thirds, the paternal side having a double share,

(*b*) "if the same, the sexes of the roots or ancestors[1] must agree or not—

(i) "if they agree, the estate must be distributed according to the persons of the branches or claimants;

(ii) "if not, according to the first rank that differs, as in the preceding class."[2]

SECTION 630
2. Distribution. Paternal side ⅔ maternal
mediate ancestors

(*c*) *Distribution: when Distant Kindred are Collaterals.*

(1) Where the claimants are descendants of the brothers or sisters of the deceased,[3] there, subject to section 632 below,—

Descendants: brothers and sisters.

(*a*) According to Abu Yusuf they divide the estate 'per capita' so that each male gets twice as large a portion as each female.

ABU YUSUF for division 'per capita.'

(*b*) According to Imam Muhammad,[3]—

IMAM MUHAMMAD:

(i) The estate is in the first instance so allotted as though the brother or sister of the deceased[4] through whom the claimants are respectively descended, were living, but so that if there are two or more claimants descended from the same brother or sister, that brother or sister is allotted the share of two or more, as the case may be.[5]

1. allotment to sisters and brothers:

(ii) Secondly, the portions so allotted to the full brothers and sisters are consolidated, and then the portion so consolidated is re-divided amongst their descendants in such proportions that (subject to clause (v) below) each male gets twice as large a portion as each female.

Full brother or Sister.

[1] I.e., of the intermediate anscetors.

[2] *Al Sharifia*—Jones, Works VIII. 312. The numbers are mine. Here too presumably there is the same difference of view between Abu Yusuf and Imam Muhammad about clause (*b*) (ii) as there is about the descendants.

[3] See illustrations. Case 113, in East's Notes, SUP. Court, Cal., (15th Feb. 1820) seems to have been decided according to Imam Muhammad's opinion.

[4] Collaterals, it is evident are either (1) the descendants of the brothers and sisters of the deceased or (2) of the uncles and aunts of the ceased; see subs. (1) and (2) respectively.

[5] Thus the share of a full or consanguine sister is ½ of the estate but of two sisters or more ⅔; so if there are two descendants of the same sister, they get ⅔ not merely ½. Similarly one uterine brother or sister gets ⅙, and two or more ⅓, but if there are two children of one uterine sister the share allotted to them is ⅓ not ⅙. For the purposes of this first allotment it will be observed that the share of two is the same as that of any greater number. Conversely if there were originally two sisters and only one of them has one claimant descended from her, that sister will be allotted only half and not two-thirds.

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Consanguine brother or sister.

(iii) Thirdly, the portions so allotted (if any) to the consanguine brothers and sisters[1] are consolidated and divided in the same manner as referred to in clause (ii) above.

Uterine brother or sister.

(iv) Fourthly, the portion so allotted to the uterine brothers or sisters[2] is divided amongst the claimants descended from them 'per capita' so that males and females take equal portions.

2. Distribution to descendant of brothers or sisters.

(v) For the purpose of the divisions referred to in clauses (ii) and (iii) above, the same principles apply as those for the division of the estate amongst the descendants.[3]

Distribution amongst uncles and aunts of the deceased (or of his ancestor.) and the descendants of such uncles and aunts.

(2) Where the claimants are the uncles and aunts of the deceased or their descendants, i.e., when they are the brothers or sisters of the parents or grandparents, of the deceased, or the descendants of such brothers or sisters, the estate is according to both Abu Yusuf and Imam Muhammad first divided into three parts, and two of such parts are allotted to those who are related to the deceased on the paternal side, and one part to those who are related to the deceased on the maternal side, and the said two-thirds and one-third are then distributed amongst the claimants on their respective sides in the manner stated in clause (*a*) or (*b*) of sub-section (1) above.

Illustrations.

N. B.— In the illustration below the letters or groups of letters in the first lines represent the existing claimants.

S = son or son's D = daughter or daughter's B = "brother" or "brother's" *Si* = "sister," or 'sister's: F, C and U indicate respectively that the sister or brother is full or consanguine or uterine.

(1) *BDD* i.e. brother's daughter's daughter.

BDS i.e. brother's daughter's son.

SiDD i.e. sister's daughter's daughter,—

Imam Muhammad : the estate will be divided first so that the brother's children each take a double share, and the sister's child a single share; i.e., (i) *BDD* and *BDS* take together four-fifth and (ii) *SiDD* one-fifth; (iii) Then the four-fifth of the former is re-divided between them so that *BDD* takes $\frac{4}{5}\times\frac{1}{3}$ i.e., four-fifteenth and *BDS* $\frac{4}{5}\times\frac{2}{3}$, i.e. eight-fifteenth respectively.

[1] The consanguine brother is excluded by the full brother; besides there may be no portion left for him, but if there is only one (claimant descended from a full sister) then the claimant descended from the consanguine sister will get $\frac{1}{3}$.

[2] The portion allotted to the uterines can only be either $\frac{1}{6}$ or $\frac{1}{3}$.

[3] See s. 629 above.

(2) uBS*D* i.e., uterine brother's son's,
uS*i*DS i.e., daughter and uterine sister's daughter's son,—

Abu Yusuf : the former will take $\frac{1}{3}$ (being a female) and the latter $\frac{2}{3}$ (being a male). Imam Muhammad : they will each take a half, as uB and the uS*i* [1] would have taken in equal shares.[2]

(3) FS*i*D*D* i.e., full sister's daughter's daughter,
cBDS i.e., consanguine brothers daughter's son,—

Abu Yusuf : the former will exclude the latter, as she is descended from the full blood and cBDS is descended from the half blood and both are in the same line. Imam Muhammad : each of them takes $\frac{1}{2}$ which is the share of and FS*i* and cB, respectively.[3]

(4) S*i*D*D* i.e., full sister's daughter's daughter,
cS*i*DS i.e., consanguine sister's daughter's son,
uS*i*DS i.e., uterine sister's daughter's son,
uS*i*D*D* i.e., uterine sister's daughter's daughter,—

Abu Yusuf : the whole will be taken by S*i*D*D* as the full blood claimant. Imam Muhammad, The full sister is first allotted $\frac{1}{2}$ as sharer, the consanguine sister $\frac{1}{6}$, the uterine sister $\frac{1}{3}$ as she has two claimants descended from her and the ultimate shares are FS*i*D*D* $\frac{1}{2}$, cS*i*DS $\frac{1}{6}$, uS*i*DS $\frac{1}{6}$, uS*i*D*D* $\frac{1}{6}$.

(5) uS*i*D, i.e., uterine sister's daughter,
i.e., consanguine sister's son,
i.e., consanguine sister's daughter's,
FS*i*SS i.e, full sister's son's son,—

The last, FS*i*SS, is excluded as being in the third generation, the other three being in the second, and so nearer; uS*i* (as a single uterine sister) is first allotted $\frac{1}{6}$, cS*i* is allotted the share of two consanguine sisters i.e., $\frac{2}{3}$, as she has two claimants descended from her.

There is a residue of $\frac{1}{6}$ which "returns"[4] and is allotted to uS*i* and cS*i* in the proportion of $\frac{1}{6}$, $\frac{2}{3}$, hence the shares become (after the return) one-fifth and four-fifth respectively.

The $\frac{1}{5}$ allotted to uS*i* is then taken by uS*i*D; and the $\frac{4}{5}$ allotted to cS*i* is divided between cS*i*S and cS*i*D in the proportion of 2 : 1 so that cS*i*S takes $\frac{4}{5}\times\frac{2}{3}$ i.e., eight-fifteenth and cS*i*D takes $\frac{4}{5}\times\frac{1}{3}$ i.e., four-fifteenth.

(6) The claimants being a full paternal aunt, FP*A*, and a uterine maternal aunt, UM*A*, then the former does not exclude the latter though of the full blood, because she is on the father's side, and the latter on the mother's side ; but FP*A* will take $\frac{2}{3}$, and UM*A* will take $\frac{1}{3}$, being the father's and mother's portion, respectively.[5]

(7) Similarly, the consanguine paternal aunt, CP*A*, will not be excluded by the full maternal aunt, UM*A*, but the former will take $\frac{2}{3}$, and the latter $\frac{1}{3}$.[5]

[1] Cf. s. 618 above.

[2] *Fatawa Alamgiri, Faraiz* ch. VII ; the same illustration is given in *Sirajia*, Jones VII. 249-250.

[3] *Sirajia* Jones VII. 250-251. Cf. s. 617 above.

[4] Of course there would be no return if one of the ancestors of the claimants were a residuary, e. g. a consanguine brother.

[5] *Sirajia*, Jones VIII. 253.

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(8) FBD full brother's daughter,
" sister's "
FSiS " " son,
cBD consanguine brother's daughter,
cSiD " sister's "
cSiS " " son,
uBD uterine brother's daughter,
uSiD " sister's "
uSiS " " son,—

Abu Yusuf: the full blood will exclude the consanguine relations, and the consanguine will exclude the uterine. In each case the male will take $\frac{1}{2}$ and the females $\frac{1}{4}$ each.[1]

Imam Muhammad: the full blood will exclude the consanguine, but not the uterine: (i) the uterine will take $\frac{1}{3}$ of the estate,[2] and then this $\frac{1}{3}$ will be divided equally between the uterines, i.e., uBD, uSiD, and uSiS will each take $\frac{1}{9}$. (ii) The rest i.e., $\frac{2}{3}$, of the estate will be divided amongst the full blood relations, i.e., FBD, FSiD, and FSiS, but so that out of this $\frac{2}{3}$ (*a*) in the first instance FB will be (notionally) allotted one double share[3] (*b*) *FSi* will be allotted two single shares,[4] i.e., the $\frac{2}{3}$ will be so allotted that FB andand *FSi* will each be allotted $\frac{1}{3}$ of it, then (*c*) the $\frac{1}{3}$ allotted to FB will be taken by his daughter FBD and (*d*) the $\frac{1}{3}$ allotted to *FSi* will be divided between *FSiD* and *FSiS* in the proportion of 1 2, i.e., the former will take one-ninth and the latter two-ninth. The distribution according to Imam Muhammad appears from the following table:

Residuaries: taking $\frac{2}{3}$.		Excluded by full blood.		Sharers: taking $\frac{1}{3}$.	
FB	FSi	cB		uB	uSi
FULL BROTHER $\frac{1}{2}$	FULL SISTER $\frac{1}{4}$	CONSANGUINE SIS	CONSANGUINE BROTHER	UTERINE BROTHER	UTERINE SISTER

FBD	FSiS		cBD	cSiS		uB	uSiS	
FULL BROTHER'S DAUGHTER	FULL SISTER'S SON	FULL SISTER'S DAUGHTER	CONSANGUINE BROTHER'S DAUGHTER	CONSANGUINE SISTER'S SON	CONSANGUINE SISTER'S DAUGHTER	UTERINE BROTHER'S SON	UTERINE SISTER'S SON	UTERINE SISTER'S DAUGHTER
	$=\frac{1}{3}$					1	$\frac{1}{3}\times 1$	$\frac{1}{3}\times\frac{1}{3}$

(9) If the claimants include two or more grandchildren of uterine brothers or sisters (*a*) they take $\frac{1}{3}$, dividing it equally amongst themselves, then (*b*) the grandchildren of full (or failing them of consanguine brothers and sisters) take collectively the $\frac{2}{3}$

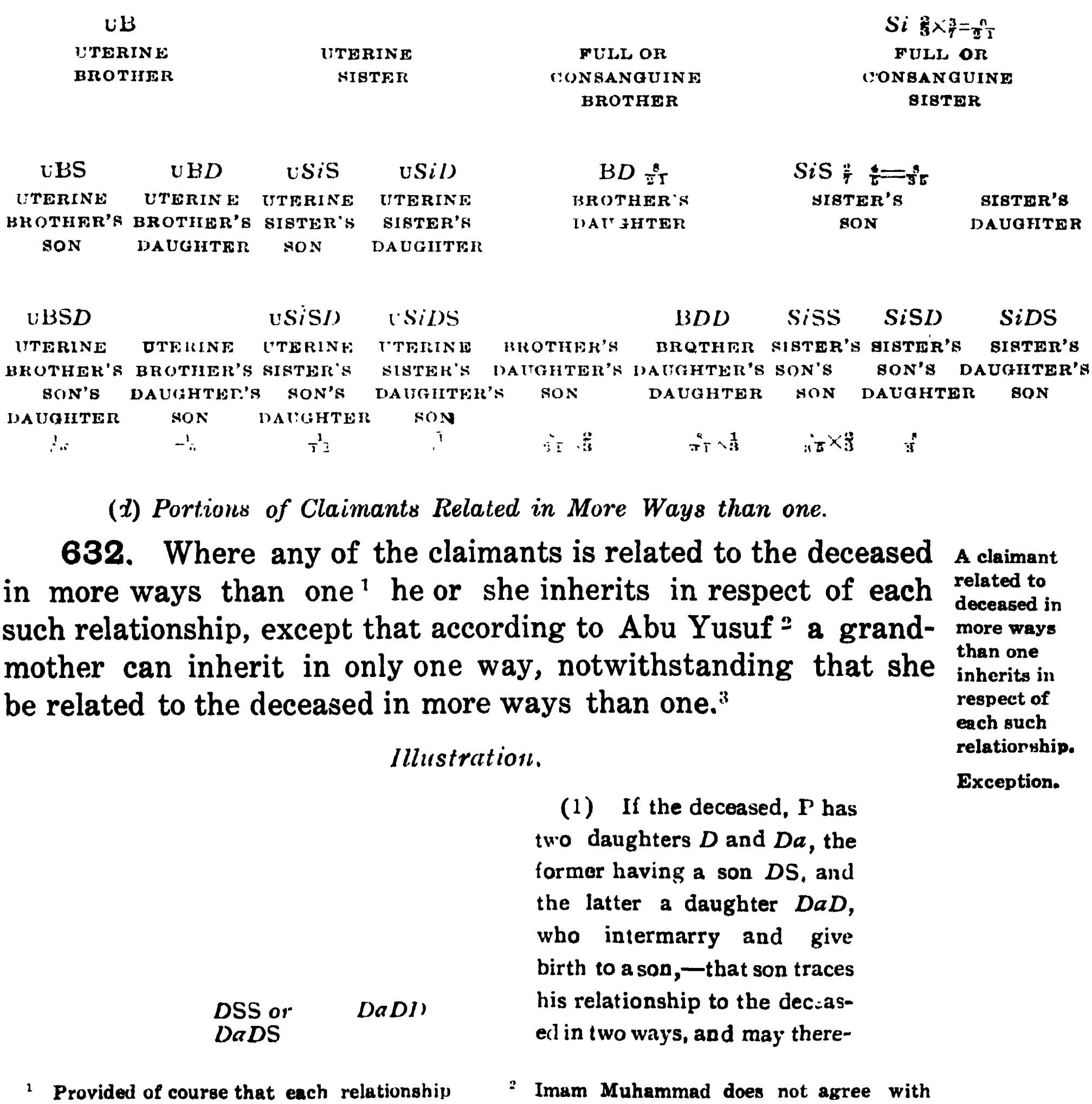
[1] *Sirajia*, Jones VII. 251.

