THE MAHAMADAN LAW

CHIEFLY BASED UPON

MACNAUGHTEN'S TREATISE

AND THE DECIDED CASES

BY

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PREFACE.

THE kind encouragement given us by the public, by the rapid sale of our Third Edition, and the demand there was for more copies when our supply was exhausted, have induced us to come forward with a new and revised edition of Mahamadan Law. Advantage has been taken of this opportunity to revise and rewrite portions of the Introduction and add at the end of each Chapter an epitome of the case-law dealing with the subject. We are much indebted for this to the valuable Digest of the Reports by Mr. Woodman; and the Decided Cases subsequent to 1886, have also been added in their proper places.

As the Madras University and the High Court have prescribed the valuable treatise of MacNaughten in the place of Bailie's Digest, we have considered it desirable to cut down the Text materially and incorporate in it more from MacNaughten's treatise than was formerly the case.

In the Appendices will be found a useful Glossary and Solutions of some Test cases on Inheritance: and we have also added at the end some questions taken from the various Examination Papers which we hope will be found valuable.

We trust that as revised this publication will prove useful not only to students preparing for the Law examinations but also to Practitioners of all classes. Those in the Moffusil, who have not much opportunity of coming by the valuable treatises on Mahamadan Law, will find here all

that is necessary for them in practice, while to others possessing the treatises and the reports this publication will, we hope, prove an Index of value.

We are sorry that owing to the indisposition of one of us and pressure of other work this publication has been delayed longer than we intended: and we regret that notwithstanding all the care and attention we have been able to devote to it some errors have crept in, for which we crave the indulgence of the public, and trust that this publication will meet with the reception that its predecessors had. The price we have fixed will, we believe, be found moderate, considering the increased size of the book and the new matter we have added.

THE AUTHORS.

MADRAS,
1*st January* 1890.

CONTENTS.

THE INTRODUCTION.

CHAPTER I.

General Observations.

		Page.
1.	Mahamadan Law contrasted with the English and Hindu Laws	1
2.	No caste distinction in Mahamdan Law	1
3.	Both Mahamadan and Hindu Laws intimately connected with religion	2
4.	The Policy of the British Government with regard to religion and personal laws	2
5.	Legislative interference with the laws of Mahamadans and Hindus	3
6.	Abolition of slavery	3
7.	Legalising marriage of Hindu widows	4
8.	The Quoran the basis of the Mahamadan Law	6
9.	Additional Authorities of Mahamadan Law	7
10.	The *Sunni* and the *Shiah* sect	7
11.	Different authorities among the Sunnies	7
12.	The authority of *Abu Hanifa* and his disciples paramount in Bengal	7
13.	Difference between the Mahamadan and Hindu Laws ...	8
14.	Matters to which the Mahamadan Law is applied ...	8
15.	The Origin of the two Schools, *Shiah* and *Sunni* ...	8

CHAPTER II.

Marriage.

1.	Inferior social position of women among Mahamadans.	15
2.	Marriage, a civil contract as amongst the English ...	16

		Page.
3.	Two forms of marriage, *Nikka* and *Shadi*	17
4.	Essentials to marriage	19
5.	Marriage which is indispensable among Hindu females is not so among the Mahamadans	19
6.	Marriage tie which is indissoluble among Hindus not so among Mahamadans	19
7.	Polygamy allowed both under Mahamadan and Hindu Laws	19
8.	Limits of intermarriage	20
9.	Valid and invalid marriages and their incidents	22
10.	Property rights of the husband and wife under the Mahamadan, English and Hindu Laws	22
11.	Decided cases on marriage	24

CHAPTER III.

Dower.

1.	The endowment of a wife	25
2.	Rights to dower	26
3.	No dower under the Hindu Law	26
4.	Points to be noted in connection with dower	27

CHAPTER IV.

Parentage.

1.	The issue of mere cohabitation may be legalized ...	30
2.	Decided cases on the subject of legitimacy and acknowledgment	36

CHAPTER V.

Divorce.

1—3.	Facility of divorce according to Mahamadan Law and its absence under the Hindu Law	38
4.	Right to maintenance how affected by divorce ...	42

		Page.
5—6.	Divorce under the English and the Hindu Laws ...	43
7.	General remarks	43
8.	The case-law on Divorce	45

CHAPTER VI.

Minority and Guardianship.

1—2.	Guardians and their powers	47
3—7.	The regard for the minor's interests under Mahamadan Law and its coincidence with other laws	48
8.	General remarks	49
9.	Right to the custody of the minor	51
10.	Mother preferred to the father as regards custody of children	52
11.	The Indian Majority Act as regards the age of Majority	52
12.	The case-law.	53

CHAPTER VII.

Inheritance.

1.	Importance of the subject of inheritance. The rules on the subject just and equitable and founded on the Quoran	56
2.	Rules of succession unique in their nature	57
3.	No distinction between real and personal, ancestral and self-acquired property, as in the case of English and Hindu Laws	57
4.	Plurality of heirs succeeding simultaneously	58
5.	No rule of primogeniture	59
6.	No principle of representation: Grandson not allowed to share with the sons (uncles of the Grandson) ...	59
7.	Parents allowed a share on the death of their child ...	60
8.	Females largely allowed to inherit	60

		Page.
9.	Widow of the deceased always allowed to take a share ...	61
10.	The female heir takes the property of the deceased as full owner and becomes fresh stock of descent	61
11.	No adoption in Mahamadan Law	62
12.	The heir has no in-cohate right in the property of the person to whom he is to succeed. The right to call for partition, or to restrict alienation does not exist under Mahamadan Law as in Hindu Law	62
13.	Principle of succession;—nearness of Kin	64
14.	The doctrines of the return and the increase	64
15.	The Hindu and Mahamadan Laws contrasted	65
16.	General observations abstracted from Bailie's Introduction.	65
17.	The Limitation Act Articles 127, 141, and 144 interpreted.	67
18.	The case-law	68

CHAPTER VIII.

Maintenance.

1.	Grounds of liability for maintenance	74
2.	Maintenance of a wife	74
3.	Maintenance of others	75
4.	The Law of Maintenance more comprehensive under the Hindu law...	75
5.	The case-law	75

CHAPTER IX.

Wills.

1.	Definition of, and the power of a Mahamadan to make a will	77
2.	Who can make a will, and in whose favor it can be made	78
3.	Wills under English Law	78
4.	Wills under Hindu Law	79

Page.

5. Distinction between the Mahamadan and Hindu Laws 81
6. Powers of an executor under Mahamadan Law 82
7. The case-Law on the subject of Wills 84

CHAPTER X.

Sale.

1. The provisions of the Contract Act and the Transfer of Property Act override the provisions of the Mahamadan Law relating to Sale 89
2. Section 54 of Act IV. of 1882 and Section 77 of Act IX. of 1872 90

CHAPTER XI.

Pre-emption.

1. The remarks of MacNaughten on pre-emption 91
2. Pre-emption, what it is, what is its cause, and under what conditions it exists 92
3. The ceremonies of *Talab-i-Mawasabat* and *Talab-istabad* (Immediate demand and demand with invocation, are essential) 93
4. Pre-emption not recognized under the Hindu Law but upheld there as custom 95
5. The history and nature of the right of pre-emption ... 95
6. Case-law on the subject of pre-emption 99

CHAPTER XII.

Gift.

1. The Mahamadan Law is extremely favorable to the donor and a gift can be revoked easily... 123
2. The Hindu Law does not allow the donor to revoke his gift 124

		Page.
3.	Death-bed gifts treated as legacies	124
4.	Gifts to relations generally irrevocable	124
5.	Gifts cannot be suspended on a condition though they could be made subject to a condition	124
6.	The thing to be given must be in existence at the time of the gift ... ...: ...	125
7.	Whole property could be given as gift	125
8.	Possession necessary for the validity of a gift and it cannot be made to take effect at a definite or indefinite future time.	126
9.	The Provisions of the Mahamadan Law regarding gifts not affected by the Transfer of Property Act	128
10.	The Hindu Law on gifts abstracted	129
11.	The case-law on gifts summarised	138

CHAPTER XIII.

Endowments.

1.	Endowments at present governed by Act XX of 1863 ...	151
2.	A *wakf* defined	152
3.	Ingredients necessary for the creation of a valid wakf stated	153
4.	A summary of the Hindu Law on religious and charitable endowments	156
5.	The case-law on the subject of Mahamadan endowments	159

CHAPTER XIV.

Debts and Securities.

1.	The Mahamadan Law is extremely lenient to debtors but its provisions have been modified by the Indian Contract Act	173
2.	The Mahamadan Law does not recognize a joint family and each is liable only for his own debts under that law	174

Page.

3. A creditor cannot follow his debtor's estate in the hands of a *bonâ fide* purchaser for value from the heir-at-law.. 175
4. A suit by a creditor of a deceased Mahamadan against the heir in possession is considered an administration suit 176
5. The liability of one person to pay the debt of another under the Hindu Law discussed 178
6. The case-law on the subject of debts under Mahamadan Law... 187

CONTENTS.

			Page.
		THE TEXT.	
CHAPTER	I.	Origin and Sources of Law	1
,,	II.	Marriage	2—11
,,	III.	Dower	11—16
,,	IV.	Parentage	17—20
,,	V.	Divorce	20—26
,,	VI.	Maintenance	26—27
,,	VII.	Guardians	28—30
,,	VIII.	Inheritance	30—86
(*a*)		*Inheritance according to the Sunni School.* ...	30—76
	(1)	Sharers	30—53
	(2)	Asubat and Residuaries	54—59
	(3)	Distant Kindred	59—71
	(4)	The Increase	71—74
	(5)	The Return	74—76
(*b*)		*Inheritance according to the Shiah School* ...	77—85
(*c*)		*Partition*	85—86
CHAPTER	IX.	Wills	86—92
,,	X.	Pre-emption	92—95
,,	XI.	Gift	95—100
,,	XII.	Wakf or Endowment	100—105

APPENDICES.

Appendix A.—Glossary ... ... 1—8.
Appendix B.—Problems ... ... 1—16.
Appendix C.—Questions ... ...17—28.

EXPLANATION OF ABBREVIATIONS.

B. D.	1.	Baillie's Digest on Mahamadan Law, page 1.
B. I.	2.	Do. do. on Inheritance, page 2.
Elb.	3.	Elberling on Inheritance, &c., page 3.
G. I.	4.	Grady on Inheritance, page 4.
Mac. Pri.	5.	MacNaughten's Principles, page 5.
Mac. Pre.	6.	MacNaughten's Precedents, page 6.
Mac. Pre. Re.	7.	MacNaughten's Mahamadan Law,
Pre. Rem.	7.	Preliminary Remarks, page 7.
S. M. Sada.	8.	Sadagopacharlu's Manual, page 8.
I. B. L. R.	9.	Bengal Law Reports, Volume I, page 9.
II. B. H. C. R.	10.	Bomby High Court Reports, Volume II, page 10.
III. M. H. C. R.	11.	Madras High Court Reports, Volume III, page 11.
IV. N. W. H. R. IV. N. W.	12.	North-Western Provinces High Court Reports, Volume IV, page 12.
V. Agra.	13.	Reports of the High Court of Agra (N. W. Provinces) Volume V, page 13.
VI. C. L. R.	14.	Calcutta Law Reports, Volume VI, page 14.
VII. W. R.	15.	Sutherland's Weekly Reports, Volume VII, page 15.
I. L. R. I. C. S.	16.	Indian Law Reports Calcutta Series, Volume I, page 16.
I. L. R. II. B. S.	17.	Indian Law Reports, Bombay Series, Volume II, page 17.
I. L. R. III. M. S.	18.	Indian Law Reports, Madras Series, Volume III, page 18.

I. L. R. IV. A. S.	19.	Indian Law Reports, Allahabad Series, Volume IV, page 19.
L. R. V. I. A.	20.	Law Reports, Indian Appeals, Volume V, page 20.
2 M. I. A.	21.	Moore's Indian Appeals, Volume 2, page 21.
S. P. C.	22.	Sutherland's Privy Council Reports, page 22.
S. D. A.	23.	Sudder Dewani Adalut Reports, page 23.
Marsh.	24.	Marshal's Reports, page 24.
2 Hyde.	25.	Hyde's Reports, Volume 2, page 25.
I. J. N. S.	26.	Indian Jurist, New series, page 26.
I. M. J.	27.	The Madras Jurists, Volume I, page 27.