[2] On the principle that two or more uterine sisters or brothers take $\frac{1}{3}$ of the estate when they co-exist with full or consanguine brothers or sisters.—See above s. 618.

[3] One share, because he has one claimant descended from him; and a double share, because he is himself a male (though the claimant descended from him is female.)

[4] Two shares, because there are two claimants, and single shares because she is herself a female, (though one of the claimants descended from her is a male, and the other a female).

(*c*) as to this ⅔ if there was one predeceased brother (full or consanguine) through whom two claimants are descended, and one predeceased sister (full or consanguine) through whom one claimant is descended (i) the brother is first allotted a double share for each of the descendants through him i e. 4 shares and (ii) the sister a single share for the claimant through her i.e. the brother is allotted $\frac{4}{5}\times\frac{2}{3}$ i.e., eight-fifteenth and the sister $\frac{1}{5}\times\frac{2}{3}$ i.e. two-fifteenth (*d*) Finally the $\frac{8}{15}$, and $\frac{2}{15}$ are divided respectively amongst the grand-children of the brother and sister in the proportion of 2 : 1. This may be tabulated as follows:— SECTION 63



(*d*) *Portions of Claimants Related in More Ways than one.*

632. Where any of the claimants is related to the deceased in more ways than one[1] he or she inherits in respect of each such relationship, except that according to Abu Yusuf[2] a grand-mother can inherit in only one way, notwithstanding that she be related to the deceased in more ways than one.[3]

A claimant related to deceased in more ways than one inherits in respect of each such relationship.

Exception.

Illustration.

(1) If the deceased, P has two daughters *D* and *Da*, the former having a son *D*S, and the latter a daughter *DaD*, who intermarry and give birth to a son,—that son traces his relationship to the deceased in two ways, and may there-

*D*SS *or* *Da*DS *Da*DD

[1] Provided of course that each relationship would have entitled him, by itself to inherit.

[2] Imam Muhammad does not agree with him.

[3] Bail. I. 707.

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fore be styled *D*SS or *DaD*S. If afterwards *DaD* marries another husband H, and gives birth to a daughter *DaDD*, then on the death of all the other persons mentioned above, *D*SS (who is also *DaD*S) and *DaDD* will be heirs. (*a*) According to Abu Yusuf, *D*SS, being a male, and being related to the deceased in two ways, will take the share of two males, i.e. a quadruple share, and *DaDD* being a female, and related to the deceased in only one way, will take a single share i.e. *D*SS will take four-fifth and D*aD*D one-fifth (*b*) According to Imam Muhammad the first distribution will be in the generation of *D*S and *DaD* where the intermediate ancestors differ in sex, and *D*S will be allotted one double share i.e $\frac{2}{3}$ and *DaD* one single share i.e. $\frac{1}{3}$.[1] The $\frac{2}{3}$ of *D*S will come to DSS and the $\frac{1}{3}$ of *DaD* will be divided equally between *DaD*S and *DaDD* i.e. the last will get only a one-sixth, and *D*SS or *DaD*S will take five-sixth.

(2) P dies leaving the consanguine sister of his father (consanguine paternal aunt) and the uterine brother of his mother (uterine maternal uncle). If the former is also his uterine maternal aunt [2] then P's estate will first be divided into $\frac{2}{3}$ for the paternal side and $\frac{1}{3}$ for the maternal; the aunt will take the whole $\frac{2}{3}$. Then the $\frac{1}{3}$ for the maternal side willagain be divided so that the uncle gets, $\frac{5}{6}$ out of it and the aunt $\frac{1}{6}$, so that the latter will get in all two-third and again one-ninth, totalling seven-ninth.[3]

(3) The uncles and aunts of the deceased being the claimants, viz.—

CPU consanguine paternal uncle CMU consanguine maternal uncle

CP*A* } aunts CM*A*A aunts
CP*A*A }

then CPU's daughter marries CP*A*'s son, and two daughters are born to them *D*, *D*A; there are also two sons of CP*A*A's daughter viz S, SA then CMU's daughter marries CM*A*'s son and has two sons SB, SC, finally CM*A*A's daughter has two daughters *D*B, *D*C.

(*a*) According to Abu Yusuf the estate is to be divided into 30 parts, of which the paternal side will take 20, and the maternal 10, of which *D*, *D*A, S and SA will each take 5, because *D* and *D*A have a double relationship, and S, SA, are males, and the 10 on the maternal side will be divided, so that SB and SC take 4 each, and DB and DC 1 each.

(*b*) Imam Muhammad however would (i) divide the estate into 36 parts giving ($\frac{2}{3}$=) 24 to the paternal side, and ($\frac{1}{3}$=) 12 to the maternal; (ii) the 24 would be re divided in the first instance between CPU on the one hand, and his two sisters CP*A*, and CP*A*A, on the other : CPU counts as two males, having 2 claimants descended from him ; CPA and CPAA as 2 females each, i. e., they take it in the proportion of 4 : 2 : 2 : hence CPU gets 12 shares, CP*A*, 6, and CP*A*A 6, making up the

[1] *Sic* in Bail. I. 707: *sed quaere* whether *DaD* should not be allotted two single shares, inasmuch as there are two claimants descended from her, *viz*. *DaD*S and *DaDD* ; the illustration is taken from the *Fatawa 'Alamgiri* ; and it seems hardly possible that there should be an error in it, but the present author is unable to think of any other explanation of this instance, except an eror in the text.

[2] If a man F has two wives, *W* and *Wa*, and the son(S)of F and *W* marries the daughter (*D*) of *Wa* (by a husband other than F), and a child P is born to S and *D* ; then *Da* the daughter of F and *Wa* will be both the consanguine sister of S,and uterine sister of *D*, i.e., both the consanguine sister of P's father, and uterine sister of P's mother.

[3] *Sharifia*, Jones, VIII. 313, 314.

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24 on the paternal side ; (iii) the 12 shares of CPU are inherited by the claimants descended through him, viz *D*, *D*A, who, as his grand children, take 6 each ; (iv) the 6 shares of CP*A* and 6 of CP*A*A, 12 in all, are consolidated, and redivided in the next generation (since they have a son and a daughter, i. e., the intermediate ancestors of the claimants through them differ in sex) : CP*A*'s son counts as 2 males, and CP*A*A's daughter as 2 females, (each having two claimants descended from him and her viz *DD*A and SSA so that CP*A*'s descendants have 8 out of the 12 allotted to them and CP*A*A's descendants have 4 allotted to them. (v) Then CPA's descendants take 4 each out of the said 8 ; they have already got 6 each through CPU: and (vi) CP*A*A's descendants take 2 each out of the 4 allotted to their mother in division (iv). Similarly the 12 shares allotted to the maternal side are divided and redivided six times giving ultimately to SB and SC 3 each from CM U and 2 each from CM*A*; and to *D*B and *D*C, 1 each from CM*A*A [1]. The figures in the following table represent the apportionment according to Imam Muhammad—

Paternal side. (24)			Maternal side. (12)		
CPU	CP*A*	CP*A*A	CMU	CM*A*	CM*A*A
	6	6	6	3	3
daughter—			daughter	son	daughter
12			6		

D	*D*A	S	SA	SB	SC	*D*B	*D*C
4==10)	(6+4==10)	(2)	(2)	(3+2==5)	(3+2==5)	(1)	(1)

§ 8—The Husband or Wife Inheriting the Whole.

633. Where no blood relation of the deceased of any description whatever can establish his claim to inherit, the husband or wife (if either is surviving) will take the whole of the estate.[2]

"Return" or wife, if no distant kindred (nor residuaries nor other sharers).

The husband and wife are postponed to all the blood relations, apparently because the Quran specifically mentions that every person related, (by blood) to the deceased should inherit, without restricting their rights to any special mode of succession, whereas the husband and wife are mentioned merely as being entitled to inherit their Quranic shares.

"There can be no doubt" said Kemp J. "that the more ancient authorities did hold that the widow and the husband were not entitled to the 'rudd' or return, under the Muhammadan law ; but more modern authorities have ruled that in the absence of the 'bait-ul-mal,' the widow and the husband, are entitled to the return."

[1] *Sharifia*, Jones, VIII. 311-316.

[2] *Mahomed Arshad* v. *Sajida Banoo* (1878) Cal. 702, following (*Mussamaut*) *Soobhanee Bhetun* (1811) 1 S. D. A. (CAL) 346. Kemp J. also refers to Sircar, "Muhammadan Law" II. 233, 234 for the modern authorites; *Bafatun* v *Bilaiti Khanum* (1903) 30 Cal. 683; Cf (*Mussamut*) *Hurmut-ool-Nissa Begum* v. *Allahdia Khan* (1871) 17 W. R. 108 (P.C.)

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§ 9—*The 'Maula' or Successor by Contract.*

'Maula' succeeds if no blood relations nor husband or wife.

634. In default of all blood relations, and of the husband or wife, the estate devolves according to Hanafi, but not Shafi'i law [1] upon the 'maula,' or successor by contract.[2]

This rule of law, like so many others, is a relic of pre-Islamic customs in Arabia.[3] It can have little applicability in British India.

§ 10—*The Acknowledged Kinsman.*

Acknowledged kinsman comes next.

635. In default of all blood relations, of the husband or wife, and of the successor by contract, the estate devolves upon the "acknowledged kinsman" i. e., a person of unknown descent whom the deceased has declared [4] to be descended from a kinsman of himself.[5]

It will be observed that a person whose claim is based on a mere acknowledgment, has his rights postponed to the rights of those who have other proof to establish their rights.

§ 11—*Universal Legatee as Successor.*

Testamentary power enhanced if there are no heirs, —or only husband or wife.

636. (1) In default of all those who are referred to in the last section, a Mussulman has the right to make a testamentary disposition of the whole of his estate; and

(2) Where out of those persons who are referred to in the last section, only the husband or wife survives the deceased, the testamentary powers of the deceased are restricted so as to operate to the extent of $\frac{1}{3}$ of the estate as against the husband or wife's interests in the estate (as Quranic shares), but are unrestricted as against the rest of the property.[6]

§ 12—*Escheat to the Government.*

Escheat to the Government if no one can establish his claim.

637. In default of all those persons who are referred to in the last two sections, the estate, or such portion of

[1] "The *Minhaj* is silent as to the 'successor by contract,' but Luciani ('Succession Musulmanes,' 108) states expressly that this form of succession is peculiar to the Hanifites, and is not recognised by the Shafeites," Wilson, "Anglo Muhammadan Law," 414.

[2] Defined above p. 93 s 61 *expl.* III; cf. p. 93 *n.* 2. There may be a mutual contract for succession between two persons, so that each may be the *maula* of the other.

[3] Cf. Smith "Kinship and Marriage," 55; and Quran IV. 37, p. 562 above.

[4] A declaration of this nature may by retracted, and if retracted, is of no effect. Cf. s. 223 p. 182 above.

[5] Such an acknowledgment does not refer to descent from the deceased himself. If it does so refer it may take effect so as to establish parentage,—in which case the acknowledged person would succeed in the same way as if he were descended from the deceased; whereas an acknowledgment under s. 635 gives a right which is postponed to all other rights. Cf. Bail. I 406. (*Il.* 1-4); Smith's "Kinship and Marriage in Ancient Arabia," 15. See also *Sahebzadi Begum* v. (*Mirza*) *Himmut* (1869) 12 W R. 512.

[6] Bail. I. 634. See above. pp. 527, 528, 529.

it as is not disposed of by a will of the deceased, escheats to the Government. SECTION 637

"Private ownership not existing," said the Privy Council, "the state must be owner as ultimate lord." [1] Cf. the dictum in an old case, where it was stated that the residual ⅞ of the estate also reverts to the widow—it being ruled by 'futwas' that there is in modern times no 'bytoolmal' or public treasury, regulary established.[2]

PART III.—SHIAH LAW OF INHERITANCE.

§ 1.—Scheme of Shiah law of Inheritance.

638. According to Shiah law,— SHIAH LAW:

(1) The husband or wife, together with the nearest blood relations, male or female, agnate or cognate,[3] succeed to the estate: proximity being reckoned as provided in section 640 below. The nearest (male or female agnate or cognate) succeed.

(2) The estate is divided amongst the said nearest relations by allotting to the husband or wife and the other Quranic sharers (subject to subsection (3) below), their respective shares;[4] the residue[4] is then divided amongst the rest of the said nearest relations 'per stirpes,' and not 'per capita;'[4] and if the said nearest blood relations comprise such only as are given Quranic sharers, then they divide the said residue as stated in sub-section (4) below; but in no case does a person remoter than the said nearest blood relations inherit any portion of the said estate.[5] Distribution. first to sharers: 'per stirpes.

(3) Where the sum total of the Quranic shares exceeds unity,[6] the shares do not all abate rateably,[7] but the division is so made that the deficit is borne by the persons hereinafter referred to.[8] No rateable abatement or "aul" in Shiah law.

[1] P. C. in *Collector of Masulipatam* v. *Cavaly* (1860) 8 Moo. I.A. 498, 525.

[2] (*Mussummaut*) *Soobhance* v. *Bhetum* alias *Shah Azamali* (1811) 1 S. D. A. (CAL) 346, 348 cited with pproval in *Mahomed Arshad* v. *Sajida* (1878) 3 Cal. 702.

[3] Cf. Bail. II. 274 (para. 2).

[4] Bail. II. 262, (para. 2), 274. The principle that males be alloted twice as large a portion as females is applied (*a*) to descendants (*b*) to agnates. It is not applied in the case of ascendants who are cognates, or collaterals who are uterine. Cf. Bail. II. 303 (*ll.* 17-18) see also Bail. II. 400; "I was directed to ask the *Imam Jeffer Sadik*, on whom be peace, to whom doth the property of a person deceased, of right appertain? to his own nearest relation, or to his *Asbat*?' He replied:—'Verily it belongs to the nearest relation, and as to the *Asbat* or more distant male kindred, "Dust in their jaws,"'"

[5] Bail. II. 270. Insomuch that there is no inheritance for a son's son, when there is only a daughter. *Ib.* 363 (para. 2).

[6] Under the operation of the Shiah rules of succession it can never happen that no residue is left in a case where there is any person who is a pure residuary (i.e., where there is any person who does not take any Quranic share).

[7] The abatemant is referred to as *'aul* or "increase," and prevails in Sunni law, "the *awl* is null, or not recognised with us," i.e., in Shiah law,—Bail. II. 274; "the nullity of the doctrine of *awl*," *ib.* 273; "innumerable traditions . . expressly annul and prohibit this practice," *ib.* 397.