N. B.—The Indian Law Reports are sometimes quoted without the S at the end as I. L. R. II. C. for Calcutta Series Volume II; and the High Court Reports are sometimes quoted without C. R. as 8 M. H. 2 for Madras High Court Reports Volume 8, page 2; and sometimes the Volumes are denoted by numerals instead of Roman characters.

C. P. Jayanarayanachar

MAHAMADAN LAW.

INTRODUCTION.

CHAPTER I.

GENERAL OBSERVATIONS.

The scope of the Introduction: Mahamadan Law contrasted with the Hindu and the English Law.

1. The source of the Mahamadan system of law is, according to MR. HOUSTON, as much a matter of *history* as that of the Hindu Law is one of *conjecture*. There appears to be little use in devoting space for tracing the historical development of the Mahamadan Law; and the introduction will, accordingly, be limited to a few general remarks on the nature of the *Mahamadan Code* itself, as contrasted with the *Hindu* and the *English Codes*, and on the social relations which the Mahamadan Law establishes among those subject to its control.

No caste distinction in the Mahamadan Law as in the Hindu Law.

2. Two systems of law more diametrically opposed to each other than the *Mahamadan* and the *Hindu* it would be difficult to conceive. While in the latter are found several divisions of castes, the former proclaims the absolute equality of all persons above the condition of slaves. Any aristocracy that can be said to exist is one of office, there being no hereditary distinction of rank, except perhaps those attaching to the Sovereign, which however, do

No *state hierarchy*.

not seem to have been recognised in the primitive stages of Mahamadan Government. Nor is there any *state hierarchy*. Whatever priesthood exists, owes its origin rather to individual piety, and private munificence, than to State endowment.

Intimate connection of both Hindu and Mahamadan Law with religion.

3. The laws, however, of the Hindus and of the Mahamadans, possess this feature in common, *viz.*, that they are intimately blended with their respective religions.

The policy of the British Government not to interfere in matters of religion and administer native laws to the natives.

4. It has been the judicious policy of the British Administration not to interfere, as a Government, with the creed of any nation, which the course of political events has placed under their control. The conversion of the native they have wisely relinquished to private zeal. This respect for the religion of the natives of India was necessarily extended in a great measure to their laws; and this was the case not only because those laws were intimately blended with their several modes of faith, but also because to bring at once a whole nation under the yoke of a code, of which they are utterly ignorant, would be to inflict hardships for which no advantages derived from British rule could, perhaps, more than faintly atone. While, therefore, they felt bound in *policy* not to interfere with the Hindu and the Mahamadan forms of worship, they felt constrained by *duty* to recognise and to administer the Hindu and the Mahamadan Codes of law. But this however was not done without making some reserva-

tions; and the tendency of modern legislation and modern practice has been to encroach more and more upon the ground once exclusively occupied by these native systems of Jurisprudence. A series of legislative provisions, on the part of the English as well as the Local Legislatures, commencing so far back as the Charter of GEORGE II. in 1753, and until 1831, expressly reserved to Hindus and the Mahamadans the benefit of their own laws with respect to succession to, and inheritance of, landed and other property, marriages and caste, &c., and every other claim to personal or real right and property, so far as the same shall depend upon these points of law.

Legislative interference with the laws of Hindus and Mahamadans.—i. Inheritance of Excommunicated persons:—Act XXI of 1858.

5. In 1832, however, by Regulation VII passed ostensibly for the improvement of Procedure in the Courts of the Presidency of Bengal, this principle was undermined, inasmuch as the bar to inheritance which, both in the Hindu and Mahamadan Codes, had existed by a difference of religion, was expressly removed. This enactment was extended to the other two Presidencies by Act XXI of 1850.

ii. Abolition of slavery.—Act V of 1843.

6. The Indian Legislature, by abolishing slavery in India, and declaring that there exists no property in slaves, has interfered with the provisions of the Mahamadan and Hindu Laws on the subject of slavery; and the provisions relating to slavery and to property in slaves in these two laws are now matter of history; and it has been held that the effect of Section 3 of

Act V of 1843 is to abrogate the rule of the Mahamadan Law regarding slaves, and to secure the succession to the heirs of the emancipated slaves as if he had never been a slave (I. L. R., III B., 422). It was further held in the same case that the provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing: that the exclusion of the natural heirs of an emancipated slave, in favor of the heirs of his emancipator, is a disability arising out of the *status* of slavery, similar in its nature to the exclusion, under the Mahamadan Law, of the natural heirs of one emancipated by a master or his heirs; and that since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in construing it, to give it the widest remedial application which its language permits, and cannot, consequently, limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death, when the words of the Statute allow of its being applied to the property of any one who had at any time been a slave.

iii. Legalising marriage of Hindu Widows. Act XV of 1856.

7. In 1856 another important innovation was made by legalising the second marriage of Hindu widows, and by declaring the legitimacy of the offspring of Hindu women by second marriage (by Act XV of 1856), which caused an alteration in the devolution of the property

of her first husband after his death. It may also be added that by upholding testamentary dispositions, which are wholly unknown to the Hindu Law, and by applying principles of English Law to testamentary dispositions of Hindus and Mahamadans, our Courts of law have still further trenched upon the recognized principles of succession in those personal laws, and the Legislature has given its sanction to most of the decisions of our Courts by codifying them. The Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882) are further encroachments upon the corresponding provisions of the Hindu and Mahamadan Laws. The Indian Evidence Act (I of 1872) has abrogated the provisions of the Hindu and Mahamadan Codes on the subject of evidence. The Mahamadan Penal Law, which was the law enforced by the Mofussil Courts, has been replaced by the Indian Penal Code. The Codes of Civil and Criminal Procedure, and the Limitation Act, have also replaced the provisions of the Hindu and Mahamadan Codes on these subjects. Subject, however, to these legislative or judicial encroachments, the Hindu and Mahamadan Laws still continue to govern, to a very great extent, all cases in which a Hindu or a Mahamadan is concerned, in which questions of *marriage, inheritance, and religious usages* and *institutions* are raised.

iv. The Hindu Wills Act—Act XXI of 1870.

v. The Law of Contract.—Act IX of 1872, and Act IV of 1882.

vi. The Law of Evidence.—Act I of 1872.

vii. The Indian Penal Code—Act XLV of 1860.

viii. The Law of Criminal and Civil Procedure. —Act X of 1882, Act XIV of 1882, Act XV of 1877.

"At the Presidency Towns in India" says BAILLIE, "the Mahamadan Law is applicable by Act of Parliament to all suits between Mahamadans which relate to their *suc-*

cession and *inheritance*, and, up to the time of the passing of the Indian Contract Act IX of 1872, it was also applicable by the same Act of Parliament to all suits between Mahamadans which related to 'matters of contract and dealing between them.' In the Mofussil, or country separated from or without the Presidency Towns, it is applicable under regulations of the local Governments, to all suits between Mahamadans, regarding *succession*, *inheritance*, *marriage*, *caste*, and all *religious usages* and *institutions*, while the Judges are expressly enjoined in cases for which there is no specific rule for their guidance, to act according to justice, equity, and good conscience. In practice the Mahamadan Law was seldom applied in the Presidency Towns, even before the passing of the Indian Act, except in cases of marriage and inheritance, but in the Mofussil Mahamadans being more in the habit of regulating their dealings with each other by their own Law, to disregard it when adjudicating on such dealings would have been inconsistent with justice, equity and good conscience." It thus happened, that the Mofussil Judges were obliged to extend the operation of Mahamadan Law beyond the cases to which it is actually applicable, under the regulations of the local Governments. But after the passing of Act IX of 1872, the provisions of Mahamadan Law in matters of contract and dealing are not applied even in the Mofussil, and the provisions of Mahamadan Laws are simply confined to questions of *inheritance*, *marriage*, and *religious usages* and *institutions*. The same is the case with the Hindu law.

Quoran, the basis of the Mahamadan Law.

8. The basis of the Mahamadan Law, civil, criminal, and religious, is the *Quoran*, or book of Revelations, believed to be of divine origin, and to have been revealed by an angel to MAHAMAD, and collected by ABU BAKER, and promulgated in the 30th year of *Hejirah* (A. D. 622.)[1]

1 SALE'S *Prel. Dis. to the Quoran*, Sec. iii.

Additional authorities of Mahamadan Law.

9. As the ordinances of the *Quoran* in *civil* matters are few and imperfect, they are supplemented by traditions collected by MAHAMAD'S companions, contemporaries and successors.

The *Sunni* and the *Shiah* sect.

10. The schism, which took place after MAHAMAD'S death amongst his followers, divided the Mahamadans into two sects, *viz.*, the *Sunni* and the *Shiah*; each having its own collections of *Ahadee*, which it considers genuine and authoritative. The *Sunnis* allow traditionary credit to the *companions* of the *Prophet*, to his four immediate *followers*, and to some of his *contemporaries*; but the *Shiahs* give credit only to ALLIE and his *partisans* and to those sayings and actions, which they believe to have been verified by any of the twelve *Imams*. These two schools differ in some points of law; but chiefly on points bearing on questions of 'Inheritance.'

Different authorities among the *Sunnis*.

11. Though all the *Sunnis* agree in matters of faith, they disagree in points of practical jurisprudence; some following one, some another of the four different great authorities, *viz.*, ABU HANEEFA who died in 772: MALIC who died in 801: SHAFFIE who died in 826: and HANBAL who died in 863.

The authority of ABU HANEEFA and his disciples paramount in Bengal.

12. The authority of ABU HANEEFA and his two disciples ABU YUSAF who died in 804, and IMAM MAHAMAD who died in 801, is paramount in Bengal and Hindustan.

Similarly, the laws of the Hindus, civil and religious, are by them believed to be of divine origin; they consist

of (i) *Sruti*, or that which was seen or perceived by the mental eye in a *revelation*, and this includes the four vedas, *viz.*, the *Rig*, *Yajur*, *Sama*, and *Atharvana*; and (ii) *Smriti* or the recollections handed down by the *Rishis* or *Sages* of antiquity which comprise the *Dharma Sastras*.

There are five great schools of Hindu law, *viz.*, (i) the *Gouda*, or that of Bengal; (ii) the *Mithila*, or that of North Behar; (iii) the *Benares*; (iv) the *Dravida*, or that of Southern India; and (v) the *Maharashtra*, or that of Western India. The original *Srutis* are common to all, but each prefer a particular commentator.

The above five schools of law may be reduced into two schools, *viz.*, (i) *Dayabhaga* or that of Bengal, (ii) *Mitakshar* or that of Benares. These schools differ but little from each other except in matters of *inheritance* and *adoption*.[1]

Differences between Hindu and Mahamadan Law.

13. The Hindu and Mahamadan Laws, however, differ materially on several points such as *marriage*, *inheritance*, &c., which will be pointed out in their appropriate places.

Matters to which Mahamadan Law is applied.

14. The principal matters with reference to which the Mahamadan Law has been applied by the British Indian Courts are:—*First*, the domestic relations of persons to each other such as those of husband and wife, parent and child, &c.; *Secondly*, the transfer of property *inter vivos* (as by sale or gift), or *from the dead to the living* (as by testate or intestate succession.)

The origin of the two schools, *Shiah* and *Sunni*.

15. The following adapted from BAILLIE'S valuable *Digest* gives the origin of the two Schools of Mahamadan Law, and points out the difference between the two schools on several important matters.

The word *Shiah* properly signifies a troop or sect, but has become the distinctive appellation of the followers

1 MAYNE'S *Hindu Law*, Sec. 33.

of ALLIE or all those who maintain that he was the first legitimate *Khaleefah*, or successor to MAHAMAD though the fourth in actual succession; and that the *Imamat* or spiritual and temporal headship of the Mussulman community belongs by hereditary right to his descendants by *Fatima*, the favourite daughter of the *Prophet*, and the only one of his children that left any offspring. ALLIE was thus according to them the first *Imam*, his eldest son HUSSUN the second, his second son HOOSSEIN the third, and ALLIE surnamed ZEEN-AL-ABIDEEN, the son of HOOSSEIN, the fourth. On this ALLIE's death a schism took place in the sect, a part of whom adhered to one of his sons called ZEYD, thence taking the name of ZEYDIANS, while much the greater part of them acknowledged another of his sons named MAHAMAD BAKIR, as the fifth *Imam*: MAHAMAD BAKIR was succeeded by his son JAFER SADIK, as the sixth *Imam*; and these two are the great heads of the *Imamia*, as a distinct school of law. JAFER SADIK appointed his eldest son ISHMAEL to succeed him in the *Imamat*, and on his premature death, nominated his second son MOOSA KASIM, sometimes called MOOSEY REZA, to be his successor. This second appointment gave rise to another and greater division among the *Shiahs*: for, part of them denying JAFER SADIK's right to make it, declared in favour of the son of ISHMAEL, thence taking the name of *Ishmaelians* while the greater number of them adhered to MOOSA KAZIM, whom they acknowledged as the seventh *Imam*. From him the dignity descended lineally for five more generations, till it ended in the *Imam Mahadee* the twelfth and last, who is supposed by the sect to be still alive, though he has withdrawn for a time from human observation since his last appearance on earth. The great body of *Shiahs* who acknowledge MOOSA KAZIM and his descendants as the true *Imams* are called *Athna Asheriahs*, or Twelve-eans, as being followers of the twelve *Imams*, and also *Imameeans*, because, according to MR. SALE they assert that religion consists solely in the knowledge of the true *Imam*. But they arrogate to themselves the title of *Moomineen*, as being the *only* true believers.

The *Hanifeea* is the first, and by far the most numerous of the four *Sunni* or orthodox schools of Mahamadan lawyers. Its doctrines are law in the Turkish empire, and generally throughout the Mussulman countries of Asia, with the exception of Persia, where the *Shiah* is the prevailing sect. The Mahamadan Sovereigns of India were *Sunnis* of the *Hanifeea* sect, and the *Hanifeea* Code was the general law of the country so long as it remained under the sway of Mahamadans. Even in Oudh, where the actual rulers were of the *Shiah* persuasion, yet, so long as they preserved a nominal allegiance to the sovereigns of Delhi, the *Hanifeea* Code remained the law of the Province. After the assumption of regal dignity by GHAZI HYDER, the *Hanifeea* was generally superseded by the *Imameea* Code, until at length the latter had become the general law of the country at the time of its annexation to the British Empire.

The founder and acknowledged head of the sect was ABOO HANEEFA; but his two disciples, ABU YUSAF and MAHAMAD, attained to so great an eminence as expounders of his doctrines, that they are usually styled his companions, and their opinions are quoted by his followers as of scarcely less authority than those of the master himself.

Of the two sects which have thus so long subsisted side by side in India, the *Shiah* is the earlier as a school of law; for ABU HANEEFA received his first instructions in jurisprudence from the IMAM JAFER SADIK, though he afterwards separated from him, and established a school of his own. He remained, however, during life, a devoted partisan of the family of ALLIE. But his adherence to it seem to have been only political; for, on questions of law, he diverged considerably from the opinions of his early instructor. The differences between the leaders, whatever they may have been, were probably aggravated by religious rancour between their followers; and there are now many important points on which the schools differ. A few of these will be enumerated below.

Differences between the two Schools.—

i. Marriage.

i. *Marriage.*—According to the *Haneefites*, the contract of marriage must be for the lives of the parties, or the women must be the slave of the man; and it is only to a relation founded on a contract for life that they give the name of *Nikah* or marriage. According to the *Shiahs*, the contract may be either temporary, or for life, and it is not necessary that the slave should be the actual property of the man; for it is sufficient if the usufruct of her person be temporarily surrendered to him by her owner. To a relation established in any of these ways they give the name of *Nikah* or marriage; which is thus, according to them, of three kinds: *permanent*, *temporary*, and *servile*. According to the *Haneefites*, the words by which the contract is effected, may be *Sureeh* (express) or *Kinayat* (ambiguous). According to the *Shiahs*, they must always be express; and to the two express terms of the other sect (*Nikah* and *tuzweej*) they add a third (*Mutta*), which is rejected by the others as insufficient. Further, while the *Haneefites* regard the presence of witnesses as essential to a valid contract of marriage, the *Shiahs* do not deem it to be in anywise necessary. As to the causes of prohibition the *Haneefite* includes a difference of *Dar* or nationality among the causes of prohibition, and excludes *lian*, or imprecation, from among them; while the *Shiah* excludes the former, and includes the latter. There is also, some difference between them as to the condition and restrictions, under which fosterage becomes a ground of prohibition. The *Shiahs* do not appear to make any distinction between invalid and valid marriages, all that are forbidden being apparently void according to them.

ii. Repudiation of marriage.

ii. *Repudiation.*—As regards *repudiation* (*tulak* in the restricted sense, as applying to dissolutions of the marriage tie effected by the use of that word or others which are deemed equivalent) while the *Haneefites* recognize two forms, the *Sunnee* and *Budaivee* or regular and irregular, as being equally efficacious, and sub-divide the regular into two other forms, one of which they designate as *ahsun* or best, and the other as *husun* or good, the *Shiahs* reject hese distinctions altogether, recognizing only one form

the *Sunnee* or regular. So, also, as to the expressions by which repudiation may be constituted; while the *Haneefites* distinguish between what they call *sureeh* or by express words, which are inflections of the word *tulak* and various expressions which they term *Kinayat* or ambiguous, the *Shiahs* admit the former only. Further, the *Haneefites* do not require intention when express words are used, so that though a man is actually compelled to use them, the repudiation is valid according to them. Nor do they require the presence of witnesses as necessary in any case to the validity of a repudiation; while, according to the *Shiahs*, both intention, and the presence of two witnesses in all cases are essential. According to the *Haneefites*, repudiation may be made irrevocable by an aggravation of the terms, or the addition of a description, and three repudiations may be given in immediate succession or even *unico contextu*, in one expression; while, according to the *Shiahs* on the other hand, the irrevocability of a repudiation is dependent on the state in which the woman may be at the time that it is given; and three repudiations, to have their full effect, must have two intervening revocations. To the *bain* and *rujaee* repudiations of both sects, the *Shiahs* add one peculiar to themselves, to which they give the name of the *tulakool-iddut*, or repudiation of the *iddut*, and which has the effect of rendering the repudiated woman for ever unlawful to her husband, so that it is impossible for them ever to marry each other again.

iii. Parentage.

iii. *Parentage.*—With regard to parentage, maternity is established, according to the *Haneefites*, by birth alone, without any regard to the connection of the parents being lawful or not. According to the *Shiahs*, it must in all cases be lawful; for a *wulud-oozzina*, or illegitimate child, has no descent, even from its mother; nor are there any mutual rights of inheritance between them. For the establishment of paternity there must have been, at the time of the child's conception, according to both sects, a legal connection between its parents by marriage or slavery, or a semblance of either. According to the

Haneefites, an invalid marriage is sufficient for that purpose or even, according to the head of the school, one that is positively unlawful; but, according to the *Shiahs*, the marriage must in all cases be lawful, except when there is error on the part of both or either of the parents.

iv. Pre-emption.

iv. *Pre-emption* or *Shufa.*—According to the *Haneefites* the right may be claimed, *firstly* by a partner in the thing itself; *secondly* by a partner in its rights of water and way; and, *thirdly* by a neighbour. According to the *Shiahs*, the right belongs only to the first of these, with some slight exception in favour of the second. The claim of the third they reject altogether.

v. Gift.

v. *Gift.*—In gift the principal difference between the schools is that a gift of an undivided share of a thing, which is rejected by the *Haneefites*, is quite lawful according to the *Shiahs*. In appropriation and alms there do not seem to be any differences of importance between the two schools.

vi. Wills.

vi. *Wills.*—In wills the leading difference seems to be, that, while according to the *Haneefites*, a bequest in favour of an heir is positively illegal, it is quite unobjectionable according to the *Shiahs*.

vii. Inheritance.

vii. *Inheritance.*—The impediments to inheritance are four in number, according to the *Haneefites*, viz., *slavery*, *homicide*, *difference of religion*, *and difference of dar* or *country*. Of these the *Shiahs* recognize the first; the second, also, with some modification, that is, they require that the homicide be intentional, in other words, murder; while with the *Haneefites* it operates equally as an impediment to inheritance, though accidental. For difference of religion, the *Shiahs* substitute infidelity; and difference of country they reject entirely.

Exclusion from the whole inheritance, according to the *Haneefites* "is founded upon and regulated by two principles. The one is that a person who is related to the deceased through another has no interest in the succession during the life of that other; with the exception of half

brothers and sisters by the mother, who are not excluded by her. The other principle is, that the nearer relative excludes the more remote." The former of these principles is not expressly mentioned by the *Shiahs*; but it is included without the exception in the second, which is adopted by them, and extended so as to postpone a more remote residuary to a nearer sharer,—an effect which is not given to it by the *Haneefites*. With regard to partial exclusion or the diminution of a share, there is also some difference between the sects. According to the *Haneefites* a child or the child of a son, how low soever, reduces the shares of a husband, a wife, and a mother, from the highest to the lowest appointed for them; while, according to the *Shiahs*, the reduction is effected by any child, whether male or female, in any stage of descent from the deceased. Further, when the deceased has left a husband or wife, and both parents, the share of the mother is reduced, according to the *Haneefites*, from a third of the whole estate to a third of the remainder, in order that the male may have double the share of the female; but, according to the *Shiahs*, there is no reduction of the mother's third in these circumstances, though, when the deceased has left a husband, the share of the father can only be a sixth.

The two schools differ materially as to the relatives who are not sharers. These are divided by the *Haneefites* into residuaries and distant kindred. The residuaries in their own right they define as every male in whose line of relation to the deceased no female enters; and "the distant kindred" as, "all relatives who are neither sharers nor residuaries." The residuaries not only take any surplus that may remain after the sharers have been satisfied, but also the whole estate when there is no sharer, to the entire exclusion of the distant kindred, though these may, in fact, be much nearer in blood to the deceased. This preference of the residuary is rejected with peculiar abhorrence by the *Shiahs*, who found their objection to it, certainly with some appearance of reason, on two passages of the *Quoran*. Instead of the triple division

of the *Haneefites*, they mix up the rights of all the relatives together, and then separate them into three classes, according to their proximity to the deceased, each of which in its order is preferred to that which follows; so that while there is a single individual, even a female, of a prior class, there is no room for the succession of any of the others.

Within the classes operation is given to the doctrine of the return by the *Shiahs*, nearly in the same way as by the *Haneefites*: that is, if there is a surplus over the shares it reverts to the sharers, with the exception of the husband or wife, and is proportionately divided among them. According to the *Haneefites*, this surplus is always, intercepted by the residuary; and it is only when there is no residuary that there is with them any room for the doctrine of the return. When the shares exceed the whole estate, the deficiency is distributed by the *Haneefites* over all the shares, by raising the extractor of the case,—a process which is termed the *awl*, or increase. This is also rejected by the *Shiahs*, who make the deficiency to fall exclusively upon those among them whose relationship to the deceased is on the father's side.

CHAPTER II.

MARRIAGE.

Inferior social position of women among Mahamadans.

1. The first and the most important of domestic relations is that of *husband and wife*. Among the Mahamadans as among the Hindus, the social position of women is very low indeed, parents and guardians generally

having the power of disposing them in marriages without consulting their feelings.

Marriage, a civil contract among Mahamadans as among the English; not so with the Hindus.

2. Under the Mahamadan Law, as under the English Law, *marriage* is a *civil* contract and *revocable* at the will of either party. The Hindu on the other hand looks upon it as a *religious union* which continues *for ever*. "A Hindu marriage" says MR. MAYNE "is the performance of a religious duty, not a contract."[1]

Differences between the rights of the English and the Mahamadan wife.

"Marriage is merely a civil contract," says BAILLIE, in his *Digest of Mahamadan Law*, "and differs in some other important respects from the same contract in this country (England). It confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing and being sued, without his consent or concurrence, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend; and is in no respect under his legal guardianship. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. He may also have as many as four wives at one time. A practice prevails in India which operates as a considerable check on the exercise of these powers of the husband. It is usual for Mussulmans, even of the lowest orders, to settle very large dowers on their wives. These are seldom exacted, so long as the parties live harmoniously together; but the whole dower is payable on divorce or other dissolution of marriage, and a large part of it is usually made exigible at any time, so that a wife is enabled to hold the dower *in terrorem* over her husband; and divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich."