[8] The deficit always falls either upon (*a*) the daughters, or (*b*) the full or consanguine sisters. It is only when either of these are present that there can be a deficit.—Bail. II. 395, (para, 3), 396-397; 263, 273, 274, 336,

SECTION 638 "Return," to sharers.

(4) Where the persons who are entitled to inherit do not include a residuary (and the respectives shares of the said persons do not exhaust the whole estate), the residue is divided amongst them in the proportion of their respective Quranic shares.

Effect of distinction between sharer and residuary in Shiah Law.

Explanation—Under Shiah law the distinction between sharer and residuary arises only in the distribution of the estate: it does not affect the question as to who are entitled to succeed.[1]

The sharer in Shiah law.

The sharer or 'zû farz' refers in Shiah, as in Sunni law to a kinsman specifically named or mentioned in the Quran,[2] all other heirs (for whom shares are not allotted in the Quran) are referred to as 'zû qarabat'[3] by the Shiah authorities.[2] The latter are referred to in Baillie as residuaries. The same heir may in some circumstances be a sharer, and in others a residuary.

SHARERS IN SHIAH LAW.

The sharers in Shiah law may be thus enumerated :—

(1) Husband, in all circumstances (taking $\frac{1}{2}$ or $\frac{1}{4}$); (2) widow, in all circumstances (taking $\frac{1}{4}$ or $\frac{1}{8}$); (3) daughter, when there is no son (one takes $\frac{1}{2}$, two or more $\frac{2}{3}$); (4) father, when there are any descendants (taking $\frac{1}{6}$); (5) mother in all circumstances (taking $\frac{1}{3}$ or $\frac{1}{6}$); (6) full or consanguine sister, where there is no brother or grandfather[4] (sharing similarly to daughters); (7) uterine brothers and sisters ($\frac{1}{6}$ or $\frac{1}{3}$). Of these the daughters, father and sisters are occasionally residuaries, viz., daughter where there is a son; father, where there are no descendants; sister, where there is a brother or grandfather.[2] This paragraph is subject to s. 640 below.

Sunnis include more persons amongst sharers as individuals entitled in their own rights.

It will be observed that the following are not classed as Quranic sharers by the Shiahs, though they are so classed by the Sunnis, viz., (i) the son's daughter, (ii) true grandfather, (iii) true grandmother. The reason is that the Shiahs adopt the principle of representation[5] and a stripital distribution throughout, so that (to take an example) in Shiah law the son's daughter takes the share not of a daughter, but of a son, and it is the daughter's child (whether male or female) who takes the share of the daughter—not the son's daughter. At the same time the principle which according to the Shiah interpretation of the Quran underlies the doctrine of the "shares," is extended in all directions,

The Shiahs include fewer individuals as sharers in their own right, but extend the principle to all kinsmen related through those individuals.

and through all generations to the remotest kinsmen.[6] In other words, the Shiahs interpret the provisions in the Quran about inheritance as indicating a scheme by which the respective rights of the various relations in the first degree immediately surrounding, so to say, the deceased, are fixed,—as a synopsis showing the relative positions of such kinsmen in regard to each

See p. 621, *nn.*

Bail. II. 377, 378. See above pp. 556, 559 *nn.*

[1] master of: *farz*= ordinance, hence the special rules of the Quran relating to shares in inheritance, hence the share itself is referred to as *farz*; and *faraiz* is the term used for the law of inheritance—See above p. 4.

[3] *Qarabat*=kinship cf. "*Zoo Kurabat* or a residuary." Bail. II. 377 (last line), above p. 559.

[4] The grandfather takes the same interest as a brother when he co-exists with a brother or sister; see s. 643 (4).

[5] Merely as regards the quantum of the estate taken,—not as regards the right to inherit: with reference to the latter the nearer rigorously excludes the remoter, and a predeceased relation's descendants do not represent him, in regard to the right to inherit.

[6] E. g., the uterine sister's share is not restricted to her, but her children take her share in her absence,—unless of course, there are relations in a nearer generation,—for in no case does a more distant kinsman succeed with a nearer one, under Shiah law.

other, with reference both to their title to inherit, and the proportion or ratio of their respective interests when they compete one with the other, and as giving the principles in which the estate is to devolve in all the various directions. SECTION 638

Principle of Shiah interpretation of Quran.

Thus the immediate relations of a person being taken to be (i) the spouse (ii) descendants (iii) parents (iv) sister or brother,[1] all these are referred to in the Quran; and according to the Shiahs their mention in the Quran lays down not only in what proportions they themselves inherit, but also the relative importance (in the law of succession) of their respective relationships, and as the resulting importance 'inter se' of all those person who are related to the deceased through them -each specific sharer being taken as a type or representative of relationship. The way in which the three classes of heirs have been arrived at, has already been adverted to. The portions which the various heirs take are always the counterpart of the portions which these primary persons are given under the Quran.

Sunni and Shiah principles compared.

With reference to the residuaries, the Sunnis hold that the male agnates are alone residuaries in their own right, and female agnates are residuaries only when they co-exist with male agnates in the same line, whereas the Shiahs extend the principles which prevail in the case of the immediate relations, to the most distant of them, introducing radical changes for the purpose of adopting those rules. As a daughter or a full or consanguine sister is a residuary under certain circumstances, so are also the descendants of the daughter, or those connected to the deceased through the full or consanguine sister. See table on p. 648 below.

§ 2—Competence to Inherit—Exclusion.

Rules of exclusion.

639. (1) The rules of Shiah law[2] as regards competence to inherit and exclusion from inheritance are (except in so far as stated below) similar to those of Sunni law, as laid down in sections 606—609 inclusive above.

Accidentally causing death does not exclude from inheritance.

(2) A person who has accidentally or unwillingly caused the death of another is not disqualified to be the heir of the person so killed.[3]

Child of parents who nave taken 'li'an' not related to father, but only to mother

(3) Where a person has disclaimed the paternity of a child by 'li'an' under section 218 above, there is no legal relationship between the said person and the child; and neither can inherit from the other; provided that, if the said person subse-

[1] *Quaere*, whether the influence of the tribal system of brotherhood in arms may be traced in the raising of brother-hood (and sisterhood) to one of the principal modes of forming kinship, and in its being placed on the same footing as marriage, and parentage.

[2] Bail. II. 264-268, 366-377.

[3] *Ib.* 266; "though *Mofeed* has, apparenthy with some propriety, excluded from the operation of this rule the *deeut* or fine to be paid in expiation of the deed, which the slayer is prevented from inheriting." The impediment to succession for causing death is personal to the killer,—it is not transmitted to those who claim through him, and others may succeed through the killer. E g., if K kills P, and K's son would be entitled in the absence of K, then K's son will succeed, as though K had predeceased P, Bail. II. 267 (para. 1). Similarly a slave is excluded, but not the son of a slave (*ib.* last para.) Cf. also *ib.* 369 (paras. 2, 3), 370 (*third*).

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quently withdraws the 'li'an,' the child may inherit from the father, but the father does not inherit from the child; [1] nor are there any rights of inheritance between the said child and the relations of the father.[2]

Illegitimate child.

(4) Subject to subsection (5) below an illegitimate child [3] is not related in Shiah law [4] either to his [5] mother, or to his father; and rights of inheritance exist only between him and his own children and his wife; they do not exist between him and any of his ascendants or collaterals.[6]

Children of persons under mistake considering themselves married.

(5) Where persons believe themselves in good faith to be lawfully married, and give birth to a child, the parentage of that child is established in the said persons; and if only one of the parents is under such mistake in good faith, the parentage of that one alone is established.[7]

Illustration.

"If a husband disavows the parentage of a 'fœtus' or embryo in the womb of his wife, and 'the li'an' or mutual imprecation takes place, after which she produces twins, they are both heirs to each other as brothers by the mother's side, but not by the father's." [8]

Missing person.

It is also stated that there are the following opinions about the procedure to be adopted in case a person is missing,[9] viz., (1) to wait until there is no probability of the missing person being alive, (2) until the expiration of 10 years, (3) "some doctors have prescribed 4 years," (4) to divide the estate "amongst his heirs if they are in opulent circumstances, to be restored to him if he should return,"[9] (5) "others have denied the legality of the distribution

[1] Bail. II. 269, 303, 304 (*ll.* 9-11; *first*), 305 (para. 4), 372 (*first*). Except the descendants of the bastard child, all his other relations must be through the mother, i.e., cognates, hence they inherit males and females in equal portions.

[2] Bail. II. 304 (*ll.* 12-19).

[3] Bail. II. 306 (*ll.* 16-9).

[4] S. 639 (4) refers to a child by fornication and adultery of parents who are not married, whereas subs. (3) refers to the child of married parents, who have made *li'an*.

[5] The masculine includes the feminine in subs. (4).

[6] *Ib.* (para. 3), where another Shiah report is alluded to according to which the illegitimate mother and child inherit from each other, (which would agree with the Sunni law); "but this report is now rejected"—*ib.*

[7] Bail. II. 374 (para. 1)—though their mistaken belief does not entitle them to inherit from one another as husband and wife. See s. 641. The converse case (where persons are really husband and wife but consider themselves to be committing adultery) is also mentioned; in such a case the offspring is lawful, Bail. II. 374 (para. 2).

[8] Bail. II. 305 (*third*); cf. p. 567 above.

[9] Bail. II. 269 (*second*), 372 (*second*), 307 (para. 4),—where it is stated that (1) is the opinion in the *Khilaf*, (2) is in the *Mofeed* "on the ground of a report of *Aly bin Muhriar*, as having been so decided by *Aboo Jâfar* . . . with respect to the sale of a small part of a mansion, but a general inference from a decision of this nature seems to be unreasonable," (3) the opinion of the *Sheikh* (4) a statement in the *Sumaut* (on a report of *Isman bin Essa*) as having been so decided by *Aboo Abdoollah*; "but this report is weak, or not sufficiently authenticated;" (5) according to a report by *Ishak Bin Omar* of a decision by *Aboo Abdoollah*. "But there are some doubts as to" *Ishak's* "fidelity, and though the report is maintaind by *Suhul bin Zuad*, it is still considered

altogether, directing that the property should be entrusted to the keeping of an heir in opulent circumstances. But the first opinion is to be preferred as best founded in reason and justice."

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Cf. "If born six months from the death of its father, the right of inheritance is established ; or even if born at nine months, if its mother has not married again."

§ 3.—Priorities amongst Blood Relations: Three Classes.

640. Priority for purposes of succession is reckoned in Shiah law on the following basis,— [1]

Three classes of heirs mutually excluding each other.

(1) All the blood relations are divided into three classes ; [2] the nearest members of each class succeed simultaneously in the proportions hereinafter mentioned. The existence of any member of the first class of heirs excludes all members of the second and third classes, and any member of the second class excludes all members of the third class.[3]

FIRST CLASS Descendants, father and mother.

(2) All (*a*) descendants, [4] together with (*b*) the father and mother of the deceased, constitute the first class of heirs ; and, as such, are preferred to all his grandparents, and to all collaterals.[5]

SECOND CLASS ; All grandparents and the brothers and sisters with their descendants.

(3) All (*a*) the ascendants [4] how high soever of the father and mother of the deceased, together with (*b*) the descendants how low soever of his father and mother,[6] constitute the second class of heirs ; and, as such, are preferred to those collaterals who are descended from a grandparent or other higher ancestor of the deceased.[7]

THIRD CLASS. Uncles and aunts, and their descendants.

(4) All other blood relations of the deceased constitute the third class,—consisting of the uncles and aunts of the deceased, or of an ancestor [4] of the deceased, and the descendants of such uncles or aunts.[8]

Priorities within the three classes amongst—
1. Descendants.
2. Ascendants.

(5) Within each of the three classes mentioned above, amongst the descendants and ascendants respectively, the claimant between whom and the deceased the fewest links (whether male or female) intervene, is considered the nearest, and has priority, and as such excludes the remoter descendants and ascendants respectively ; provided that no descendant excludes the father or mother in the

[1] For the principle of s. 640 see comment.

[2] *Tabaqa* in Arabic : Bail. renders it "class" and I have adhered to it, though "grade" or "series" would have been preferable.

[3] Bail. II. 323.

[4] Male or female, agnate or cognate : cf. Bail. II. 271 (para. 5) 324 (*ll.* 14-17).

[5] Bail. II. 270-271, 276, 324-325, 364 (para. 1).

[6] I.e., all the grandparents how high soever, together with the brothers and sisters (full consanguine or uterine) and their descendants how low soever, form the second class.

[7] Bail. 271, 280, 326-328, 364.

[8] Bail. II. 271 (para. 2) 285, 328-331, 364 (para. 3).

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first class, and no ascendant excludes a collateral in the second class; and 'vice versa.'[1]

3. Collaterals.

(6) Amongst collaterals, within the classes mentioned above,—

Descendant of nearest common ancestor preferred.

(*a*) All the descendants whether full, consanguine, or uterine, of a nearer ascendant of the deceased have priority over all the descendants of a more remote ascendant of the deceased.[2]

(*b*) Amongst the descendants of the same common ancestor,—

(i) The claimant between whom and the said common ancestor the fewest links intervene, has priority (subject to clause (*d*) below) over all others.

Full blood perferred to consanguine, but uterine not excluded by full or consanguine.

(ii) The full blood relations and their descendants, have priority over the consanguine relations and their descendants, respectively, in the same line, [3] but the uterine relations and their descendants rank with, and do not exclude, nor are they excluded by, the full blood, or the consanguine relations, or their descendants respectively, in the same line.[3]

Competition between paternal and maternal side relates merely to generation but not to full blood or consanguine relationship.

(*c*) Amongst the third class of heirs, the uncles and aunts on the paternal as well as the maternal side are considered as being relations of the same description, and the nearest of them on either side excludes a claimant in a lower line, even though the latter belongs to the other side: but so that the full blood relation excludes a consanguine relation if the latter is on the same side and in the same line, but does not exclude a consanguine relation in the same line on the other side.[4]

Exception. Son of full paternal uncle excludes consanguine uncle.

(*d*) Where the claimants are the son of a full paternal uncle and a consanguine uncle, (there being no maternal uncle) the son of the paternal uncle is preferred to the consanguine uncle, notwithstanding that the latter is in a higher generation.[5]

[1] Bail. II. 324-325.

[2] Bail. II. 280, (para 3), 287 (*first*), 329, 331 (para. 4), 332 (para. 1) e.g. the maternal uncle as the son of the maternal grandfather excludes the great-great-grandfather's great-grandson: *Nijabat Ali* v. *Wazir Ali* [1908] All. W. N. 149.

[3] Bail. II. 271 (para. 3), 280 (para. 4).

[4] In other words a claimant on one side does not exclude a claimant on the other side merely on the ground of the former being a full blood relation, and the latter consanguine, but only if the former is in a nearer line than the latter.