1 *Hindu Law*, § 84.

Nikka or marriage = Carnal Conjunction

3. The Mahamadan Law recognises two forms of valid marriages known as the *Nikah* and *Shadi*, but no religious ceremonies seem to be essential. It has been held (I. L. R., VIII. C., 736) that the *Mutta* form of marriage does not admit of repudiation under the law of the *Shiah* sect of Mahamadans, and it is a question of doubt whether the form of divorce called *Zihar* may be exercised in the *Mutta* form of marriage. It was also decided that under the law of the *Shiah* sect a *Mutta* wife is not entitled to maintenance, but such a provision of law does not interfere with the statutory right to maintenance given by Section 536 of the Code of Criminal Procedure, the Court saying, "a right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a suit in a Civil Court. But we think that this right, depending upon the personal law of the individual, is altogether different from the statutory right to maintenance, given by Section 536, in every case in which a person, having sufficient means, neglects or refuses to maintain his wife." But in a suit brought by a Mahamadan of the *Shiah* sect against his wife, belonging to the same pursuasion, for a declaration that the relationship of husband and wife had terminated and that he was not liable to pay maintenance to her which he had been directed to do by an order passed under the provisions of the Code of Criminal Procedure

Two forms of marriage, *Nikah* and *Shadi*.

The incidents of the *Mutta* marriage.

on the allegation that the marriage was of a *Mutta* form, and that he on the 22nd February 1882 had made *Hiba-i-muddat* (gift of the term) of whatever period then there might remain, unexpired; the wife pleaded *inter alia* that her husband was not competent to dissolve the marriage tie within the contracted period without her consent, and that if under Mahamadan Law the consent was unnecessary the Court was bound in administering justice, equity and good conscience to modify the strict law in this respect; held, that although the ordinary law of divorce does not exist in respect of marriages by the *Mutta* form, they can nevertheless be terminated by the husband giving away the unexpired portion of the term for which the marriage was contracted and the consent or acceptance on the part of the wife is not necessary for the dissolution of the marriage; held, further, that although the Court would not grant an injunction restraining the Magistrate from enforcing the order of maintenance, the plaintiff was entitled to ask the Magistrate to abstain from giving further effect to his order after the Civil Court had found that the relationship of husband and wife had ceased to exist. XVI C., 276.

But the Hindu Law which originally recognized eight forms of marriages, known as *Brahma*, *Daiva*, *Arsha*, *Prajapatya*, *Asura*, *Gandharva*, *Rakshesa*, *Pisacha*[1] now recognizes only two forms, *Brahma* and *Asura*, the rest being declared obsolete, and *religious ceremonies* are very *essential*.

1. MAYNE'S *Hindu Law*, § 75.

4. *Puberty* and *freedom* of *consent* appear to be essential to a marriage under the Mahamadan and English Laws, but both these are not essential to a Hindu marriage, and nothing is more common than to find marriages among Hindus performed at very early ages.

Essentials to a marriage in Mahamadan Law.— Puberty and free consent.

Not necessary in Hindu Law.

"Consenting mind is not necessary and its absence whether from infancy or incapacity is immaterial."[1]

5. According to the Hindu Law marriage is indispensable to women (especially in the higher classes), while this is not enjoined by the Mahamadan and English Laws. And a Hindu woman who was once been married, cannot unite herself to *another* husband except in the lowest classes, and must for ever remain a widow after the death of the husband; the English and Mahamadan laws, however, allow a woman to marry a second husband, either after the *death* of the first, or even during his life after *divorce*. The Indian Legislature has, however, declared that Hindu widows could remarry, but the Act (XV of 1856) has remained a dead letter.

Marriage is indispensible for women under Hindu Law, not so in Mahamadan Law.

Remarriage of women prohibited by Hindu Law; Mahamadan Law allows it on divorce or widowhood.

6. Though a Hindu wife can be put away by her husband, the marriage relation does not cease, and she is still his wife.

Marriage tie indissoluble among Hindus.

7. The Mahamadan and Hindu Laws agree however in allowing a *plurality* of wives simultaneously (the Mahamadan Law limiting their number to four in the case of a free man and

Polygamy allowed both in Hindu and Mahamadan Law.

1. MAYNE'S *Hindu Law*, § 84.

two in the case of a slave while the Hindu Law imposes no limits whatever); differing in this respect from the English law, which allows a man only one wife at a time, and under which the marriage of two wives simultaneously is an offence known as *bigamy*.

"It is now quite settled" says Mr. MAYNE "that a Hindu is absolutely without any restriction as to the number of his wives, and may marry again without his wife's consent or any justification except his own wish."[1]

Limits of inter-marriage.

8. These laws also differ as to the limits within which marriages are allowed or prohibited. The Hindu law, basing all its principles on *religion*, prohibits the marriage of a man with a woman of the same *Gotra*, *i. e.*, one descended from the same progenitor in direct male line. While there is nothing in the English and Mahamadan laws to prevent the marriages of the children of brothers, the Hindu law looks upon it as incestuous and prohibits such a union in whatever degree removed. On the other hand while the marriage of a deceased wife's sister is forbidden totally by the English and Mahamadan Laws, (at least during the life time of the wife in the latter), the Hindu law does not prohibit it. The Hindu law does not recognize any prohibition arising from *fosterage*, while the English and Mahamadan laws recognize it.

"The degrees of consanguinity and affinity within which marriage is prohibited are," says BAILLIE, "nearly

1. MAYNE'S *Hindu Law*, § 85.

the same as under the Mosaic law. But under the Mahamadan law affinity may be contracted by illicit intercourse, as well as by marriage, and, in some instances, by irregular desires, accompanied by the sight or touch of certain parts of the person. To these grounds of prohibition must be added some that are peculiar to the Mahamadan law. Thus, a man may not marry a woman related to him by fosterage, a prohibition which embraces not only the foster parents, but also all persons related to them within the prohibited degrees of consanguinity and affinity. So also, a *Mooslim* or man of the Mussalman religion, is prohibited from marrying an idolatress, or a fire-worshipper, though he may marry a Christian, or a Jewess; and a *Mooslimah*, or woman of the Mussalman religion, cannot lawfully be married to any one who is not of her own faith. A difference of *Dar*, or nationality, may also be classed among the prohibitions of marriage; for, if one of the married pair should happen to change his or her nationality, the marriage between them would be at an end. For this and other purposes generally, nations or peoples are held to differ only as they are or are not the subjects of a Mussalman state. Among those who are not the subjects of a Mussalman state, difference of allegiance is recognised as a further difference of countries; but the effect of this distinction is confined to questions of inheritance. Moreover, though a Mussalman is allowed to have as many as four wives, he cannot lawfully have two women at the same time who are so related to each other by consanguinity or affinity that, if one of them were a male, marriage between them would be prohibited. This objection does not apply to his having the women in succession; for a Mussalman is not prohibited from marrying the sister of his deceased or divorced wife."

"The selection of persons to be married is limited" says MR. MAYNE "by the two rules; first, they must be chosen outside the family; secondly, they must be chosen inside the caste."

Valid and invalid marriages; their incidents.

9. The Mahamadan and the English Laws allow marriages after *puberty;* but the Hindu Law does not (especially among the Brahmins). Marriage, like other contracts, is constituted by *Eejab-o-kubool*, or declaration and acceptance. But some conditions are required for its legality; and an illegal, or invalid marriage, though after consummation similar in some of its effects to one that is valid, does not confer any inheritable rights on either of the parties to the property of each other.

"The principal incidents of marriage" says BAILLIE "are the wife's rights to dower and maintenance, the husband's rights to conjugal intercourse and matrimonial restraint, the legitimacy of children conceived, not merely born, during the subsistence of the contract, and the mutual rights of the parties to share in the property of each other at death. The last incident belongs exclusively to valid marriages. The right to dower is opposed to that of conjugal intercourse, and the right to maintenance opposed to that of matrimonial restraint. Hence, a woman is not obliged to surrender her person until she has received payment of so much of her dower as is immediately exigible by the terms of the contract, and is not entitled to maintenance except while she submits herself to personal restraint."

Property rights of the husband and wife under the English, the Hindu and the Mahamadan Law.

10. The English, the Hindu and the Mahamadan Laws also differ in the rights of property of the *wife* during coverture, and as to her right to succeed to her husband's property after his death. The Hindu Law always looks upon a woman as a disqualified owner, and looks upon her as under perpetual protection of a male, her father while young, her husband during cover-

ture, her son during old age, being considered her protectors. Marriage generally merges the property of the *wife* in that of the husband by the Hindu Law, and he becomes the *de facto* owner of his wife's property. All these Laws however recognise separate property in the woman, and that of different kinds. According to the Mahamadan Law marriage does not vest the wife's property in the husband, and during coverture she continues a *full owner* of whatever property she had before marriage or acquires after it. "One grand distinction" says MACNAUGHTEN "between the Mahamadan Law and our own (English), and in which the former resembles the Civil Law is that, according to it, the husband and wife are considered as distinct persons, who may have *separate estates, contracts, debts* and *injuries*." The legal capacity of the wife is not sunk in that of the husband and she can *sue* and *be sued*, without his consent as if she were still unmarried. The husband is not liable for her debts though he is bound to maintain her. The Hindu Law however gives her uncontrolled power only over her peculiar property known as *Stridanam*, more properly *Soudayakam*,—gifts made to her through natural love and affection by her husband or other near relations; and as to the property inherited by her from her father, she is but a qualified owner—a mere life-tenant—handing it over to her father's heirs. Under the English Law marriage *settlements* tend to

keep the wife's property separate, and give her uncontrolled power over it, which otherwise would probably vest in the husband. While the wife under the Mahamadan Law is always entitled to a share in her husband's property, the sons—including grandsons and great grandsons—always exclude a Hindu wife from inheriting her husbands's property, while in the case of an undivided Hindu family a joint coparcener excludes her. And while a husband under Mahamadan Law succeeds to a share in the property of his wife, a Hindu husband has no right to the property inherited by his wife from her father, and is excluded by her children from inheriting even her own *peculiar* property. Under the English Law each succeeds to the property of the other as heir in the absence of a devise by will, which each is at liberty to make.

Decided cases on the subject of marriage.

11. The following decisions on the subject of marriage may be studied with advantage:—

(1) Where a son has been uniformly treated by his father and all the members of his family as legitimate, a presumption arises under the Mahamadan law that the son's mother was his father's wife. (I. L. R., II C., 184.)

(2) The acknowledgment and recognition of children by a Mahamadan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children provided certain conditions negativing this relationship are absent. (I. L. R., VIII C., 422).

(3) The *Mutta* form of marriage does not admit of repudiation under the law of the *Shiah* sect of Mahamadans. [1]

(4) A woman of the *Sunni* sect of Mahamadans marrying a man of the *Shiah* sect, is entitled to the privileges secured to her married position by the law of her sect, and does not thereby become governed by the *Shiah* law.[2]

CHAPTER III.

DOWER.

The endowment of a wife under Mahamadan Law.

1. "The mode by which a wife is endowed according to Mahamadan Law," says MACNAUGHTEN "partakes partly of the nature of a jointure and partly of common dower, according to the law of England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her Muhr-Misel or her proper dower, which, it must be admitted, is but ill-defined, being so much as it may be found to have been usual on an average estimate, to endow other females of the same family with."

"Dower," says BAILLIE, "though not the consideration of the contract, is yet due without any special agreement, such dower being termed 'dower of the like,' or 'the proper dower.' But when any dower has been specified

1. I. L. R., VIII C., 736.
2. I. L. R., VI A., 205.

by the contract, it supersedes the proper dower, which in that case comes into operation only on the failure of the specified dower. When dower is expressly mentioned in the contract, it is usual to divide it into two parts, which are termed *mooujjal*, or prompt and *moowujjal*, or deferred; the prompt being immediately exigible, while the deferred is not payable till the dissolution of the marriage."

Right to Dower.

2. Dower is a necessary concomitant of the contract of marriage, and it becomes due on the termination of the Marriage (though it is usual to stipulate for delay as to the payment of a part), or on the death of either party or on divorce; and as a check against the freedom of divorce, and with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay. A woman has a *lien* for her dower on her deceased husband's estate, and dower is considered in the light of a *debt*, and the claim to dower precedes the claim to *inheritance*; and if payment of dower be unjustly withheld the wife may refuse to reside with her husband and may enforce maintenance from him. This right of *dower*, is separate from the wife's right of *maintenance*, and her right to succeed to a share of her husband's property as a legal sharer.

No dower under Hindu Law.

3. There is nothing like dower known to the Hindu Law, and any special gifts made to a *wife* by her *husband* when actually given, form portion of her separate property, but the law does not recognize any thing like a claim to

such by a Hindu wife against her husband; but there is the right of the wife to be maintained from the moment of her marriage, and this right could be enforced against the husband in a Court of Judicature, if he fails to maintain his wife, and could only be *defeated* by the wife's unchastity. "In Mahamadan Law also" says MACNAUGHTEN "the right of a wife to maintenance is expressly recognised." In the recent case of *Abdool Fettah Moulvie* v. *Zabanusse Khatun*[1] it was held that in a suit for maintenance by a Mahamadan wife against her husband, where there was no decree or agreement for maintenance before suit, the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree; and also that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life. In both the points however, the decision would be different under the Hindu Law, for a Hindu wife or a widow is entitled not only to *past* maintenance, but also to future maintenance during her natural life. Apparently the English Law would allow past maintenance but would restrict it until divorce or widowhood.

Right to maintenance under the Hindu, Mahamadan and English Laws.

4. The only points worth noting in connection with this subject under the Mahamadan Law are :—

Points to be noted in connection with *dower*.

(1) Stipulated dower, however excessive, is recoverable at law. It was held by a Full Bench of the Allaha-

i. Stipulated dower always recoverable.

1. I. L. R., VI C., 631.

bad High Court that a Mahamadan widow was entitled to the whole of the dower, which her deceased husband had, on marriage, agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower debt.[1]

Husband cannot sue for restitution of conjugal rights without paying dower which is *prompt*.

(2) A husband cannot sue to recover his wife without paying her dower which is exigible. If a wife's dower is 'prompt,' she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to co-habit with him, until he has paid her dower, and that notwithstanding that she may have left his house without demanding her dower, and only demands it when he sues, and notwithstanding also that she and her husband may have already co-habited with consent since their marriage.[2] He cannot maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by co-habitation for five years, when the wife's dower is "prompt" and has not been paid.[3]

Presumptions as to whether dower is *prompt* or *deferred*.

(3) A portion at least of the stipulated dower is presumed to be 'prompt' when the whole is not stipulated to be 'deferred.' When at the time of marriage the payment of dower has not been stipulated to be 'deferred,' payment of a portion of the dower must be considered 'prompt.' The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the court, with reference to the status of the wife and the amount of the dower. In a case where the wife came from the family of prostitute, before marriage, the portion was fixed as one-fifth.[4] The nature of the dower, when not expressly specified at the time of marriage, is not to be determined with reference to custom but a portion of it must be considered prompt. The amount to be considered prompt

1. *Sugra Bibi* v. *Musuma Bibi*, I. L. R., II A., 573.
2. I. L. R., I A., 483.
3. I. L. R., II A., 831. See also, I. L. R., VI A., 605.
4. I. L. R., I A., 483.

must be determined with reference to the portion of the wife, and the amount of the dower, what is customary being at the same time taken into consideration. [1]

Gift in lieu of a dower-debt considered as sale.

(4) The provisions of Mahamadan Law applicable to gifts made by persons laboring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale.[2] Where a husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower, it was held that such a transfer was a sale and gave rise to the right of pre-emption.[3]

Dower need not be stipulated for beforehand.

(5) It is not necessary to constitute dower that the dower should be agreed upon before marriage: it may be fixed afterwards. [4]

Limitation in case of dower.

(6) Widow's heirs may claim their dower at any time; and payment of the dower may also be enforced at any time [5]; and until demand is made no cause of action accrues for dower. [6] *Vide* also Articles 103 and 104 of Sch. II of Act XV of 1877.

When fixed by minor, not recoverable.

(7) Dower fixed by a minor without the consent of his guardian is not recoverable.

Lien for dower on husband's property.

(8) Where there is no agreement on the part of the husband to pledge his estate for dower, but his widow obtains actual and lawful possession of the estate under a claim to hold them as heir and for her dower, she is entitled to retain that possession until her dower is satisfied. And the heirs of the husband could not recover the possession of their shares until that satisfaction had taken place. [7]

1. I. L. R., I A., 596.
2. I. L. R., II A., 854.
3. I. L. R., V A., 65.
4. I. L. R., III A., 266, P. C.
5. VI M. H. C. R., 29.
6. VIII M. J., 219.
7. *Mussumat Bebee Backun* v. *Sheik Hamid Hossin*, 14 M. I. A., 377.

CHAPTER IV.

PARENTAGE.

The issue of mere cohabitation may be legalised under Mahamadan law by subsequent declaration.

1. According to the Mahamadan Law the issue of mere co-habitation can be legalized by a mere declaration, but not so in other laws. By the Scotch law subsequent marriage seems to legalize the previous born issues, while under the English Law marriage after co-habitation is not illegal; but the Hindu Law *proper* does not recognise any thing like marriage after co-habitation. The Hindu and English Laws do not recognise any thing like acknowledgment.

"It is remarkable" says MACNAUGHTEN "with what tenderness the rules relative to marriage and parentage are framed. MR. EVANS, in his Appendix to Pothier, treating of hearsay evidence, observes, 'there is a disinclination to bastardize issue, which is perhaps carried too far. When parties are actually married, and there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the admission of evidence to the contrary; but when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy which requires that those who have the real rights in their favor should meet with obstacles in substantiating the proof of usurpation.' But the Mahamadan lawyers carry this disinclination much further: they consider it a legitimate course of reasoning, to *infer* the existence of marriage from the proof of co-habitation. None but children who are in the strictest

sense of the word spurious are considered incapable of inheriting the estate of their putative fathers. Where by any possibility, a marriage may be presumed, the law will rather do so than bastardize the issue; and whether a marriage be simply voidable or void *abinitio*, the offspring of it will be deemed legitimate. Though the marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate, still there is no more difficulty in establishing a marriage by the Mahamadan than by the Scotch Law, according to which, though no formal consent should appear, marriage is presumed from the co-habitation, or living together at bed and board of a man and a woman, who are generally reputed husband and wife. Marriage also according to the Code is entirely a civil contract. One grand distinction between the Mahamadan Law and our own (English,) in which the former resembles the civil Law, is that according to it the husband and wife are considered as distinct persons, who may have separate estates, contracts, debts, and injuries."

In the late case of *Mahamad Azam-at Ali Khan* v. *Lalli Begum*[1] their Lordships of the Privy Council said, "The rule of *Mahamadan Law* is that the acknowledgment and recognition of children by a Mahamadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist. It has been decided in several cases that there need not be proof of an express acknowledgment; but that an acknowledgment of children by a Mahamadan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend upon the circumstances of each particular case in which it arises."

In the case of *Mahamad Ismail Khan* v. *Fidayat Unnissa*, SPANKIE, J. (of the Allahabad High Court) says, "Their Lordships of the Privy Council do not question the position that according to the Mahamadan Law, the legitimacy or legitimation of a child of Mahamadan

1. I. L. R., VIII C., 422.

parents may properly be presumed or inferred from circumstances without proof, either of a marriage between the parents, or of any formal act of legitimation. But the presumption of legitimacy from marriage, according to the Judgments of their Lordships, follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not ante-dated by relation: an ante-nuptial child is illegitimate, a child born out of a wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundation of the Law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment . . . . A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds and cannot be permitted to over-ride over-balancing proofs whether direct or presumptive." In the same case, referring to *Khajah Hidayut Pollah* v. *Rai Jan Khanum* [1] their Lordships observe that the co-habitation spoken of in that judgment was continual; it was proved to have preceded conception, and to have been between a man and women co-habiting together as man and wife, and having that repute before the conception commenced; and the case decided that not co-habitation simply and birth, but that co-habitation and birth with treatment amounting to acknowledgment, sufficed to prove legitimacy.[2]

1. 3 M. I. A., 295.
2. I L. R., III A., 726.

In the case of *Mahammad Allahbad Khan* v. *Mahmad Ismal Khan* it was held that the effect of an acknowledgment by a Mahamadan that a particular person born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the status of legitimacy, is to confer upon such person the status of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. In that case it was held by PETHRAM, C. J., (BRODHURST, J., dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate although the evidence showed that the deceased never treated him as a legitimate son or intended to give him the status of legitimacy.[1]

But in the same case BRODHURST, J., was of opinion that the letters and documents filed in the case did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the status of a son capable of inheriting.

On an appeal,[2] it was held by EDGE, C. J. and STRAIGHT, J., that the rules of Mahamadan law relating to acknowledgments by a Mahamadan of another as his son are rules of the substantive law of inheritance; that such an acknowledgment, unless certain impediments exist confers upon the person acknowledged the status of a legitimate son capable of inheriting; and that when there is no proof of legitimate birth or of illegitimate birth, and the paternity of a child is unknown in the sense that no specific per-

1. I. L. R., VIII. A. S., 234.
2. I. L. R., X. A. S., 289.

son is shown to be the father, then the acknowledgment of him by another who claims him as a son affords a conclusive presumption that he is the legitimate child of the acknowledger and places him in that category; and that such a status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any one claiming through him.

In the same case, MAHMOOD, J., says "Although according to the Mahamadan law, *Ikrar* or acknowledgment in general stands upon much the same footing as an admission as defined in the Evidence Act, acknowledgments of parentage and other matters of personal status stand upon a higher footing than matters of evidence, and form a part of the substantive Mahamadan law. So far as inheritance through males is concerned, the existence of consanguinity and legitimate descent is an indispensable condition precedent to the right of succession, and such legitimate descent depends upon the existence of a valid marriage between the parents. Where legitimacy cannot be established by direct proof of such a marriage, acknowledgment is recognized by the Mahamadan law as means whereby marriage of the parents or legitimate descent may be established as a matter of substantive law. Such acknowledgment always proceeds upon the hypothesis of a lawful union between the parents and the legitimate descent of the acknowledged person from the acknowledger, and there is nothing in the Mahamadan law similar to adoption as recognized by the Roman and Hindu systems, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatized by acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth, is a matter of uncertainty.

In a recent case the Privy Council held that an acknowledgment and recognition by a Mahamadan of his

natural son, with a view to give him the *status* of son capable of inheriting was sufficient to enable him to succeed as heir. Their Lordships observe: "The real issue in this case is whether *Selim*,—who was beyond question the actual son of *Amir Hossein* by a woman known as *Domni*—had been so recognized by *Amir Hossein* as to give him the *status* of a son capable of inheriting..... A question of importance was raised by the counsel for the appellant. He contended that *Selim* could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between *Amir Hossein* and *Domni* was an adulterous intercourse, as she had been previously married to a person then and still living, and that consequently, whether her connection with *Amir Hossein* was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that, according to Mahamadan law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition. It, therefore, becomes necessary to consider in the first instance whether the alleged marriage of *Domni* to a man named *Jummun* has been established by satisfactory proof." After going into the evidence they observe: "Their Lordships have then come to the conclusion that the parties failed to establish this marriage between *Jummun* and *Domni*. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for the appellant; namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment.....They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahammad Azmat Ali Khan* v. *Mussumat Lalli Begum*[1] which is as follows: "that the acknowledgment and recognition of children by a Mahamadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case." Their Lordships

1. L. R., 9. I. A. 8.; VIII. I. L. R., C. S., 422.

do not intend at all to depart from that rule, or to throw any doubt upon it. In that case there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son from which an inference is fairly to be deduced that the father intended to recognize him and give him the *status* of a son capable of inheriting and it was held that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir[1]

Dicided cases on the subject of legitimacy and acknowledgment.