[5] Bail. II. 285 (para. 3). This is a case entirely *sui generis*; the nephew is preferred to

PRINCIPLES ON WHICH PRIORITIES OBTAINED. SECTION 640

The nearest in every case (except in the anomalous case mentioned in clause *(d)* above) excludes the remoter,[1] i.e., the claimant in the generation nearest to the deceased is always preferred; this, however, is subject to the gloss that the parents of the deceased are considered to be neither remoter nor nearer than his descendants;[2] similarly the parents[3] of the father, or mother of the deceased are on the same footing as the descendants of the father or mother of the deceased. When two or more claimants are in the same generation, and on the same side but some are full blood, and others half blood, then the uterine relations always succeed,[4] but the full blood relations exclude the consanguine relations.[5] See table on p. 648 below.

1. Nearest always preferred.
2. Ye know not whether parents are nearer or children.
3. Full blood preferred to consanguine but not to uterine.

The same may be stated in the form of the following propositions,—

I. The three classes are each in turn exclusive of the other (so that if any member of the 1st class, male or female, agnate or cognate, exists, none of the 2nd or 3rd class can succeed, and similarly the 2nd class excludes the 3rd.)[6]

The three classes mutually exclusive.

II. As to those included in each of the three classes,—

FIRST CLASS.

(1) The 1st class consists of two sub-groups (*a*) and (*b*) below member of which do not compete against each other,[7]

Two divisions.

(*a*) the father and mother,

(*b*) descendants. Of the descendants only the nearest succeed (so that a son or daughter excludes a grandchild, whether male or female, agnate or cognate: a daughter's daughter will, e.g., exclude a son's son's son). But how remote soever the nearest descendant

Amongst descendants nearer exclude remoter. But no competition between the two divisions.

the uncle "while the case remains exactly so; but if it is changed by the addition of a maternal uncle, the son of the paternal uncle is excluded."—*ib.* 329. The son of a paternal full uncle, [that is, the son of an uncle who was full brother to the deceased's father by the same father and mother] excludes a paternal half uncle only of the deceased, and takes the whole inheritance preferably to the latter, although nearer in degree, if the succession should be limited to these two; and it is in virtue of this exception, that had the Prophet of God on whom and his posterity be blessing and peace, left no issue at the period of his dissolution, his whole succession must by law have devolved on the . . . Commander of the Faithful, *Aly*, on whom be the blessing of God, in preference and complete exclusion of *Abbass*; for *Aboo Tâlib* was the full brother of *Abdoolla*, both by father's and mother's side, and consequently his son, the Commander of the Faithful, although more remote in degree, must have excluded *Abbass*, half uncle of the Prophet, as being brother to *Abdoolla* by the father's side only. . . *Imam Jafer Sadik*. . . observed, . . . 'Verily, *Abdoolla*, father to the Prophet of God, was full brother of *Aboo Talib* by the same father and mother, whence the Commander of the Faithful, as son of *Aboo Talib*, had no issue of the Prophet remained, would have excluded *Abbass*, his uncle by the same father only, from inheritance.' And hereupon a question has arisen whether the exception is by law restricted to the particular instance before us, without application to any other, or may be also legally extended to all similar cases. The most common and prevalent doctrine has restricted its influence to this particular case alone, and the author of the *Shuraya* has expressly declared that if with these two persons, viz. the son of a paternal full uncle and paternal uncle of the half blood, any other heir, even a maternal uncle, should exist, the decision of law would be completely altered, and the title of the uncle's son entirely cut off.—Bail. II. 329-331.

[1] Bail. II. 363 (para. 2.)

[2] See Quran IV. 12, see above p. 562.

[3] Not only the parents but any ascendant how high so ever. This is anomalous: on principle the uncle should rank *with* (and not be excluded by) the great grandfather. But the chances of such ancestors surviving are so slight, that it is no wonder the law is not developed harmoniously regarding them.

[4] Bail. II. 333.

[5] Bail. II. 362 (para. 2).

[6] Bail. II. 323 (para. 2).

[7] Bail. II. 324-325.

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may be he or she will succeed conjointly with the father and mother and will neither exclude the latter nor be excluded by them (e.g., the children's children's children will succeed with the father and mother; provided that there are no children nor grandchildren).[1]

SECOND CLASS
Two divisions: in each, nearer excludes remoter; but no competition between the two divisions.

(2). The 2nd class also consists of the two sub-groups (*a*) and (*b*) below, members of which do not compete against each other,[2]—

(*a*) grand parents (how high soever),

(*b*) brothers and sisters, and their descendants how low soever. In each of these sub-groups (*a*) and (*b*) there is competition 'inter se,' only amongst the members of that group (e.g., the mother's mother will exclude the father's father's father; and the brother's son is excluded by the sister; but the grandfather will not exclude a sister's daughter's daughter).

THIRD CLASS.
Not divided into sub-groups for the purpose of competition.

(3). The 3rd class includes the brothers and sisters of the father and mother of the deceased, and their descendants, and the brothers and sisters of all other ancestors (male or female agnate or cognate of the deceased). This class, it may be observed, involves only one general description of heirs, because their title to succession is derived from one general relation to the deceased, viz., that of brotherhood or sisterhood to his parents.[3] Hence the nearest of them all succeeds, and any member of the third class competes against all the others. (E. g., a paternal uncle or aunt is nearer than, and thus excludes a paternal uncle or aunt's son, and a maternal aunt[4] will exclude a paternal uncle's son. Again the great grandson, of the brother of the father[5] is nearer than the brother of the grandfather).

HEIRS UNDER SHIAH LAW: TABLE OF PRIORITY.

N.B. { The husband or wife always succeed whoever be the blood relations. Those in I. II. and III. below succeed simultaneously, unless otherwise stated. See also table on p. 648 below.

FIRST CLASS OF HEIRS.

I. (*a*) The nearest descendants,[6] (*b*) father *and/or* (*c*) mother.

The members of group (*a*) have priority in the following order, each heir excluding all those below:—

1. Sons *and/or* daughter.
2. Son's children *and/or* daughter's children.
3. Great grandchildren,—and so on.

SECOND CLASS OF HEIRS.

II. (*a*) The nearest grandparents (*b*) brothers *and/or* sisters, and, failing them, their nearest descendants how low soever.

[1] Bail. II. 324-325.
[2] Bail. II. 326-327.
[3] Bail. II. 329.
[4] Full, consanguine or uterine.
[5] So any other descendant how low soever of the father's brother will exclude the grandbrother, just as any descendant of the propositus will exclude the brother of the descendant.
[6] No matter how distant they are, so long as there are none nearer than themselves.

The members of group (*a*) have priority in the following order, each heir excluding all those below (F=father or father's, *M*=mother or mother's). SECTION 640

1. FF, F*M*, *M*F, *and/or MM*.
2. FFF, FF*M*, F*M*F, F*MM*, *M*FF, *MF.M*, *MM*F, *and/or MMM*,—and so on.

in group (*b*) the members have priority as follows, each set numbered 1, 2, 3, 4 below excludes the sets following it of with relative priorities amongst those within the same set as appears below.

1. full brother *and/or* sister, and failing them, / consanguine brother *and/or* sister, — together with — uterine brothers *and/or* sisters,
2. full brother's *and/or* sister's children, and failing them, / consanguine brother's *and/or* sister's children, — " — uterine brother's *and/or* sister's children,
3. full brother's *and/or* sister's grandchildren, and failing them, / consanguine brother's *and/or* sister's grandchildren. — " — uterine brother's *and/or* sister's grandchildren.

and so on.

III. The uncles *and/or* aunts of the deceased, and, failing them, the uncles *and/or* aunts of the father and mother of the deceased, and failing them, the uncles *and/or* aunts of the grand parents of the deceased, and so on. The priorities in each group under class III mentioned above are as follows: each set numbered 1, 2, 3 4, below, excludes the sets following with the priorities amongst those within the same set, as stated. THIRD CLASS OF HEIRS.

	Father's side:		*Mother's side*:
1.	(*a*) The full brothers *and/or* sisters of the father, and failing them,—	the uterine brothers *and/or* sisters of the father,	the uterine brothers *and/or* sisters of the mother, — (*a*) the full brothers *and/or* sisters of the mother and failing them. (*b*) the consanguine brothers *and/or* sisters of the mother,
	(*b*) The consanguine brothers *and/or* sisters of the father,[1] failing all the above,—		
2.	(*a*) The children of the full brothers *and/or* sisters of the father,[1] and failing them,—	the children of the uterine brothers *and/or* sisters of the father,	the children of the uterine brothers *and/or* sisters of the mother, — (*a*) the children of the full brothers *and/or* sisters of the mother and failing them. (*b*) the children of the consanguine brothers *and/or* sisters of the mother,
	(*b*) the children of the consanguine brothers *and/or* sisters of the father,		

and failing all the above,

[1] This is subject to the anomalous exception referred to in s. 640 (6) (*d*).

SECTION 64 (3. the children of each of those included in group 2 above, and failing them—
4. the brothers *and/or* sisters of the grandparents in the order indicated in *ill.* (33) to s. 644, below.

§ 4—*Distribution of the Estate amongst the Claimants.*

(1) The Husband or Wife a Sharer.

Husband's share ½, if descendant ¼, if not; wife's ¼ or ⅛.

641 (1) The husband takes ¼ of the estate if the deceased has left any descendant,[1] and ½ of the estate if she has not left any.[2]

(2) The wife takes ⅛ of the estate if the deceased has left any descendant, and ¼ if he has not left any; provided that where the widow has no child by the deceased, she takes no part of the land left by him, but her share of the value of the household effects and buildings is to be given to her.[3] Where there are two or more widows they take such ¼ or ⅛ of the estate in equal portions.[4]

Illustrations.

(1) A has four wives. He divorces one of them, and marries another W_A, and then dies, leaving no children. If there is a doubt as to which of the four was divorced, then ¼ of ¼ or $\frac{1}{16}$ is taken by W_A (whose right is undisputed) and the first four wives take ¼ of $\frac{3}{16}$ each.[5]

(2) H marries *W*, a relative within the prohibited degrees or W_A, the mother of a woman with whom H has had illicit intercourse; there is no valid marrriage between H and *W* or W_A; and neither can succeed from H nor H from either;—though H may not have known of the illegality of the marriage [6]

(3) "If a sick man contract marriage with a woman, whether his distemper be dangerous or otherwise, and die of that distemper, without intervenient recovery or convalescence, previous also to consummation of his nuptials, such contract of marriage is thereby null, or in other words, is not considered to be established in law, until consummation, or recovery of the husband from that disease with which he was afflicted at the time."[7]

[1] Male or female, agnate or cognate.

[2] Bail. II. 273, 338; 303-304, 365 (*ll.* 6-30) 381 (para 3). Of course the marriage must be valid, *ib.* 373 (para 4); cf. p. 573 above. As to *mut'a* see s. 25 (9) and p. 177 above.

[3] See however comment. By the *Lex Papia* of Roman law the childless "lost half of all their inheritance and legacies," Gaius, II. 286. The Lex Julia "forbade the unmarried to take nheritance and legacies," *ib.*

[4] See, s 641 *ill.* (1); Bail. II 315 (*ll.* 21-27); para 2).

[5] Bail. II. 294 (*third*).

[6] Bail II 311 (*second*).

[7] Bail. II. 340; "It follows that in this case there can be no title of inheritance between the parties, no dower even incumbent on the husband, and that the woman is not bound to observe an *Iddut* or term of probation. This law of annulment of contracts entered into by parties legally qualified to contract, without divorce or voluntary dissolution, may certainly at first sight appear irreconcilable but all objection and doubt is removed neces-

(4) "An 'oom-i-wulud' or female slave who has borne a child to her master has nevertheless no claim to his inheritance." [1]

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Husband and wife's shares liable to no

Under Shiah law the husband never gets less than ¼ or ½. He can take more than ½ only when there is no blood relation of the deceased at all. The wife never takes less than ⅛ nor more than ¼. This is expressed by saying that the estate never "returns" or "reverts" to the wife, and to the husband only when there are no blood relations See. s. 647 below. The shares of the husband or wife never abates by "increase." [2]

Wife does not take by return.

The blood relations take the rest of the estate of thehusband or wife has had his or her Quranic share in it, under section 641. In excluding the widow from the "return" or "surplus" when there are no other heirs, the Shiah law is less favourable to her than the Sunni ; cf. ss. 633, 647 above.

CHILDLESS WIDOW AND IMMOVABLE PROPERTY.

Childless widow debarred from sharing lands.

The rule debarring the childless widow from taking any portion of the land of her husband is a variation from the Sunni law, and is one of the few instances where Muhammadan law has made a distinction between lands and other property. The 'Shara'ya-ul-Islam' [3] has been thus translated on this point: "When the wife has had a child by the deceased, she inherits out of all that he has left; and if there was no child, she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given to her, It has been said however that she is to be excluded from nothing except the mansions and dwellings ; while 'Moortuza' (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued, and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority." [3] This passage shows that there has been a conflict of opinions on this point. If the translation is accurate it expressly limits the rule to cases where the widow *has had* no child by the deceased. But the Allahabad High Court has followed [4] Syed Ameer Ali's dictum that "when she *has* no child, or when a child was born but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects, trees, buildings, etc.; she takes no interest in the landed property." [5] On referring to the mere wording of the 'Shara'ya-ul-Islam' it seems that the point may not be without some doubt ; and there is little to throw light on the point even in the very exhaustive commentary, the 'Jawahir-ul-Kalam.' One has therefore to fall back on the general principle that in this matter as in others relating to inheritance deceased persons do not affect the rights of the living and that

Is a widow who has had a child (which predeceases the proposi-tus) childless?

sarily by a reference to those authentic proofs of their nullity, already detailed in the Book of marriage." Baillie adds, "This Book, which was probably added to the Digest compiled under the superintendence of Sir William Jones, by the translator, was never published, and has not been found among his papers which have come to my hands.—Ed."

[1] Bail. II. 371 (para. 4)."

[2] See above p. 621 *nn.* 7, 8, Bail. II. 271-272, 273 (last line). 338, 339, 365 (*ll.* 6-30).

[3] Bail. II. 295 ; cf. s. 603 above.

[4] *Muzaffar Ali Khan* v. *Parbati* 29 All. 640, 644-645.

[5] "Mahommedan Law," (2nd ed.) II. 118 78 ; (3rd ed.) II. 148. The decision was given on June 13th. 1907. In 1908 the third edition of Syed Ameer Ali's learned book came out, and the passage is reproduced there. citing decided cases and referring generally to the *Jami'-ush-Shittat*.' The present writer has not been able to discover any passage in the *Jami'-ush-Shittat* that can directly settle the point. See comment.

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unless the widow has a child surviving her deceased husband, she must rank as childless. Though the decisions are numerous, none of them seem to have had to deal with this particular point.[1]

(2) Distribution amongst Blood Relations.

(a) Distribution amongst heirs of the First Class.

FIRST CLASS.