2. The following abstract of the case-law on the subject of legitimacy and acknowledgment would be found interesting.

The Mahamadan law is very scrupulous in basterdising the issue of any connection in which it can be shown by presumption that there has been co-habitation and acknowledgment of paternity.[2] It allows legitimacy to be inferred from circumstances without direct proof; and the Privy Council has held that the legitimacy or the legitimation of a child may be presumed or inferred from circumstances, without proof, or at least without any direct proof, of a marriage between the parents, or of any formal act of legitimation.[3] A public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it and the mother of the child without the father specifically connecting his paternity with any particular woman; to rebut this presumption the onus of proving the impossibility of the marriage is on the other side.[4] Where a son has been uniformly treated by his father and all the members of the family as legitimate a presumption arises that the son's mother was his father's wife.[5] The acknowledgment of a father

1. Syed Sadakut Hossein *v.* Syed Mahamod Yusoof L. R. I. A. XI. 31; I. L. R., X. C. S., 663.
2. 5. W. R., 5: I. L. R., 2. C. S., 184.
3. 8. M. I. A., 136.
4. 3. W. R., 187.
5. I. L. R., 2. C. S., 184.

renders a son or daughter a legitimate child and heir unless it is impossible for the son or daughter to be so,[1] whether the mother was or was not lawfully married to the father.[2] An acknowledgment that a person is his son is not *primâ facie* evidence of the fact which may be rebutted, but establishes the fact acknowledged. Such acknowledgment is valid when the age of the parties admit of the relationship between them and where the descent of the party acknowledged has not been already established from another.[3]

The acknowledgment of a son by a father need not be a formal acknowledgment; if it can be made out from his acts and conduct it will be sufficient.[4] The acknowledgment need not be of such a character as to be evidence of marriage.[5] The declaration of acknowledgment ought to be clear and distinct in respect to each child, and the children, or those of them who have reached years of discretion, ought to come forward and acknowledge their father.[6] The acknowledgment and recognition of children as one's sons may without proof of his express acknowledgment of them be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent.[7] Though marriage and acknowledgment may be presumed still the presumption must be one of fact and as such subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from raising the presumption of a prior marriage *primâ facie* at least excludes that presumption.[8] Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment has been left an open question by the Privy Council, which decided that the acknowledgment of a natural born son gives him the status of a

1. 5. W. R., 132.
2. 10. W. R., 45.
3. 4. B. L. R., A. C., 55.
4. 2. B. H. C. R., 285.
5. 15. W. R., 403.
6. 20. W. R., 352.
7. I. L. R., 8. C. S., 422.
8. 11. M. I. A., 94.

legitimate son unless certain conditions already referred to exist.[1] Where in a transaction with a third party A describes B as his son and B speaks of A as his father, the acknowledgment of sonship is complete and formal and conclusive against all parties.[2] A man cannot acknowledge a brother so as to establish the "Nasab." A recital in a petition in which A, B & C describe themselves as the son and daughter of D, was not such an acknowledgment as to constitute between them the status of full brotherhood and heirship. The acknowledgment by one man of another as his brother is not valid so as to be obligatory on the other heirs, though it is binding as against the acknowledger himself.[3]

Mere continual cohabitation without proof of marriage or of acknowledgment is not sufficient to raise such a legal presumption of marriage as to legitimise the offspring.[4] The son of a slave girl or the son of a woman with whom the father was not married might be raised to the status of a legitimate son by acknowledgment by the father.[5]

CHAPTER V.

DIVORCE.

Facility of Divorce according to Mahamadan Law and its absence under the Hindu Law.

1. "The latitude granted by the permission of polygamy" says MACNAUGHTEN "and the apparent facility of divorce, are not, it must be admitted, in accordance with the strict principles of impartial justice, but the evil, I believe, exists chiefly in theory, and but little inconvenience is found to follow it in practice."[6]

1. I. L. R., 10. C. S., 663.
2. 20. W. R., 164.
3. 21. W. R., 113.
4. 11. M. I. A., 94.
5. 2. B. H. C. R., 285; I. L. R., 10. C. S., 663.
6. Mac. Pre. Remarks, p. xxii.

"Their sentence of divorce" he says elsewhere "is pronounced with as much facility as was repudiation among the Romans in case of espousal. There is no occasion for any particular cause, mere whim is sufficient,"[1] The Hindu law knows no such thing as divorce, but a Calcutta case affirms a special local custom of divorce in Assam even among Hindus..

In that case, KEMP, J., said "We think that the Judge was right so far in holding that the Hindu law does not contemplate divorce: but we think that he was clearly wrong in holding, as he has done, broadly, that a custom (respecting divorce) even if established, cannot override the general provisions of the Hindu law. There can be no doubt that the Hindu law has been affected in particular districts by particular usages and these usages have hitherto been respected unless clearly repugnant to the principles of Hindu law. The text lays down that reason and justice are more to be regarded than mere texts, and that wherever a good custom exists it has the force of Law."[2]

MR. MAYNE in his valuable Treatise of Hindu Law states: "He (a Hindu) cannot however, divorce his wife except by special local usage (and such a usage has been affirmed in Assam), nor does conversion to Christianity with its consequence of expulsion from caste, operate as a dissolution of the union."[3] "The right of a divorce and second marriage"[4] says MR. MAYNE elsewhere, "has been repeatedly affirmed by the Bombay Courts. So, in Southern India, widow marriage and divorce is common among many of lower classes, such as the Vellalans of the Palanis, the Marawars (except in the case of the women of the Sambhu Nattan division), the Kallans,

1. Mac. Pre. Remarks, p. xxv.
2. I. L. R., III. C. S., 305.
3. Mayne's 4th Edition, 87.
4. Mayne's 4th Edition, 89.

the Pallans, the tank diggers, the potters, the barbers, and the pariahs generally. In the better classes, such as the oilmongers, the weavers, and a wandering class of minstrels, called the Bhat Rajahs, who claim to be Kshatriyas, it is found in some localities and not in others. It is not practised at all among the Brahmins and Kshatriyas, or among the higher classes of Sudras, such as the shepherds, the Komaty caste, the writers, or the five artisan classes, who claim equality with the Brahmans and wear the thread. Similarly the Bengal High Court has recognised the validity of widow marriage among the Nomosudras. The degree in which divorce and widow marriage prevails is probably in the direct ratio to the degree in which the respective castes have imitated Brahmin habits."

Facility of Divorce.

2. No decree of court, nor any other act of a solemn nature, is requisite to annul a marriage. The mere *putting* away of the wife by the husband is sufficient to effect a divorce. A vow of abstinence, made by the husband and maintained inviolate for a period of four months, amounts to an irreversible divorce. The husband's making oath, accompanied by an imprecation as to his wife's infidelity, is sufficient to effect a separation[1] A wife is also at liberty with her husband's consent to purchase, from him, her freedom from the bonds of marriage; and established impotency is a ground for admitting a claim to separation on the part of the wife.

In a recent Calcutta case, PRINSEP, J., observes :—

"The Mahamadan law on the subject, which has been laid before us, provides for the *delegation* of the power of *divorce* by the husband to the wife on certain occasions by word of mouth, but it no way, so far as it has been laid

1. MacNaughten, Chap. vii. pp. 27—29.

before us, limits the exercise of that power to those occasions. It would seem rather that, by providing how the wife should act, it recognises her power to *divorce* her husband, if he should give her the power to do so. All the occasions, specially provided for, are what I may term casual. We are aware of no reason why an agreement, entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to *divorce herself* under the form prescribed by Mahamadan law, should not be carried out."[1]

3. As an instance of the facility of divorce may be mentioned the case of *Hamad Ali* v. *Intiazan*[2] In that case a Mahamadan had said to his wife, when she insisted, against his wish, on leaving his house and going to that of her father's, that if she went, she was his paternal uncle's daughter, meaning thereby, that he would not regard her on any other relationship and would not receive her back as his wife; and it was held, that the expression used by the husband to the wife being used with intention, constituted a *divorce*, which became absolute if not revoked within the time allowed by the Mahamadan law. A very recent Madras case[3] decides that no special expressions are necessary to constitute a valid divorce, and that the words need not be repeated thrice except when the repudiation is final.

Their Lordships say: "We agree with the Judge that no special expressions are necessary under Mahamadan

1. *Hamidoollu* v. *Faizunnissa*, I. L. R., VIII. C. S., 327.
2. I. L. R., II. A. S., 71.
3. I. L. R., XII. M. S., 63.

law to constitute a valid divorce. It is sufficient if they clearly indicate an intention to put an end to the relation of husband and wife; nor do we consider that the expressions should be repeated thrice except when the repudiation is final and irrevocable. If the divorce pronounced is liable to be reversed, as in the case before us, and if it is not reversed within the period of *iddut*, it becomes thereafter irrevocable. The same view was taken by the High Court of Allahabad in *Hamad Ali* v. *Intiazan*."[1]

Right to maintenance how affected by divorce.

4. The facility for *divorce* affects the wife's right to maintenance; and maintenance under that law can be made payable only from the date of the decree and only during the continuance of the marriage.

The Calcutta High Court say: "As to the first point (that no orders ought to have been made for past maintenance) the law is stated thus in BAILLIE'S *Digest*, p. 443:— When a woman sues her husband for maintenance for a time antecedent to any order of the Judge or mutual agreement of the parties, the Judge is not to decree maintenance for the past . . . . . We think, therefore, that as in this case no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from the date of the decree. We think it also quite clear that maintenance can only be payable during the continuance of the marriage." *Abdool Futteh Moulvie* v. *Zaleunnessa Khatune*[2]. It is unnecessary to point out that under the Hindu law arrears of maintenance could be decreed unless barred, and maintenance awarded is payable during the plaintiff's natural life.

In another case[3] it was held that under the law of the *Shiah* Sect a *Mutta* wife is not entitled to maintenance, but that such a provision of law does not interfere with the statutory right to maintenance given by S. 536 of the Code of Criminal Procedure.

1. I. L. R., II. A. S., 71.
2. I. L. R., VI. C. S., 631.
3. I. L. R., VIII. C. S., 736.

Divorce under the English and the Hindu Laws.

5. The English law, though it allows *divorce*, still wants a decree of a Court to annul the *marriage* contract, and this decree is not given at the mere whim of either party, but a case of adultery uncondoned, and cruel treatment, or other sufficient cause, must be made out before such a decree could be passed.

6. The Hindu law, though it agrees with the Mahamadan law in allowing a plurality of wives to a man, and in giving liberty to a man to put away his wife without any cause, does not recognise *divorce*; and the woman is never at liberty to release herself from her husband. Unchastity in her justifies the husband in putting her away, and she forfeits her rights to maintenance, but the *marriage* relation *does not cease;* but in a Calcutta case it has been held that a special local custom of divorce exists among Hindus in Assam.[1]

General remarks.

7. The following adapted from the Introduction to BAILLIE's *Digest* is worth perusal:—

The dissolution of marriage during the lives of the parties is termed *firkut* (separation); and there are thirteen different kinds of it, or ways in which it may be effected.

A *firkut*, or separation, which comes from the side of the wife without any cause for it on the part of the husband, or, more generally, every separation of a wife from her husband for a cause not originating in him, is a cancellation of the marriage, while every separation for a cause originating in the husband is termed a *Tulak*, or divorce. Cancellation differs from divorce in so far

1. I. L. R., III C. S., 305.

that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower; whereas, though a divorce should take place before consummation, she is entitled to a half of the specified dower, or a present, if none has been specified.

Of the different forms of divorce, there is one kind of so much more frequent occurrence than the rest, that the term *Tulak* is sometimes restricted to it. This class comprises all separations which require the use of certain appropriate language to effect them, and is technically called *Repudiation*.

Repudiation or *Tulak* in this restricted sense, is either revocable or irrevocable. A revocable repudiation may be revoked at any time until the expiration of the *iddut* or probationary term, usually about three months, prescribed by the law for ascertaining if a woman is pregnant; on the expiration of that term the repudiation becomes irrevocable, and divorce is complete. A repudiation may, however, be made at once irrevocable by the force of the peculiar expressions employed, or by pronouncing it three times. A triple repudiation is not only irrevocable but has this further consequence that it prevents the parties from re-marrying, until the woman has been intermediately married to another husband, and the marriage has been actually consummated; a consequence, which in some degree accounts for the strictness with which verbal repudiations are construed. The words by which repudiation may be given are either plain and express, or ambiguous. The former take effect by the mere force of the expressions, but unless repeated induce only a single repudiation. The latter require intention on the part of the person employing them; which is generally determined by the state of mind in which they are uttered; and the repudiation effected by them is with a few exceptions irrevocable.