1. If there is a son or (descendant of son) he is residuary with daughter. —the rest taking shares.

642. (1) If amongst the heirs who are entitled to succeed under section 640 above there is a son or the descendant of a son, then subject to section 645 below,—

(*a*) the husband or wife, take $\frac{1}{4}$ or $\frac{1}{8}$ of the estate, and the parents take $\frac{1}{6}$ each as shares,[2] and

(*b*) the residue [3] is (subject to clause (*c*) below) divided amongst the descendants 'per stirpes' in such proportions that in each generation each male takes twice as large a share as each female.[4]

(*c*) the eldest son of the deceased is entitled (in addition to his share in the residue,) to the body clothes, ring, sword and Quran of the deceased; provided first that the said son is neither a prodigal [5] nor deficient in understanding; secondly that the deceased has left some other property besides the said property; [and thirdly that the said son is liable for the payment and fulfilment of the unperformed fasts and prayers of the deceased].[6]

2. If no son, but daughter then she bears the deficit, but the surplus she shares with father (and mother).

(2) If amongst such heirs there is no son, nor the descendant of a son but a daughter or daughters, or the descendants of a daughter or daughters, then subject to section 645 below,—

(*a*) the parents and the husband or wife will take the respective shares mentioned in clause (*a*) above, and

(*b*) if there is one daughter or (in her absence) the descendants of one daughter, she or they will take $\frac{1}{2}$ of the estate

[1] (*Mir*) *Alli Hussain* v. *Sajuda Begum* (1897) 21 Mad. 27; *Umardaraz Ali* v. *Wilayat Ali* (1896) 19 All. 169; (*Mussumat*) *Toonan* v. (*Mussumat*) *Mehndee Begum* (1868) 3 Agra 13; (*Mussumat*) *Asloo* v. (*Mussumat*) *Umdut-oonnissa* (1873) 20 W. R. 297; *Husain Khan* v. *Umedi Bibi* [1889] All. W. N. 192. Cf. *Aga Mahomed Jaffer Bindanesm* v. *Koolsom Beebee* (1897) 25 Cal. 9; 24 I.A. 196.

[2] Bail. II. 261, 276, 365, 381. See p. 634 *ill.* (1), (3), (8).

[3] There is necessarily some residue left.

[4] Bail. II. 385 cf: "The son of *Aboo Auja* having expressed his ignorance and doubt of the cause why a female, the weakest and most helpless of the two, should enjoy only half the portion of inheritance bestowed upon a male, some of our companions stated this matter to the *Imam Jafer Sadik*, on whom be peace; he replied, a female is excused from the performance of many duties imposed by law upon a male, such as service in the Holy Wars, maintenance or support of relations, and payment of expiatory fines, and for this reason her share of inheritance has been justly limited to half the portion of a male."

[5] Presumably a "prodigal under inhibition"—Cf. Hed. Book. XXXV.

[6] Bail. II. 279 (*third*). Semble, the words in [ ] refer to religious not legal liability.

(subject to clause (*c*) below); if there are two daughters, or (in their absence) their descendants, they will take $\frac{2}{3}$ as sharers (subject as aforesaid).[1] SECTION 642

(c) if the sharers are such that the sum total of the shares to which they are entitled exceeds unity, then the portions allotted to the daughters or their descendants will alone be diminished, and those mentioned in clause (*a*) will take their full shares ; [2] Abatement of daughters' shares.

(*d*) if the sharers are such that the sum total of the shares to which they are entitled is less than unity, then the residue will be divided between the parents and the daughter or daughters (or their descendants) [3] in the proportions of their respective shares ; [4] provided that if the mother is prevented under clause (3) (*b*) below from taking any part of the residue then it is divided between the father and the daughter or her descendants alone in proportion to their respective shares. Return of surplus or residue.

(3) If there are no descendants, then subject to section 645 — 3. If no descendants, but

(*a*) the husband or wife, and mother respectively take $\frac{1}{2}$ or $\frac{1}{4}$, and $\frac{1}{3}$ of the estate (subject to clause (*b*) below), and the residue [5] is taken by the father ; [6]

(*b*) the mother takes $\frac{1}{3}$ of the estate [7] if there is no descendant, but she is prevented from taking more than $\frac{1}{6}$ when— Mother's share.

(i) the father of the deceased is also in existence, and—

(ii) with the father and mother there also co-exist either—

(*a*) two or more full or consanguine brothers, *or*

(*b*) one such brother and two such sisters, *or*

(*c*) four such sisters.

Explanation—A child 'en ventre sa mere', infidels, slaves, and (according to the most prevalent doctrine) murderers, are not taken into consideration for the purpose of diminishing the mother's share to $\frac{1}{6}$; nor do children of deceased brothers and sisters take their place for the said purpose. In the circumstances referred to in clause (*b*) above, she does not participate in

[1] See p. 634. *ill.* (4), (5), (8).

[2] Bail. II. 316 (para. 2); see p. 634 *ill.* (13).

[3] The husband or wife do not take any part of the residue or surplus so long as there are any blood relations ; cf. below s. 647.

[4] See p. 634 *ill.* (9), (10), (12), (14).

[5] There is always a residue and never a deficit in this case.

[6] Bail. II. 278 (*ll.* 8-11), 383 (para. 3).

[7] In Sunni law when both parents coexist with husband or wife, the mother takes $\frac{1}{3}$ of the *residue* after the husband or wife has taken his or her share of $\frac{1}{2}$, or $\frac{1}{4}$. In Shiah law the mother takes $\frac{1}{3}$ of the *whole estate*.

SECTION 642 the residue after the shares have been allotted, but she takes barely $\frac{1}{6}$ of the estate, leaving the whole of the residue to the father.[1]

Illustrations.

N.B.—The persons mentioned in the beginning of each illustration below being the claimants, the portion of the estate taken by each is indicated by the fractions by their side.

(1) Son's son, $\frac{2}{3}$; children of a daughter, $\frac{1}{3}$.

Similarly if there were children (or a single daughter) of a son's son, and the children (or a single daughter) of a daughter's daughter, the former would take $\frac{2}{3}$, and the latter $\frac{1}{3}$.[2]

(2) Daughter's son's children, $\frac{1}{3}$; son's daughter's daughter $\frac{2}{3}$.[2]

(3) One daughter's son's children $\frac{1}{2}$, daughter daughter's daughter's $\frac{1}{2}$.[2]

(4) Daughter *or* daughter's daughter, full sister *or* brother,—

The daughter or daughter's daughter takes the whole, excluding the brother or sister.[3]

(5) Father, paternal uncle, and grandfather. The father takes the whole property excluding the rest.[4]

(6) Husband $\frac{1}{2}$, mother $\frac{1}{3}$, father $\frac{1}{6}$.[5]

(7) Wife $\frac{1}{4}$, mother $\frac{1}{3}$, father $\frac{5}{12}$.[5]

(8) Husband $\frac{1}{4}$, father $\frac{1}{6}$, mother $\frac{1}{6}$, children male and female take the residual five-twelfth, dividing it stirpitally, males twice as much as females.[6]

(9) Wife $\frac{1}{8}$, mother (or father) $\frac{1}{6}[+\frac{1}{4}\times\frac{5}{12}]$, daughter $\frac{1}{2}$ $[+\frac{3}{4}\times\frac{5}{12}]$—

The residue is $\frac{5}{12}$; and the first fractions given above are taken as shares, the second enclosed in brackets (with + symbol) as return.[7]

(10) (*a*) Wife $\frac{1}{8}$, father $\frac{1}{6}[+\frac{1}{5}\times 2\frac{1}{4}]$, mother $\frac{1}{6}[+\frac{1}{5}\times 2\frac{1}{4}]$, daughter $\frac{1}{2}[+\frac{3}{5}\times\frac{1}{2\frac{1}{4}}]$. (*b*) Husband $\frac{1}{4}$, father $\frac{1}{6}$ $[+\frac{1}{4}\times 1\frac{1}{2}]$ daughter $\frac{1}{2}[+\frac{3}{4}\times 1\frac{1}{2}]$

The residue (being $\frac{1}{2\frac{1}{4}}$ and $1\frac{1}{2}$ respectively) is taken by the blood relations in the proportion to their respective shares.[8]

[1] Bail. II. 272, 273 (*ll.* 12-22), 276 (para 2), 365-366. When there is no father, the mother takes the whole residue though there may be two or more brothers or sisters as there are no descendants—the husband or wife being postponed in that right to all blood relations. See s. 647 below.

[2] Bail. II. 386. Under SUNNI LAW in *ill.* (1) the son's son would alone succeed, excluding the daughter's children who would be classed as distant kindred, and postponed to all male agnates and sharers. Similarly all the claimants in *ill.* (2), (3) are cognates.

[3] Bail. II. 328 (*ll.* 4-8). Under SUNNI LAW in *ill.* (4) the daughter and sister would each take $\frac{1}{2}$; whereas the brother, as a male agnate would take the whole, excluding the daughter's daughter, a cognate, and as such belonging to the "distant kindred" of English authors.

[4] Bail. II. 325 (*ll.* 23-28). Under SUNNI LAW the same result follows.

[5] Bail. II. 383 (para. 3), 384 (paras. 1,2), 394, (*ll.* 27-35)—unless there are two or more full or consanguine brothers or sisters reducing the mother's share to $\frac{1}{6}$. Under SUNNI LAW in *ill.* (6), (7) the mother would take respectively $\frac{1}{3}\times\frac{1}{2}$ and $\frac{1}{3}\times\frac{3}{4}$ leaving $\frac{3}{4}$ of the residue to the father.

[6] Bail. II. 395 (*ll.* 5-9).

[7] Bail. II. 401 (last 6 lines). Under SUNNI LAW the father or any other male agnate would prevent any of the mere sharers from taking any part of the residue.

[8] Bail. II. 402 (para. 1) Under SUNNI LAW the father would alone take the whole of the residue in addition to the $\frac{1}{6}$, i.e., $2\frac{1}{4}+\frac{1}{6}$ in (*a*) and $1\frac{1}{2}+\frac{1}{6}$ in (*b*). Similarly in *ill.* (11) and (12)

(11) Father $\frac{1}{6}$, mother $\frac{1}{6}$, two or more daughters $\frac{2}{3}$.[1] If there were the children of two daughters, the division would be the same.[2]

(12) Father, mother, one daughter. The original shares are $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{2}$ respectively; the surplus of $\frac{1}{6}$ reverts to them all in the same proportions,[1] unless the mother is excluded from it by the presence of two or more full or consanguine brothers and sisters, see s. 642 (3) (*b*).

(13) Husband, father, mother, 2 daughters ; the full shares would be $\frac{1}{4}$, $\frac{1}{6}$, [illegible] The first three are paid out in full, and the daughters bear the deficit i. e. they take five-twelfths instead of eight-twelfths.[1] If there were only one daughter, there would still be a deficit and she would take five-twelfths instead of $\frac{1}{2}$.[1] If there were a son instead of the daughter the residue would be the same, and it would be divided between the son and daughter in the proportion of 2 : 1. Similarly if there were the children of daughters or sons respectively.[2]

(14) Mother, daughter, brother (or paternal uncle). Mother $\frac{1}{3}$, daughter $\frac{1}{2}$; and the residue is taken by the mother and daughter in the same proportion, the brother or paternal uncle is excluded.[3]

There are five "general rules," mentioned by Baillie from Sir W. Jones's Digest, which may be referred to here: (1.) The father in the absence of descendants is a pure residuary : he does not take any share, but takes whatever residue is left after the sharers (husband or wife and mother) have taken their shares.[4] (2.) Amongst descendants the estate is always distributed (not only 'per stirpes,' but also) in such manner that at each stage, each male is allotted twice as large a portion as each female.[5] (3.) The division is always 'per stripes', so that (*a*) when a claimant is related to the deceased through one who would have been a sharer, that claimant takes the share of that sharer; and (*b*) if the claimant related through a residuary he takes the residue,[6] this is subject to the claimant having been himself specifically mentioned as a sharer in the Quran, and also to rule (5) below; (*c*) in the secondary distribution amongst full blood and consanguine relations on the father's side, males take double the portion of females, but on the maternal side and amongst uterines on the paternal side, the males and females share alike.[7] (4.) When some

1. Father pure residuary if no descendants.
2. Descendants divide 'per stripes,'—males twice the portion of females.
3. Relations through sharers rank like sharers. Amongst uterines and maternal relations males and females share alike.
4. One uterine relation takes $\frac{1}{6}$, two or more $\frac{1}{3}$.

[1] Bail. II. 263 (para. 2), 277 (*ll.* 6-9), 313 (*ll.* 11-12, 23—33), 314 (para 1), 317 (*ll.* 16-27), 318 (*ll.* 1-9), 395 (*ll.* 19-23), 396 (*ll.* 16-29).

[2] Bail. II. 385 (para 3.) In SUNNI LAW, if there is no son, the shares of all the sharers (and not merely the daughter) would abate proportionately.

[3] Bail-II. 274 (*ll.* 21-22, 27,28), (383 (para. 3), 398 (para. 2) 401 ; (*Rajah*) *Deidar Hossein* v. (*Ranee*) *Zuhoor-oon-Nissa* (1841) 2 Moo. I.A. 441. In SUNNI LAW the residual $\frac{1}{6}$ would be taken entirely by the brother or paternal uncle.

[4] Bail. II. 383 (para. 3). See s. 642 *ill.* (5).

[5] Bail. II. 384 (para. 3). See s. 642 *ill.* (1), (8).

[6] Bail. II. 385 (para. 3); e.g. (i) the children of one daughter take $\frac{1}{2}$ of the estate as a share, and have the right to the residue or surplus together with the father and mother just as the daughter herself would have had ; (ii) the children of two daughters take $\frac{2}{3}$; (iii) the children of a son are merely residuaries; (iv) the children of one full (or consanguine) sister take $\frac{1}{2}$; (v) of two or more $\frac{2}{3}$ (vi) of one uterine sister or brother $\frac{1}{6}$ (vii) of two or more $\frac{1}{3}$; (viii) the maternal grandfather (or maternal grandmother) takes the share of the mother, i.e. $\frac{1}{3}$; (ix) paternal uncles and aunts receive the shares of the father and mother respectively ; (x) the children of the uncles get the share of their parents.

[7] So that uterine brothers and sisters share equally, also all cognate grandparents, and the children of uterine paternal uncles, and of all maternal uncles ; but full and consanguine brothers, agnatic grandparents, and the children of full and consanguine paternal uncles (and aunts) share in the proportion of a double share to a male.

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5. Grand parent's share like brothers and sisters when they co-exist with brothers and sisters.

of the claimants are of the full blood or consanguine, and others uterine, the latter take ⅛ if only one or ⅓ if two or (more to be divided equally amongst them), and the former take the residue (to be divided in the proportion of a double share to males) [1] (5.) If grandparents and brothers or sisters co-exist, then paternal grandparents rank like full (or consanguine) brothers and sisters; and maternal grandparents like uterine brothers and sisters; but if they are only grandparents and no brother or sister then the paternal grandparents take the father's ⅔; and the maternal grandparents take the mother's ⅓.[2]

INCREASE AND RETURN: THEIR COUNTERPARTS IN SHIAH LAW.