Repudiation may not only be pronounced by the husband himself, but the power to repudiate may be committed to the wife, or to a third party. The Commission

is termed *Tufweez*, and is of three kinds, *Ikhtiyar*, *Amr-bu-yud*, and *Mushceut*.

Repudiation may also be contingent, or, as it is termed by Mahamadan Lawyers, may be suspended on a condition.

Case law.

8. The following cases on the question of Divorce would be found interesting:—

1. The non-payment by the wife of the consideration for a Divorce does not invalidate the divorce. The divorce is the sole act of the husband though granted at the instance of the wife, and purchased by her. It is created by the husband's repudiation of the wife and the consequent separation: the deed securing to the husband the stipulated consideration does not constitute the divorce, but assumes and is founded upon it. [1]

2. The Mahamadan law does not provide for the nature of the evidence required to prove a divorce. Although writing is not necessary to the validity of a divorce, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, the parties, for their own security, may be expected to have some document affording satisfactory evidence of what they have done. [2] An instrument of divorce signed by the husband in the presence of, and given to, the wife's father was held to be valid, notwithstanding that it was not signed in the presence of the wife. [3] In a Madras Case it was held that there was a valid divorce when the husband made a declaration in the presence of the town Kazi in the shape of a letter to the wife to the effect that he had divorced her, and repeated the divorce three times successively before the said Kazi, although there was no evidence of the wife having received the letter of divorce which the husband directed to be sent to her. It was also held in the same case that compressing the expres-

1. 8 M. I. A., 379.
2. 20. W. R., 214.
3. 8. W. R., 23.

sion of the intention into one sentence seems on the authorities not to affect the legality of the repudiation, although some Doctors consider the process immoral. [1] It was doubted in a case whether the husband's mere statement that he had divorced his wife is sufficient proof of the fact. [2]

3. The divorce of a married woman should not be presumed only from the fact of her husband having taken another woman to live with him, in consequence of which his wife left his house and went to live with her relation, nor from the fact of his having stated in his will that he had no wife, lawful or *Necca*. [3] A charge of adultery by the husband against his wife does not operate as a divorce, though if false it might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights. [4] The mere pronunciation of the word "Talak" three times by the husband without its being addressed to any person is not sufficient to constitute a valid divorce. [5] But a divorce pronounced in due form by a man against a woman who is in fact his wife dissolves the marriage though he pronounces it under a belief that she is not his wife; [6] and although he divorces upon compulsion from threats. [7] A *khoola* divorce is valid though granted under compulsion. [8]

4. A divorce is irreversible if the husband does not take back the wife before the expiration of her "Iddut," or term of probation. [9]

5. An agreement between a husband and wife authorising the wife to divorce him upon his marrying a second wife during her life and without her consent is valid,

1. 6. M. H. C. R., 452.
2. 2. W. R., 208.
3. I. J. N. S., 221.
4. 3. W. R., 93.
5. I. L. R., 4. C. S., 588.
6. I. L. R., 4. C. S., 588.
7. 12. W. R., 460.
8. I. L. R., 3. M. S., 347.
9. W. R., 1864, p. 32.

and the wife on proof of her husband having married a second time without her consent is entitled to a divorce.[1]

6. Where the husband gives the wife an option as to declaring herself repudiated and she avails herself of it, the repudiation or divorce is binding on him; a discretion to repudiate when attached to a condition need not be limited to any particular period, but may be absolute as regards time. Such option is not lost by non-user, where there is nothing in the contract between the parties obliging the wife to exercise the option directly a breach of the condition occurs.[2].

CHAPTER VI.

MINORITY AND GUARDIANSHIP.

Guardians and their powers.

1. "The period of Minority" says Mr. BAILLIE "is so short under the Mahamadan Law, being terminated by puberty in both the sexes, that there is not so much to be said of the relation between guardian and ward in Mussulman as in other countries, for instance in England where minority continues till the age of twenty-one years complete. Of guardians there seem to be two kinds—the *lineal* and the *testamentary*. The powers and duties of the former are limited to the *marriage* of his ward, and those of the latter to the care of his *person* and *property*. The testamentary guardian does not appear to be distinguished from the ordinary executor. No executor has authority to contract a minor in marriage, unless he happens to be the *lineal* guardian also."

1. 7. B. L. R., 442. S. C., 15. W. R., 555.
2. 16 W. R., 20.

2. The Regulations of Government (particularly the Indian Majority Act), by defining the age at which persons shall be held to have attained majority, have precluded the occurrence of many disputes which might arise, were this circumstance to be judged of by the indefinite criterion of Mahamadan Law; a criterion more fallible even than that of the *hability* of the civilians.

The regard for the minor's interests and its coincidence with other laws.

3. "The rules relating to *guardian* and *ward*," says MACNAUGHTEN, "are remarkable for their equity and good sense; while scrupulously regardful of the interests of the minor, he is nevertheless not exempted from responsibility where justice obviously requires, that he should be considered liable." [1]

4. To show that the provisions of the Mahamadan Law on this subject do not differ widely from those of Hindu or other Laws we append a passage from COLEBROOK'S *Dissertations on Obligations and Contracts.*

"The promise or executary agreement of a minor, not apparently beneficial, and still more, one that is on the face of it prejudicial to him, is absolutely void. An engagement apparently beneficial to him is only voidable, yet a contract made by a minor, with the advice and consent of his friends, will be held binding where in conscience it ought. Minors may be charged for trespasses and torts; they are bound by obligations arising from delinquency."

5. Under the Hindu Law the natural guardians of minors are (1) *father*, (2) *mother*; in

1. Mac. Pre. Rem., XXIX.

default of her, his nearest male kinsmen in the paternal line; and lastly kinsmen in the maternal line, the paternal kindred being preferred to the maternal: in other respects it almost agrees with the Mahamadan Law.

6. It may be worth while to note in passing that under the Contrct Act there can be no enforceable agreement entered into with a minor, though his ratification after attaining age might give it validity.

7. In a recent case upon a bond, executed on the 5th June, 1875, by a Mahamadan, who on that date was sixteen years nine months old, the defendant pleaded that at the date of bond he was a minor and that the agreement was therefore not enforceable against him and it was held that the defendant, having at the date of execution of the bond, reached the full age of sixteen years, and so attained majority under the Mahamadan Law, was competent in respect of age, to make a contract in the sense of Sec. II of the Contract Act, and that the agreement was therefore enforceable as against him.[1]

General Remarks.

8. The following extract from the Preliminary remarks of MACNAUGHTEN may be usefully studied.

Guardians are of two descriptions, natural and testamentary; the natural guardians are the father and father's father, and the paternal relations generally in proportion to their proximity to succeed to the estate of

1. I. L. R., XII. A. S., 763.

the minor: the testamentary guardians are the executors of the father and grand-father. The father and grand-father are competent to hold the office of *curator*, as well as *tutor*, or, as they are expressed in the Bengal Code of Regulations, of manager as well as guardian; their executors (being strangers) can act as *curators* only, and the other paternal relations as *tutors* only. From this it would appear, that in providing for the care of minors, the Mahamadan Law partially agrees with the *Roman*, "committing the care of the minor's estate to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding, and this they term the *summa providentia*." With a view, however, to afford some protection to the minor, the law requires that, until he be independent, or, according to the more approved doctrine, until, he attains the age of seven years, he should remain in the custody of his mother, and in her default, in that of some other female relation; and indeed, in the *Hidaya*, in treating of this custody, some danger seems to be apprehended from trusting a minor with one who, though sufficiently near in point of relation to inherit the estate, is not near enough to entertain any very strong affection for his ward.

The Regulations of Government, however, (as far as the guardianship of the person is concerned) seem to adopt the *maxim* of the English Law, that "to commit the custody of an infant to him that is next in succession *is quasi agnum committere lupo ad devorandum*"; and consequently, they are distinctly precluded from the trust by Section II Reg. I. of 1800, which declares, that "the guardianship is in no instance to be entrusted to the legal heir of ward, or other person interested in outliving him." The good sense of the Law of *Charondas* is recognised, who separated the care of the person and estate, giving that of the latter to the next heir. By Section VIII; Reg. X of 1793, it was enacted, that, in the selection of a manager, preference should be given to the legal heirs of the estate; and although that rule has

been rescinded, and it is now no longer obligatory to show such preference, where better managers may be procurable, yet the principle of the rule remains unchanged, and the legal heirs are still, at least equally eligible with other persons."

Right to the custody of the minor.

9. According to the Shiah School a mother is entitled to the custody of her female children unless she has been guilty of unchastity.[1] In *Imam Buksh* v. *Thackor Bibee*, the Calcutta High Court held that under the Mahamadan Law the brother of the mother of a female minor, whose parents are dead, is entitled in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property, and the mere fact that he (the proposed guardian) is on the direct succession to the minor is not a sufficient ground for refusing a certificate to the charge of the property. The court observe: "The law in this matter is perfectly clear, that is, if any person establishes a right by virtue of a will or deed to take charge of the property of a minor, that person shall have a certificate of administration. There being no person so entitled, or any person so entitled being unwilling to undertake the trust, it is in the discretion of the court to entrust any near relative of the minor, who is willing to take up the trust, with the charge of the property. Failing the person who is entitled to a certificate, and failing any

1. I. L. R., VII. C. S., 435.

near relative who is willing and fit to undertake the trust the court may make other provisions."[1]

Mother preferred to the father as regards custody of children.

10. One question of importance in connection with the subject we are discussing is the right of either parent to the custody of their infant children. On this point the Mahamadan Law is more in favour of the mother than other systems. In an Allahabad case it was held that the Mahamadan Law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while under the Mahamadan Law the mother's title to such custody remains till the children attain the age of seven years. In that case it was further decided that a father is entitled to have the custody of his children of 9 and 12 years in preference to the mother, subject always to the principle that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury.[2]

The Indian Majority Act as regards the age of Majority.

11. According to the English Law minority continues till the end of 21 years. Questions regarding the period of minority are now governed in this country by the Indian Majority Act 1875, which has fixed the completion of the age of 18 years as the period at which majority is attained by any person except in the case of

1. I. L. R., IX C. S., 599.
2. I. L. R., 8. A. S., 322.

every minor of whose person and property a guardian has been or shall be appointed by any court of Justice, and every minor under the jurisdiction of the Court of Wards. As regards the powers of guardians, and their duties and responsibilities to the minor, and *vice versâ* the HINDU, the ENGLISH, and the MAHAMADAN Laws seem to agree with each other to a great extent:

12. The following is an abstract of the case law on the point :— The case law.

THE CUSTODY OF THE MINOR.

1. The mother is entitled in preference to the father to the custody of an infant under seven years of age ;[1] and if such child be a female this right extends till the child shall have reached the age of puberty,[2] even in preference to the husband of the girl.[3] Though a mother is of all persons best entitled to the custody of her infant children up to the age of puberty, still her right is made void by marriage with a stranger[4] or by unchastity[5]. A mother has a preferential right over the paternal uncle to the guardianship of the minors and to the custody of their persons[6]. The grandmother is entitled to the guardianship of a minor female child in preference to the child's paternal uncle, where such child, though married to a minor, has not attained puberty[7]. The brother of the mother of a female minor whose parents are dead, is entitled in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that

1. W. R., 1864, p. 131.
2. 2 *Hyde*, 63.
3. I. L. R., XI. C. S., 649.
4. 20 W. R., 411.
5. I. L. R., 7 C. S., 434.
6. 6. W. R., Mis., 125.
7. I. L. R., XI. C. S., 574.

he is in some way unfit to take charge of such property[1]. A sister though legally entitled to the custody of her minor sister loses that right by unchastity[2]. A husband is not entitled to recover the custody of his minor wife of 10 years from the custody of her mother[3]. The rule of Mahamadan Law that an uncle cannot be the guardian of a minor nephew's property does not prevent an uncle representing his infant nephew under the Code of Civil Procedure as next friend in a suit[4].

THE POWER OF THE GUARDIAN OVER THE PROPERTY OF THE WARD.