Otherwise the paternal side takes ⅔ and the maternal ⅓.

Deficit borne by daughters or sisters.

Residue or surplus taken by full or consanguine blood relations only

Exemplification of the rules.

Under Shiah law—

I. Where the sharers are such that the sum total of the fractions of the estate to which they are (primarily) entitled exceeds unity, there is not a proportionate abatement of the shares of each, but the deficit is borne entirely by the daughters or daughter, or the full or consanguine sister or sisters.[3]

II. Where, after the shares are allotted, there is a residue or surplus left "it is to be returned to the sharers excepting (*a*) the husband, (*b*) wife, and (*c*) the mother when there are brothers,"[4] but if there are both full blood relations and uterine relations, then the former alone take the surplus[5] provided that they are equal as regards the priority of their rights to inherit.[6]

The above mentioned two rules cover all the various cases, as will appear from the following detailed consideration of all the possible alternatives:

1. If only one heir, he takes the whole.

1. Where there is only one heir entitled to succeed under s. 640, he or she takes the whole estate: whether the heir is agnate or cognate, full blood, consanguine, or uterine, or by contract (under s. 647), or whether he is the husband. (As regards the wife see s. 641, 647.) If such heir is a pure residuary he or she takes the estate as such; if a Quranic sharer, he takes his specific fraction of the estate as such sharer, and the residue by return.[10]

2. If any residuary amongst heirs he takes the residue, after sharers if any.

2. If there are two or more heirs, then they must include either—

(*a*) both sharers and residuaries in which case the sharers take their appointed shares, and the residuaries take whatever is left[11] 'per stripes' either equally (if they are of the same) sex) or males taking double the portion of females.

If no residuaries.

(*b*) only residuaries—in which case they take the whole estate.

(*c*) only sharers—in which case the sum total of the shares, either

(i) exactly equals unity,—when each heir is given his share and nothing more has to be done, or

[1] Bail. II. 388 (para. 2). See s. 644 *ill.*

[2] Bail. II. 391 (para. 2). See s. 644 *ill.*

[3] Bail. II. 263, 273, 274-275, 336, 396-397.

[4] See s. 642 clause (3) & (*b*).

[5] Bail. II. 317, (*ll.* 31 *et seq.*), 335 (para. 2).

[6] E.g., the full paternal uncle does not exclude a uterine sister "either from her residuary title, or her appointed share, by reason of their disparity in degree"—Bail. II. 335 (*ll.* 12-15): In every case the nearest alone succeed, and then the rules as to the distribution apply merely as between those who are the nearest, and as such entitled to inherit.

[7] Bail. II. 395. See s. 642 *ill.* s. 644 *ill.*

[8] Bail. II. 395. See s. 642 *ill.* s. 644 *ill.*

[9] Bail. II. 398. See s. 642 *ill.* s. 644 *ill.*

[10] Bail. II. 392 (para. 2).

[11] Bail. II. 393-394; under the Shiah law if there is any pure residuary in any combination of heirs, there is always some residue left; the division into the three classes of heirs prevents the sharers from being very numerous.

(ii) exceeds unity,—and this can happen only where there is the husband or wife amongst the sharers, and with him or her there co-exist either— SECTION 643

(a) one or more daughters or

(b) one or more (full or consanguine) sisters—

and in each case the daughters, or sisters, respectively, bear the deficit.[1]

(iii) falls short of unity,[2] (i.e., a surplus or residue is left after the shares have been allotted), in which case the surplus is taken in the proportion of their respective shares by—

(a) the full blood or the consanguine relations alone, and failing them,—

(b) the uterine relations, and failing them,—

(c) the husband (not the wife) takes the whole.

The rules relating to the "return" are not uniform. In the first class of heirs though the daughter alone suffers the loss, she does not get the "return" exclusively, but shares it with the father and mother. In the second class the full sister take the whole surplus by return, just as she bears the whole deficit. On the other hand the consanguine sister's position is not quite settled : some authorities place her (in competition with the uterine sister) in the same position as the daughter is in competition with parent, i.e., they hold that the consanguine sister alone bears the deficit, but shares the surplus with the uterine sisters and brothers; this view is favoured by the 'Shara'ya-ul-Islam.' Other authorities place the consanguine sister in the same position as the full sister. See s. 644 *ill.* (14). See table on p. 648.

Rules about return—
1. Daughter bears deficit herself but divides surplus with parent.
2. Full sister alone bears deficit and alone takes surplus.
3. Consanguine sister's rights in doubt.

(*b*) *Distribution amongst Heirs of the Second Class.*

643. In the absence of any heirs of the first class,[3] the estate devolves upon heirs of the second class,[4] and is distributed amongst them (subject to section 645 below) in accordance with the following principles of division,—

(1) The husband or wife takes his or her share in accordance with section 641 above.

SECOND CLASS of heirs (1) grandparents, (2) Brothers and sisters and their descendants. Husband or wife.

[1] Bail. II. 395, 396.

[2] If this happens (*a*) where the heirs are of the 1st class; the father, mother and daughters or their descendants take the residue, for *ex hypothesi*, (i) the son is absent-since he is a pure residuary, and the present point is concerned with the case of sharers alone; (ii) there are daughters surviving, for otherwise the father is pure residuary (the mother is excluded from the residue when there are two or more brothers or sisters); (*b*) where the heirs are of the 2nd class, the full or, failing them, the consanguine sisters alone take the residue: *ex hypothesi* there are no grandfathers, or brothers who are pure residuaries (cf. s. 644 *ill.*) (14); (*c*) where the heirs are of the third class, there is a primary division of the estate into two-thirds for the paternal side, and one-third for the maternal side, and the surplus on each side is taken by the full or consanguine, and failing them, by the uterine relations. If either side fails entirely, the other side takes the share of that side also. In every case the first point to settle is what persons are entitled to succeed as being the nearest under s. 640 above.

[3] I.e., where there is neither any descendant (male or female, agnate or cognate), nor the father nor mother of the deceased; see s. 640 above.

[4] I.e., the nearest grandparents that exist (how high soever they be), with and the brothers and sisters, full, consanguine or uterine, or failing brothers or sisters, their nearest descendants (how low soever they be), Bail. II. 326.

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Division between maternal and paternal sides.

(2) Next, the estate is notionally allotted between the mother and father in accordance with clauses (*a*) and (*b*) below; and the portions so allotted to the mother and father are distributed, respectively, amongst their descendants and ascendants,[1] in accordance with sub-section (3) below.

Maternal side's portion for uterine brothers and sisters and maternal grandparents

(*a*) The mother is so allotted in the first instance ⅓ of the estate; provided that, if amongst the heirs who are entitled to succeed, there is no maternal grandparent, and only a single uterine brother or sister, or the descendants of a single uterine brother or sister, then the mother is so allotted only ⅙ of the estate.[2]

(a) for full brother and sisters
(b) paternal grand-parents.

(*b*) The father is so allotted in the first instance the residue of the estate (i.e. two-thirds or five-sixths, minus the share of the husband or wife), provided that if in any case, amongst the heirs who are entitled to succeed on *the father's side, there is no paternal grandfather, and there are only consanguine sisters (one or more),* or their descendants,[3] then according to some authorities—[4]

Whether consanguine sisters alone take whole residue, or share it with maternal side.

(i) such sister, if only one, or, in her absence, the descendants of such one sister takes (or take) ⅓ of the estate as Quranic share, and if there are two or more such sisters, or (in their absence) their descendants, they so take ⅔ thereof, and,—

(ii) the surplus or residue of the estate, if any,[5] is divided amongst the consanguine sisters as well as the claimants on the maternal side in the proportion of their respective shares,[6]

[1] Bail. II. 391 (para. 2). The mother's descendants are the uterine brothers and sisters, and the father's are the full or consanguine brothers or sisters. The full brothers do not rank under both classes for this purpose (see s. 645 below). The mother's ascendants are the maternal grandfather and grandmothers, and their ancestors. Similarly the paternal descendants are the father's ancestors.

[2] See *ill.* (2,) (3,) to s. 644. *Quaere*, if there exists only a single maternal grandparent, and no uterine brother or sister, and on the paternal side there are brothers and sisters, then does the maternal grandparent take only ⅙ or ⅓? As between grandparents (without brothers and sisters), the maternal side apparently takes ⅓ though consisting of a single individual—Bail. II. 391 (para. 2); cf. s. 644. *ill.* (11) (12) (13) (15).

[3] The rule does not apply where there are also paternal ancestors, the doctrine of shares being applied only to the sisters, and the ancestors ranking as pure residuaries.

[4] This opinion is preferred by the author of the *Shara'ya-ul-Islam*, Bail. II. 282 (para. 2, last 2 lines), but see *contra*, *ib.* 336 (para. 2), the latter passage being apparently from the *Kafee* (cf. *ib.* p. xxvii); see *ill.* (14).

[5] There cannot be a surplus if there is a husband or wife.

[6] The shares referred to are: (*a*) for the uterine side ⅙ if only one, and ⅓ if two or more, and (*b*) for the consanguine side ½ if only one, or ⅔ if two or more.

according to other authorities—the consanguine (like the full) sister or sisters take the whole residue by themselves just as they alone bear the deficit caused by the presence of the husband or wife.[1] SECTION 643

(3) Thirdly, the portions allotted to the mother and father under clauses (*a*) and (*b*) above are distributed amongst the ascendants and descendants of the mother and father respectively, 'per stirpes,' the first division of each of the said portions being made as between the immediate parents of the mother and father respectively, together with the brothers and sisters on each side:[2] and in such division the grandfather ranks as a brother and the grandmother as a sister on each side, but so that in the said and in subsequent divisions: (*a*) the maternal grandparents and the uterine brothers and sisters or their descendants, in each generation, share males and females in equal portions,[3] (*b*) and the agnatic[4] grandparents and the full or consanguine brothers and sisters or their descendants, share so that in each generation, each male gets twice as large a portion as each female. Distribution within the groups.

The principles of division in the second and third classes are similar, and the illustrations relating to both follow s. 644; *ill.* (1)—23 of which refer to the second class of heirs. See also table on p. 648 below.

(*c*) *Distribution amongst Heirs of the Third Class.*

644. In the absence of any heir of the first or second class,[5] the estate devolves upon the nearest heirs of the third class, i.e. upon (*a*) the uncles or aunts of the deceased, or (*b*) their descendants. THIRD CLASS of heirs. Uncle and aunts and their

[1] As to the *full* sister there is no difference of opinion: Bail. II. 282 (*ll.* 16-18). See s. 644, *ill.* (3) (14). The full sister when there are no brothers, ranks in the first instance as a sharer, one taking ½ and two or more ⅔; but as the sisters take the residue if any is left, and bear the deficit if there is the husband or wife, they are practically residuaries, and it has seemed best not to encumber the section with an unnecessary distinction, see *ill.* (2) and (17), pp. 641, 643.

[2] I.e. (F=father, or father's, and M=mother or mother's) the first divisions are (*a*) the maternal side's portion is allotted to *M*F, MM together with the uterine brothers and sisters (even though MF, *MM* be dead, and the actual claimants be the ascendants of *M*F and *MM*—and similarly though the uterine brothers and sisters be dead, and the actual claimants be their descendants). (*b*) the paternal side's portion is to be divided amongst FF and F*M* together with full or consanguine brothers or sisters.

[3] Bail. II. 388 (para. 2). See s. 644, *ill.* (3.)

[4] Bail. II. 386-387, so that as soon as a female intervenes between the deceased and a grandparent, the males and females in that generation take equal portions. This will be clear by referring to *ill.* (12) to s. 644 where it will be observed that F, *M*, FF, F*M*, FFF, and FF*M* are agnates, and the distribution amongst them is unequal at each stage; but all the rest including F*M*F, and F*MM* are cognates, and so share equally at each stage.

[5] I.e. where there is neither any descendant not ascendant, nor brother nor sister, nor the descendants of brothers or sisters.

SECTION 643

Husband or wife. ⅓ to maternal side and ⅔ to paternal side.

1. maternal side and uterines take equally.
2. Paternal side divide on principle of males taking a double portion.
3. grand-parents who are cognates take equally.

descendants, or (*c*) the uncles or aunts of an ancestor of the deceased, or (*d*) the descendants of such uncles or aunts,—and is distributed amongst them, after giving to the husband or wife his or her share under sections 641 above, (and subject to section 645 below) in accordance with the following principles of division,—

(1) In the first instance ⅓ of the estate is allotted to the uncles and aunts on the maternal side, or their descendants, and the residue (consisting of ⅔ of the estate minus the share of the husband or wife, if any) to the uncles or aunts on the paternal side, or their descendants.[1]

(2) The ⅓ and the residue allotted to the maternal and paternal sides respectively are then apportioned as follows,—

(*a*) The uterine relations on each side get ⅙ of the portion allotted to that side if there is only one such uterine relation, and ⅓ if there are two or more (the descendants of one uterine relation being reckoned as a single claimant).

(*b*) The full blood, or in their absence, the consanguine relations on the maternal and paternal sides respectively, take the residue of the portion (i.e. ⅔ or ⅚) allotted to their own side after the uterine relations on their own side have taken their said ⅓ or ⅙ as the case may be, and—

(*c*) the said ⅓ or ⅙ referred to in clause (*a*) above, and the residue referred to in clause (*b*) above, are divided respectively amongst the members of the respective groups 'per stirpes,' but so that

(i) on the paternal side where the relations are full or consanguine the division is made in such proportions that at each stage each male is allotted twice the share of each female, and

(ii) where the claimants on the paternal side are uterine, or where the claimants are relations on the maternal side, there the distribution is 'per stirpes,' and so that males and females share in like portions.

[1] The maternal side taking the share of the mother, and the paternal side of the father

Illustrations.

N.B. The persons mentioned in each illustration below, being the claimants, the portion of the estate taken by each is indicated in fractions.

(1) If there is only one full (or consanguine) brother, and no other claimant, he takes the estate by himself; two or more divide it equally. If there are any full (or consanguine) sisters with the brothers, the estate is so divided amongst them that each male gets twice as large a portion as each female.[1]

(2) If there is only a single full (or consanguine)[2] sister, she takes $\frac{1}{2}$ of the estate as her sharer and the other $\frac{1}{2}$ reverts to her.[3] If there are two or more they take $\frac{2}{3}$ as sharers, and the $\frac{1}{3}$ reverts to them.[1]

(3) One uterine brother, one full (or consanguine)[2] sister,—
The former takes $\frac{1}{6}$, the latter $\frac{1}{2}$ as sharers, and the residue or surplus (i.e. $\frac{1}{3}$) reverts to the full (or consanguine) sister,[2] (who ultimately takes $\frac{5}{6}$.)[4] If there were two or more uterine brothers or sisters, or a uterine brother and a uterine sister, they would take $\frac{1}{3}$ (dividing it equally amongst themselves, males and females sharing alike) and the full (or consanguine)[2] sister would take $\frac{1}{2}$ as sharer, and the residual $\frac{1}{6}$ would revert to her. Again if there were two or more full (or consanguine)[2] sisters they would take $\frac{2}{3}$ as sharers, and then $\frac{1}{3}$ would revert to them[3] and they would divide the portion amongst themselves equally (being all females).[4]

(4) Three uterine sisters $\frac{1}{3}$; three consanguine brothers $\frac{2}{3}$
i.e., each sister takes $\frac{1}{9}$ and each brother $\frac{2}{9}$.[5]

(5) Two uterine brothers or sisters $\frac{1}{3}$;
Two full (or consanguine) sisters $\frac{2}{3}$.[6]

(6) Husband $\frac{1}{2}$; consanguine half sister $\frac{1}{2}$.[6]

(7) Husband $\frac{1}{2}$; uterine brothers and sisters $\frac{1}{3}$; full (or consanguine) brother (or sister), residual $\frac{1}{6}$. If there is only one uterine brother or sister, he or she takes $\frac{1}{6}$, leaving $\frac{1}{3}$ for the full or consanguine.[7]

(8) Husband $\frac{1}{2}$; grandfather $\frac{1}{2}$.[8]

(9) Husband $\frac{1}{2}$; two (full or consanguine) sisters $\frac{1}{2}$; the share of the latter is $\frac{2}{3}$ but the whole deficit falls on them.[9]

(10) Husband $\frac{1}{2}$; uterine sister $\frac{1}{6}$; full or consanguine sister $\frac{1}{3}$.[10]

(11) Mother's[11] father, Mother's mother $\Big\}$ $\frac{1}{3}$ $\Big\{$ $\frac{1}{2}\times\frac{1}{3}=\frac{1}{6}$ Father's father, Father's mother[11] $\Big\}$ $\frac{2}{3}$ $\Big\{$ $\frac{2}{3}\times\frac{2}{3}=\frac{4}{9}$, $\frac{1}{3}\times\frac{1}{6}=\frac{2}{9}$[11]

[1] Bail. II. 280 392-393.

[2] But see *ill.* (14) below.

[3] The distinction between what they take as sharers and what reverts to them as residue may be of significance when there are other sharers like the husband or wife and grandparents, the latter of whom are entitled to share in the residue.

[4] Bail. II. 280 (para. 2), 314 (*ll.* 35-39), 315 (*ll.* 7-15, 31-39), 318 (*ll.* 9-16), 335 (*ll.* 16-33) In SUNNI LAW the full sister would take only $\frac{1}{2}$ leaving the other half to the male agnates, unless there co-exists a daughter or daughters. The consanguine sister's rights are similar.

[5] Bail. II. 254 (*ll.* 1-7), 388 (last 4 lines), 389, (*ll.* 1-11).

[6] Bail. II. 263 (para. 2), 395 (*ll.* 24-30).

[7] Bail. II. 274 (*ll.* 23-25), 390 (para. 2).

[8] Bail. II. 388 (*ll.* 18-20).

[9] Bail. II. 396 (*ll.* 5-10, 33-36).

[10] Bail. II. 396 (*ll.* 12-16, 36-39).

[11] Bail. II. 281 (para. 3). In SUNNI LAW the father's mother and the mother's mother (as true grandmothers) would take $\frac{1}{3}$ between them, i.e., $1\frac{1}{2}$ each, and the father's father would take the residual $\frac{5}{6}$, the mother's father being excluded as a false grandfather.

SECTION 644

(12) Mother's [1] father, Uterine brother, Uterine sister, } $\frac{1}{3}$ { Father's father, Father's mother, Full sister,[1]

(13)

Only one of the following,—	One or more of the following,—	
Mother's father, *or*	Father's father,	$\frac{2}{3}$
Mother's mother, *or*	Father's mother,	$\frac{2}{3}$
Uterine brother, *or*	Full sister,	$(+\frac{1}{3})$
Uterine sister.	Full brother,	$(+\frac{1}{3})$

Here after giving $\frac{1}{3}$ to the maternal side, and $\frac{2}{3}$ to the paternal side, there is a surplus of $\frac{1}{3}$, which surplus is also taken by the father's father and the rest on the paternal side in the proportion of 2: 1; so that really after giving the $\frac{1}{3}$ to the single claimant on the mother's side, the $\frac{5}{6}$ is taken by the claimants on the father's side.[1]

(14) Husband $\frac{1}{2}$; uterine sister or brother $\frac{1}{3}$; full (or consanguine) sister, residual $\frac{1}{3}$. Here the full (or consanguine) sister's share alone bears the deficit, and instead of getting $\frac{1}{2}$ she gets $\frac{1}{3}$.[2] On the other hand if there were no husband the full sister would get $\frac{5}{6}$. There are two opinions as to whether the consanguine sister would get (*a*) the whole $\frac{5}{6}$ or (*b*) the residual $(1-\frac{1}{3}-\frac{1}{2}=)\frac{1}{3}$ would be divided between the consanguine and uterine sisters in the proportion of $\frac{1}{3}$: $\frac{1}{2}$, i.e. 1 : 3. The second opinion, i.e. (*b*) above, is preferred in the 'Shara'ya-ul-Islam.'[3] But the former, i.e. (*a*) above, is supported in the 'Kafi.'[4]

(15) F="father" or "father's" M="mother" or "mother's." All the eight grandparents are living, and there are no other claimants; If the estate consists of 108, the shares and the mode of division at each stage is indicated by figures.[4]

FFF	FFM	FMF	FMM	MFF	MFM	MMF	MMM
32		12	12				
FF		FM		MF		MM	
46		24		18		18	
F				M			
72							

DECEASED.
108

[1] Bail. II. 281 (para 4). In SUNNI LAW the mother's father would be excluded being a "false grandfather," and the uterine brother and sister would be excluded by the true grandfather. The father's mother (and mother's mother) would take $\frac{1}{3}$, (jointly); the full sister's rights would be subject to the operation of s 620. See p. 638 *n.* 2, and comment following s. 644, on p. 645.

[2] Bail. II. 282. In SUNNI LAW the full sister would not alone bear the deficit, but it would be borne proportionately by all the sharers. The residue would be taken by the nearest male agnate, and failing him, would be divided proportionately amongst all the sharers except the husband.

[3] Bail. II. 336: "A person related by the father's side only supplies the place of a *full* kinsman upon failure of the latter in all cases, and therefore excludes those related by the mother's side from all residuary title, in like manner as the former. This is agreeable to the doctrine of *Sudook*, and most of our lawyers, because the full kinsman and he by the father's side only, on failure of the former, suffering alike the loss or deficiency, they ought in justice to have a similar exclusive title to the *residue* or surplus. Besides, there is a positive judgment to this effect of the *Imam Mohummud Bakir*." Cf. *ib.* 403.

[4] Bail. II. 283 (*second*). In SUNNI LAW FFF would take $\frac{5}{6}$ i.e. 90; and the $\frac{1}{6}$ or 18 would be divided equally between the true grandmothers, i.e. FF*M*, F*MM*, *MMM*.

(16) If in *ill.* (15) there were also (*a*) full or consanguine brothers or sisters (or their descendants) they would participate in the 72 allotted to F, and apparently F's 72 would be first divided as though the claimants were FF, F*M* and the full or consanguine brothers or sisters,—males taking a double share; (*b*) similarly if there were also uterine brothers or sisters or their descendants, the 36 allotted to *M* would be divided between them together with *MF* and *MM*, but in this case males and females would take equally.

(17) Children [1] of uterine brothers and sisters $\frac{1}{3}$; children of full brothers and sisters $\frac{2}{3}$; (children of consanguine brothers and sisters being excluded by the full).[2] If there is a husband or wife with these, the full (or consanguine) brothers' and sisters' children's total portion diminishes to the extent of the share of the husband or wife (i.e. it becomes $\frac{2}{3}-\frac{1}{2}$ if there is a husband, and $\frac{2}{3}-\frac{1}{4}$ if a wife); and if there is only one uterine brother's or sister's child or children, then the share of the full or consanguine is enhanced by $\frac{1}{3}$ (because the uterine side takes only $\frac{1}{3}$).[2] If there are grandparents they rank equally with brothers and sisters, the maternal grandparents ranking like the uterine brothers and sisters, or their children; and the paternal grandparents like the full or consanguine brothers and sisters, or their children.[3]

(18) Husband, 2 uterine brothers or sisters, 2 consanguine (or full) sisters: The shares are $\frac{1}{2}$, $\frac{1}{3}$, $\frac{2}{3}$; the first two take their full shares, and the consanguine (or full) sisters take the $\frac{1}{6}$ residue.[4]

(19) Husband, 2 uterine brothers, 2 consanguine brothers, being the heirs of P; before partition the husband dies, leaving a son and two daughters. If the estate consists of 24, the husband takes (half or) 12, the uterine brothers (a third or) 4 each and the consanguine brother (the residue i.e.) 2 each. The husband's 12 are then re-divided between his son and daughter who take 8 and 4 respectively.[5]

(20) Husband, 2 uterine brothers or sisters, and a consanguine brother being the heirs of P, the husband dies before partition leaving two sons and a daughter. If the estate consists of 30, the husband originally takes 15, the uterine brothers 5 each, and the consanguine brother the residue of 5; the husband's 15 are then re-divided amongst his children so that each son gets 6 and the daughter 3.

(21) Brother's son $\frac{1}{2}$, grandfather $\frac{1}{2}$.[6]

(22) Six brothers and one grandfather (supposing them all to be on the paternal or maternal side respectively) each takes $\frac{1}{7}$.[7]

[1] The uterine half brother, excludes the son of the full brother; the former being nearer: Bail. II. 283. (*third*). Similarly any claimant in a higher generation excludes any claiment in a lower generation.

[2] Bail. II. 284.

[3] Bail. II. 285. In SUNNI LAW if there is any son of a full or consanguine brother, he would take the whole as a male agnate. Similarly a "true grandfather." A "true grandmother" would, after taking her $\frac{1}{6}$, take the rest by return, unless there were a male agnate to compete with her.

[4] Bail. II. 275; 317 (*ll.* 5-12). In SUNNI LAW the abatement would have to be borne by all the sharers proportionately by *'aul* or increase of the common denominator.

[5] Bail. II. 319 (*first*).

[6] Bail. II. 328 (*ll.* 1-2).

[7] Bail. II. 391 (para. 3); as to SUNNI LAW see s. 620.

ECTION

(23) One sister's daughters $\frac{1}{3}$; grandfather $\frac{2}{3}$.

This "decision obviously proceeds on the supposition that both sister and grandfather were related by the same side" (*semble* the paternal side) "whence the distinction of male and female would have bestowed a double portion on the latter."[1]

(24) One uterine paternal uncle or aunt $\frac{1}{6}$ (if two or more $\frac{1}{3}$, sharing it equally males and females alike);[2] than the full or consanguine paternal uncle or aunt[2] takes the residue.[3]

(25) Aunt by the father's side $\frac{2}{3}$; aunt by the mother's side $\frac{1}{3}$.[4]

(26) Paternal uncle's son, maternal aunt (or uncle). The former takes the whole.[5]

(27) Paternal uncle $\frac{2}{3}$; paternal aunt $\frac{1}{3}$.[6]

(28) Paternal uncle's son $\frac{2}{3}$; maternal aunt's son $\frac{1}{3}$.[6]

(29) Full maternal aunt $\frac{1}{3}$; consanguine paternal uncle $\frac{2}{3}$.[7]

(30) Consanguine maternal uncle $\frac{1}{3}$; full paternal uncle $\frac{2}{3}$.[7]

(31) Husband $\frac{1}{2}$; maternal uncle $\frac{1}{3}$; paternal uncle $\frac{1}{6}$. "The maternal uncle being also a sharer, receives his $\frac{1}{3}$, and the residue or $\frac{1}{6}$ only goes to the paternal uncle."[8] Similarly if there were, with the husband, the children of the maternal and paternal uncles.[8]

(32) The division between paternal and maternal uncles and aunts full (or consanguine) and uterine is as follows;[9]

Maternal uncles and aunts,		Paternal uncles and aunts,	
Uterine $\frac{1}{3}$ of $\frac{1}{3}$.[10]	Full or (failing them) consanguine $\frac{2}{3}$ of $\frac{1}{3}$.[10]	Uterine $\frac{1}{3}$ of dividing equally.[10]	Full or (failing them) consanguine $\frac{2}{3}$ of $\frac{2}{3}$, dividing so that each male takes twice as much as each female.[11]
Males and females sharing equally.			
If there are no uterine, the full (or consanguine) take the whole $\frac{1}{3}$ of the maternal side, and 'vice versa.'		If there are no uterine the full or consanguine take the whole $\frac{2}{3}$ of the paternal side, and 'vice versa.'	

If there are none on the maternal side the paternal side takes the whole, and 'vice versa.'

(33) If all the eight uncles and aunts of the parents of the deceased are living, and his estate consists of 108,—four divisions have to be made,

[1] Bail. II. 392 (para. 1). In SUNNI LAW the grandfather would take the whole.

[2] The relationships might be paraphrased as that existing between the father's full brothers or father's consanguine or uterine brothers. Similarly with reference to his sisters and to the relations of the mother, and of the parents of the father and mother, and other grandparents.

[3] Bail. II. 285 (para. 2).

[4] Bail. II. 330 (*ll.* 12-15).

[5] Bail. II. 330 (*ll.* 28-34).

[6] Bail. II. 330 (last 6 lines), 388 (*ll.* 26-28).

[7] Bail. II. 334 (para. 2).

[8] Bail. II. 394 (*ll.* 9-14, 15-19), 395 (*ll.* 1-6).

[9] Bail. II. 285, 296, 389.

[10] Instead of $\frac{1}{3}$ there will be only $\frac{1}{6}$ if there is only one in this division.

[11] Instead of $\frac{2}{3}$ there will be $\frac{1}{3}$ if there is only one on the mother's side.

and the results of each are shown from right to left below, giving ultimately 32, 16, 12, 12, 9, 9, 9, 9, to the parties respectively.[1]

Father's paternal	uncle	32	48	
„ „	aunt	16		72
„ maternal	uncle	12	24	
„ „	aunt	12		108
Mother's paternal	uncle	9	18	
„ „	aunt	9		36
„ maternal	uncle	9	18	
„ „	aunt	9		

(34) If in *ill.* (33) some of the uncles and aunts were uterine and others full or consanguine, their respective portions (i.e. 48, 24, 18, 18) would be first divided on the principle of $\frac{1}{3}$ or $\frac{1}{3}$ of that portion being given to the uterine uncles and aunts, and the residue of the said portion to the full or consanguine.[2] If there were descendants of the uncles and aunts, they would take the portions of their parents: on the full (or consanguine) paternal side alone the distribution would be on the principle of males sharing twice as much as females, whereas on the uterine paternal and on the maternal sides respectively males and females would take equal portions.[3]

(35) Two[4] or more sons of one uterine paternal uncle,
One „ „ „ „ full „ „

(36) Sons[3] of two or more uterine paternal uncles, $\frac{1}{3}$,
Son or sons of one or more full paternal uncles, $\frac{2}{3}$.[4]

(37) A Shiah lady, Nurjehan Khanam, alias Fatma Khanam, died leaving heirs only of the 3rd class, viz the great grand children of two full paternal uncles and one such aunt, (the full brothers and sister respectively of her father). The plantiff was an uncle's son's son's daughter, Defendant 1 and 2 are an uncle's son's daughter's son and daughter, respectively. Defendant 3 the aunt's daughter's son's daughter. The estate was divided in the first instance into 5 parts, 2 of which were taken by each of the uncles, and 1 by the aunt. Then the $\frac{2}{5}$ share of the plaintiff's great grandfather was allotted to her, the $\frac{2}{5}$ share of the great grandfather of Defendants 1 and 2 was divided between them, so that Defendant 1 got $\frac{2}{3}\times\frac{2}{5}$ (as a male) and Defendant 2. $\frac{1}{3}\times\frac{2}{5}$ (as a female), and Defendant 3 took the $\frac{1}{5}$ share of her great grandmother.[5]

There is room to doubt whether if on the maternal side there is a single maternal grandparent, and on the paternal there are grandparents with brothers or sisters the former will take only $\frac{1}{6}$ or $\frac{1}{3}$. Cf. *ill* (13) above.

Bail. II. 286 (para. 3).

Bail. II. 389.

Bail. II. 389-390.

Bail. II. 287 (*second*), "the same rule is applicable to sons of maternal uncles and aunts."

[5] *Aga Sher Alli* v. *Bai Kulsum Khanam* (1908) 32 Bom. 540. A great number of authorities are cited from Arabic texts, but, as the Court held (see p. 558), Baillie's translation of the *Shara'ya-ul-Islam* sufficiently covers the point. In SUNNI LAW all the claimants would have been classed as "distant kindred" and the plaintiff as an agnate would have been preferred to the others, and taken the whole. Failing the plaintiff the estate would have been distributed according to Abu Yusuf giving to Defendant 1, $\frac{1}{3}$; to Defendant 2 and 3, $\frac{1}{3}$ each. Imam Muhammad Defendant 1, $\frac{1}{3}$ Defendant 2, $\frac{2}{3}$ and Defendant 3, $\frac{1}{3}$ respectively.

ICTION 645

(3). *Person bearing More Relationships than One.*

are allotted respect of ch ationship.

645. Where a person bears more relationships than one to the deceased, he inherits in respect of each such relationship[1] provided first that each of the said relationships is such as by itself entitles him to inherit under section 640 above,[2] and secondly that for the purposes of this section relations of the full blood[3] rank only as bearing a single relationship to the deceased, they do not rank as bearing one relationship to the deceased through the father and another through the mother.

Illustrations.

(1) A's father is both the consanguine paternal uncle, and the uterine maternal uncle of the deceased.[4] A can share twice, first as the son of a consanguine paternal uncle, and then as the son of a uterine maternal uncle.[1]

(2) One maternal uncle MU and one paternal uncle who is also uncle on the mothers side PMU: The maternal side would be allotted $\frac{1}{3}$, and the paternal side $\frac{2}{3}$; that $\frac{2}{3}$ would be taken by PMU as the only one on the paternal side; then the $\frac{1}{3}$ of the maternal side would be divided between MU and PMU, each taking $\frac{1}{6}$; so that ultimately MU gets $\frac{1}{6}$ and PMU $\frac{5}{6}$.[5]

The double relationship above referred to occurs in a case that is illustrated by the following table:

F and M represent father or father's, and mother or mother's.

The symbol═represents that the parties are married.

Another wife of FF═ FF═══*MM*═══another husband of *MM*

PMU

F═══ *M*

THE DECEASED

PMU is the consanguine half brother of F, and also the uterine half brother of *M*, i. e, the consanguine paternal, and the uterine maternal, uncle of the propositus.[5]

[1] Bail. II. 287 (*third*), 336 (para 3). Similarly A may be the husband and also the son of the paternal or maternal uncle.

[2] *Ib.* So that if a person is both a brother, and the son of a paternal uncle, he inherits only as a brother, and shares only once as against other brothers. Bail. II. 311 (para. 2).

[3] When they compete with uterine relations, who of course rank as relations through the mother only. The uterine relations are given a definite share, viz. of $\frac{1}{6}$ if one, and $\frac{1}{3}$ if more than one; cf. ss. 643, 644.

[4] This happens if *MM* (mother's mother) is twice married, the second time one of the wives of FF (father's father); then the son of *MM* and FF would bear the two relationships mentioned above.

[5] Bail. II. 337.

§ 5.—*The Successor by Contract.*

SECTION 646

646. In the absence of all blood relations (subject to the right of the husband or widow to take ½ or ¼ of the estate) it devolves upon the successor by contract, (if any,) i.e. the person whom the deceased has named as his heir in consideration of that person's promising to pay for the deceased any fine or ransom to which the deceased might become liable.[1]

by contract inherits in absence of all blood relations.

§ 6.—*Return to the Husband.*

647. In the absence of blood relations, and the successor by contract, the whole of the estate of the deceased devolves upon the husband of the deceased if he is a male, but not upon the widow if the deceased is a female.[2]

Husband (not wife) follows next.

On the failure of all blood relations and the 'maula' or the successor by contract the husband takes the whole of the estate half of it as the Quranic sharer, and the other half reverts to him thus preventing escheat to the state.[3] *Quaere* whether the residue (or surplus), ever revert to the wife.[3]

§ 7.—*Escheat to the State.*

648. In the absence of all blood relations and of the husband or widow, and of the successor [4] by contract, (subject to section 579 above) the estate escheats to the State.[5]

Escheat to State.

"A relation by blood however remote excludes an emancipator, and in like manner an emancipator or his representative in the inheritance of the freedman, is preferred to the surety for offences, and the surety for offences preferred to the 'Imam.'"[6]

[1] Bail. II. 296, 360 In strict Shiah law the emancipator of a slave, called the *maula* of manumission (*wala* means relationship and *maula* means one having *wala*) has rights of inheritance prior to those of the successor by contract, Bail. II. 345-360. But those rules can have no application in British India: See above p. 51.

[2] Bail. II. 262 para. 4), 339, 367 (para. 2). Nor does the right devolve upon the heirs of the successor by contract. There is a difference of view whether the contract is absolutely binding, or may be dissolved by the contracting party, so long as the *maula* has not had to pay any fine by reason of the contract. After he has done so, the contract cannot be revoked or dissolved Bail. II. 361-362.

[3] Bail. II. 262, (para. 4): "the surplus never reverts to a wife, and reverts to a band only in the single case of there being no other heir than the *Imam*," *Ib.* 339 (para. 2). But see *ib.* 272 (para. 1): "Upon this point however there are three different opinions: (*a*) . . . She takes the remainder by virtue of reversionary right; . . . (*b*) it never reverts to her . . . (*c*) it reverts to her on failure, that is during the absence, of the *Imam*, but not if he is present. The right doctrine however is that it never reverts to her."

[4] Bail. II. 362 (para. 3): "with the provisions and restrictions already quoted respecting the latter" i.e. the widow, cf. s. 647.

[5] Bail. II. 362, 363. See above s. 637.

[6] Bail. II. 271 (para. 4). Cf. *ib.* 364 (para. 5).

SECTION 648 TABLE OF HEIRS: SHIAH LAW OF INHERITANCE.

Husband or Wife.

The husband or wife's share does not vary greatly. See pp. 630, 631 above.
Below are given only the heirs by blood relationship. See also pp. 628, 629.

First Class of Heirs.

Sub-group.

(1) Descendants, *and/or*
(2) Father and mother.

Residue :—(*a*) If there is any son (or his descendants) the residue is taken by the son (or his descendants) together with the daughter (or her descendants), in the proportion of a double share to a male, 'per stripes.'

(*b*) If there is no son (or descendants of a son), the residue is divided amongst the rest of the blood relations (i.e. the daughter or her descendants, and the father and mother) in the proportion of their respective shares.

Deficit borne by daughter alone. [There is no deficit unless there is a daughter; nor is there any deficit if there is a son i.e., there is a deficit only where there is a daughter who ranks as a sharer.]

Second Class of Heirs.

(1) Grandparents how highsover, *and/or*
(2) Brothers *and/or* sisters; or failing them their descendants.

Residue taken or *deficit* borne by full sister alone: If there is no full sister, but consanguine sister, the latter bears the *deficit*; it is doubtful whether she takes the whole of the *residue*, or divides it with the uterine relations proportionately to their respective shares.

Third Class of Heirs.

Uncles *and/or* aunts; or failing them their descendants.

The estate is divided on the basis shown in the table on p. 644.

THE SUNNI AND SHIAH SYSTEMS OF INTERPRETING THE QURAN AND THEIR RESULTS COMPARED. SECTION 648

1. The most important reform by Islam referred to the rights of women: The verses about women taking a portion of the estate as well as men,[1] have been interpreted by the Sunnis strictly, and with reference to the pre-Islamic customs : So that by the Sunni interpretation of the law those women alone compete with the customary heir in whose case the only bar to their recognition (under the customary law) was their sex, i.e., female agnates. The Shiahs on the other hand have on the strength of these verses removed the basic distinction between agnates and cognates. They interpret the verses as giving a right to those who are related through women, 'pari passu' with those related through men. The result is that with the Shiahs the agnates have no priority over the cognates, and proximity is reckoned merely by counting the connecting links, whether male or female.

1. Under Shiah law not only women, but relations through women are placed on equality with the customary heir.

2. The verse that a male shall have as much as the share of two females[2] in combination with the verses referred to in the last paragraph, is interpreted as changing the entire principle of distribution prevailing in the pre-Islamic times, and introducing a distribution 'per stirpes' instead of 'per capita.' For it is clear that if those who are related through females are to succeed as well as those related through males, and if at the same time the males are to get twice as much as females, there must be a distribution at each stage where the sexes of the intermediate links differ, and the step from this to a distribution 'per stirpes' is an easy one.[3] There is an exception made in the case of the uterine relations, among whom the males and females share alike. This has been explained as a result of the interpretation of the verse of the Quran dealing with the rights of "mother's children,"[4] where no specific statement is made that the males should take twice the share of females. Another reason has already been indicated why in this instance the rule giving to males twice as much as to females has not been applied, viz., that the males were given a larger share than the females only in those cases where the males would have succeeded according to the old law, and the females alone were introduced for the first time by Islam. But it is evident that the uterine brother, no less than the uterine sister, was excluded by the customary law, and that both of them were newly entitled heirs under Islam. There was no reason, therefore, to give to the uterine brother preferential treatment over the uterine sister—any more than there was to prefer the father over the mother in cases where there are descendants of the deceased.

2. Adoption by Shiahs of division 'per stirpes.'

3. The Quranic provision that the daughter is entitled to succeed with the son, is interpreted by the Shiahs as entitling all female descendants to succeed, and similarly the mention in the Quran of the full and consanguine sister, and of the uterine brothers and sisters, are taken to indicate that all collaterals whether male or female, whether of the full blood or of the half blood, rank with the customary heirs in their own line. Then as the Quran states that the

In Shiah law rights of all females, however, remote similar to those of daughter and sister.

[1] Quran IV. 9, 36, 37; VIII; 76, XXXIII; 6. These verses are cited above pp. 560-563.

[2] Quran LV, 12.

[3] Or rather it is so difficult to avoid it that it is inevitabe; see, however, ss.629-631 for Sunni law according to Imam Muhammad.

[4] Quran IV 15.

SECTION 648 nearest relation shall succeed, and no mention is made about agnates having priority, hence cognates and agnates succeed 'pari passu' in Shiah law. So while the Sunnis give rights of inheritance to the sister (unless she comes into competition with a customary heir who is nearer than herself) but they give no such rights to the niece of the deceased (except in default of all male agnates), the Shiahs on the other hand take the verse of the Quran as not restricted to the individual instances expressly stated, but as adumbrating a principle that all female and uterine relations shall have rights of the same kind as are expressly stated with reference to the sisters and uterine brothers and sisters. So that a uterine sister's daughter is entitled (under Shiah law) to take the same rights in the estate in competition with a full brother's son, as a uterine half sister takes in competition with a full brother.

4. Division of the heirs into three kinds under Sunni law.

4. The Sunnis leave the pre-existing rights of the ''asaba' (or agnates, —who were the customary heirs) intact, giving rights in the nature of charges on the estate to those mentioned in the Quran. It is, therefore, necessary for the Sunni system to divide the heirs into three different classes : the Quranic sharers, the residuries (consisting mainly of the ''asaba,' or agnates) and the distant kindred (cognates and female agnates). The Shiahs do not leave the old rules of law as they were, but replace them by a set of rules consisting of a fusion of the customary law and the Islamic reforms, and thus amongst the Shiahs the classification of heirs becomes important only when we have to deal with the question of the quantum of shares they take, and not for the purpose of considering what persons are entitled to succeed.

Under Shiah the principle that parents and descend-ants may succeed together, extended to ancestors and

5. The verse about the relative proximity of parents and children, and the provision that the two should succeed concurrently, has received a slightly differing verbal interpretation by the two sects, but the results have been very far reaching. Here again the Hanafis have given to it the more literal meaning, and by their interpretation of it any ascendant how highsoever shares in the estate with any descendant low lowsoever. The Shiahs on the other hand extract a principle from the instance given. They argue that if the father of the propositus, F, is entitled to succeed with his own grandchildren (and failing them with their descendants), so F's father, FF, (the grandfather of the propositus) should similarly be in the same rank with his grandchildren (i.e. the brothers and sisters of the propositus) and failing brothers and sisters their descendants. On this point the Shafi'is and Malikis take the same view.[1]

The mother's right to take $\frac{1}{3}$ of the estate not diminished in Shiah law.

6. The mother is given by the Quran $\frac{1}{3}$ of the estate when the father is living. The Hanafis wishing to preserve the proportion between her share and that of the father, give her $\frac{1}{3}$ of only the residue if the husband or wife are living. The Shiahs let her take $\frac{1}{3}$ of the whole, leaving only $\frac{1}{3}$ to the father if there is a husband and $\frac{5}{12}$ if there is a widow of the propositus.

[1] This principle has apparently been restricted to the grandfather, and not followed in regard to the great grandfather, who is made to exclude and not to rank with the uncle. But the rights of the great grandfather being of little practical importance, are probably stated without much thought.

INDEX AND GLOSSARY.

THE REFERENCES are to pages throughout, unless otherwise indicated. *Ill.* refers to "illustrations;" *n* to footnotes; and s. to section.

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