2. The question of legal necessity does not necessarily arise in cases of sale though it may properly be an element for consideration when the conduct of a guardian is called in question. The Mahamadan Law looks to the benefit of the minor, and permits the guardian to dispose of movable property if it be for the benefit of the minor. In a certain case it was held that a sale made to carry on an important litigation was *bonâ fide* and for the benefit of the minor[5]. A sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity or clear advantage to the infant. A purchaser from such guardian cannot defend his title on the ground of the *bonâ fides* of the transaction. An elder brother is not in the position of a guardian having any power as such over the property of his minor sister.[6] Remote guardians, among whom are brothers, can under no circumstances alien the property of a minor; their guardianship only extends to matters connected with the education of their wards, and the near guardians alone have limited power over the

1. I. L. R., IX. C. S., 599.
2. I. L. R., I. A. S., 598.
3. 5. N. W., 196.
4. 6. C. L. R., 413.
5. 17. W. R., 239.
6. 3. B. L. R, A. C., 423.

immovable property. [1] A duly constituted guardian has power to sell the immovable property of his ward, when the late incumbent died in debt, or when the sale of such property is necessary for the maintenance of the minor. It was also held in that case that the sanction of the Ruling power constituted a sufficient authority for the act of the guardian. [2] The sale by an aunt of property which she had assumed charge and was in possession of on her own account and as guardian of her minor nephew and niece was upheld when it was made in good faith and for valuable consideration in order to liquidate ancestral debts and for other necessary purposes and wants of herself and the minors. [3] The surviving widow though held in respect by the members of the family would not be entitled to deal with the property so as to bind them, and the entry of her name in the Revenue Registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitation, act as guardians of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the Ruling authority, in default of other relations who are entitled to such guardianship. Even therefore if some of the daughters in the present case were minors at the time of mortgage by the mother their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the rule of Estoppel contained in Section 115 of the Evidence Act, or the doctrine of equity formulated in Section 41 of the Trans-

1. 3. Agra, 21.
2. I. L. R., 6. B. S., 467.
3. I. L. R., I. A. S., 533.

fer of Property Act.[1] In a recent Calcutta case, the shares of infants were held not bound by a mortgage by a co-heir.[2]

CHAPTER VII.

INHERITANCE.

Importance of the subject of inheritance. The rules on the subject just and equitable and founded on the Quoran.

1. SIR H. MACNAUGHTEN, in his preliminary remarks,[3] says "no branch of jurisprudence is more important than the Law of Succession or Inheritance; as it constitutes that part of any national system of laws which is the most peculiar and distinct, and which is of most frequent use and extensive application. The subject unquestionably is of the greatest importance as affecting the interests of all descriptions of people. It deserves special notice, as giving rise to interminable litigation; a result attributable, more probably, to the almost universal ignorance of the people who are affected by it, than to any intricacy or obscurity of the law itself."

"In the Mahamadan Law," says MACNAUGHTEN,[4] "ample attention is paid to the interests of all those whom Nature places in the first rank of our affections; and indeed it is difficult to conceive any system containing rules more strictly just and equitable. The obvious principle of preferring the nearer kindred to claimants whose relation to the deceased is not so proximate, seems to

1. I. L. R., 8 A. S., 324.
2. I. L. R., XI. C. S., 417.
3. p. i.
4. Pre. Re., p. v.

have been adopted as the invariable standard for fixing the proportions; and the rules for the succession of several heirs, and the order of preference assigned to the different degrees of consanguinity seem to be exactly what would be most consonant to the general inclination of mankind."

"The Mahamadan Law of Inheritance" say the Calcutta High Court[1] "is based on *Sura-i-nissa* in the Quoran, which was revealed in order to abrogate the customs of the Arabs, and on the *Hadis* or traditions of the prophet. According to the principles of the Mahamadan Law any attempt to repudiate the law of the Quoran would amount to a declaration of infidelity, such as would render the individual concerned liable to civil punishment by the *Kazee* in this world, and to eternal punishment in the next. No custom opposed to the ordinary law of inheritance, which was created to destroy a custom, would be recognised by the doctors of Mahamadan Law, and in our opinion it follows as a natural consequence, that no such custom should be recognised by our Courts which are bound by express enactment to administer the Mahamadan Law on questions of inheritance among Mahamadans." From this it would appear that custom which plays so important a part in Hindu Law is not to be recognised in the Mahamadan Law.

Rules of succession unique in their nature.

2. The rules of succession under the Mahamadan Law seem to be peculiar and differ from other laws. And a short epitome bringing together by way of contrast the principal points wherein the Mahamadan Law differs from the English and the Hindu Laws, may not be an inappropriate introduction to a work on Mahamadan Law.

As differing from English and Hindu Law.—

i. No distinction between real and personal,

3. In the Mahamadan Law, no distinction is made, as in the English Law between real and personal property; nor as in the Hindu and English Laws between ancestral or self-

1. I. L. R. VIII. C. S., 830.

ancestral and self-acquired property.

acquired, and movable or immovable property. While under the English Law real and personal property follow different rules of succession, the same rules apply under the Mahamadan Law whether it is real or personal, or ancestral or self-acquired. The holder has absolute power of control over it, and could dispose of it as he pleases during his life-time. He is not fettered as in the Hindu Law by the rights of his co-parceners, for the Mahamadan Law does not contemplate an undivided family as among the Hindus.

ii. A plurality of heirs succeeding simultaneously.

4. "It will be seen, on reference to the principles of inheritance," says MACNAUGHTEN, "that many persons have the privilege of succeeding simultaneously whether the property be *real* or *personal*; which circumstance is the chief peculiarity of the Mahamadan Code." While under the Mahamadan Law there are a plurality of heirs, varying in degrees of relationship inheriting *simultaneously* a man's property, each taking his own share, the Hindu Law does not recognise heirs succeeding *simultaneously* but only *successively;* for according to the Hindu Law where there are sons or other male descendants they alone are the legal heirs. Under the Mahamadan Law the class of heirs known as "legal sharers" including among others, father, mother, daughter, husband and wife, are always entitled to some share or other, and succeed simultaneously; while there is nothing like such a simultaneous succession in

the Hindu Law: and the nearest thing that could be thought of is the rule of the English Law in distributing the personal property of an intestate among his next-of-kin, though this resemblance is but faint. The class of heirs known as "legal sharers" is something like those entitled to maintenance under the Hindu Law; but the latter have no specific shares allowed them, and the resemblance is also therefore but faint.

iii. No rule primogeniture.

5. The apparently unjust preference of the eldest son to the exclusion of all the rest, which in the English Law had its origin in the feudal policy of the times, is rejected by the Mahamadan Law, and the equitable principle of equality obtains in its stead. The Hindu Law, though it originally favored the eldest born and gave him an extra share, does not now allow him that privilege and treats all sons alike; and it is only in the case of property of an impartible nature, such as a Raj or a principality, that the Law of primogeniture is allowed to prevail; and this law may be considered to be a departure from, or a derogation of, the general law.

iv. No principle of representation: grandson no allowed to share with the sons (uncles of the grandson.)

6. The Mahamadan Law does not allow the right of *representation*, and it declares that a son whose father is dead shall not inherit the estate of his grandfather together with his uncles. "This certainly seems" says MACNAUGHTEN, "harsh rule and is at variance with the English, the Roman, and the Hindu laws." The Hindu law carries the principle of repre-

sentation to three degrees, that is, as far as the great grandsons, and treats sons, grandsons, great grandsons, as possessing equal rights.

v. Parents allowed a share on the death of their child.

7. While the Mahamadan Law always gives the parents a share in the property of their sons or daughters, the English and Hindu Laws do not go quite so far, though parents are considered heirs by both the laws. The English Law while paying some consideration to the parents in succession to the personal property of an intestate, excludes them from inheriting real property. Under the Hindu Law the parents are entitled to the inheritance only in default of male issue, including sons, grandsons, and great grandsons, in an undivided family, and the widow, and the daughter, and her sons, in a divided family. The widowed mother always comes after the deceased's widow.

vi. Females largely allowed to inherit.

8. While the daughter, son's daughter, and the sister, are classed as "legal sharers" under the Mahamadan Law, and are entitled to a share each, if the one preceding her does not exist, the Hindu Law excludes females and looks upon them as qualified owners only. While under the Mahamadan Law a daughter shares with a son and is entitled to half the share of a son, and the son's daughter becomes a legal sharer in the absence of the daughter, the Hindu Law excludes the daughter when sons are alive, and the son's daughter is entirely excluded. In a divided Hindu family the daught-

er succeeds only in the absence of sons (including under that term son's sons and grandsons) and that only after the widow.

vii. Widow of the deceased always allowed to take a share.

9. While the husband or wife is each entitled to succeed to a share in the property of the other, under the Mahamadan Law, the sons always exclude the wife, under the Hindu Law; and in the case of an undivided family, the widow is not considered an heir at all, but must be simply satisfied with maintenance, except under the Dayabagha. Under the English Law the widow gets a share of the personal property of an intestate husband, but does not appear to succeed to his real property when there are sons.

viii. The female heir takes the property of the deceased as full owner; and becomes a fresh stock of descent.

10. According to the Mahamadan Law an owner, whether a male or a female, is a complete owner, and could alienate during his or her life-time as he or she pleases. The English and the Hindu Laws, however, look upon a female as but a qualified owner, and under the Hindu Law a woman, inheriting property from a male, is considered as a mere life-tenant having power of enjoyment only during her life-time, and holding the property in trust for the other heirs of the last male holder. Under the English Law, however, though marriage would vest the property of the woman in her husband, a widow or unmarried woman is a complete owner of her property. Even this right is denied to a female by the Hindu Law. As regards however her peculiar property known

as *Stridhana*—more properly *Soudayaka*—it follows a peculiar descent of its own, the daughter being preferred to the son.

ix. No adoption.

11. The Mahamadan Law does not recognise adoption, and no right of inheritance is conferred by adopting a boy. The English Law also does not seem to recognise adoption, while under the Hindu Law adoption confers a right of inheritance, and the adopted son succeeds to the entire estate of his adoptive father, and is also entitled to a share with an after-born son.

x. Heir has no inchoate right in the property of the person to whom he is to succeed.

e. g., the right to call for a partition, to restrict alienation does not exist.

12. The Mahamadan Law does not recognise an inchoate right in the heir in the property of his ancestor, and it is only after the death of an individual, that his or her property vests in the heirs. But according to the Hindu Law the sons have a vested and inchoate right in the ancestral property of their father from the very moment of their birth; and this leads to much difference in the rights of heirs under the Hindu and the Mahamadan Laws. Thus for instance, while a Hindu son could claim partition from his father during the father's life-time, and also prevent some alienations made by him on the ground that they are not made for proper purposes, no such right is allowed to the heirs under the Mahamadan Law. This power of a son to call for a share during his father's life-time is peculiar to the Hindu Law alone, and the English Law does not recognise it. The distinction between an undivided and divided Hindu family, and the different principles which are applied to the

different conditions of the family, are also peculiar to the Hindu Law, for in the other laws though the heirs might live together jointly, the peculiar features of a joint Hindu family are not found there. It has been held that when the members of a Mahamadan family live in commensuality, they do not form a "joint family" in the sense in which that expression has been used with regard to Hindus; and in Mahamadan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of several members are made for the benefit of the family jointly.[1] The Hindu Law enjoins on a son the duty of paying his father's debts, and that not only to the extent of the father's share, but also to his own share of the ancestral property unless it was incurred for an immoral and illegal purpose; but these distinctions do not find a place in the Mahamadan Law, under which the heir is entitled to a share only in the property which is left after paying the debts of the deceased.

In a recent *Allahabad* case it was held that upon the death of a Mahamadan intestate who leaves unpaid debts whether large or small with reference to the value of his estate, the ownership of such estate, devolves immediately on his heirs and such devolution is not contingent upon and suspended till the payment of his debts.

In execution of a decree for a debt due by a Mahamadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree holder put up for sale and purchased

1. *Hakim Khan* v. *Goolkhan*, I. L. R., VIII. C. S., 826, doubting the case in III., *Ibid* 97.

certain property which form part of the said estate. One of the heirs who was out of possession, and who was not a party to these proceedings, brought a suit against the decree holder for recovery of a share of the property sold in execution of the decree by right of inheritance, and it was held, by the full Bench, that the plaintiff was not entitled to recover from the auction-purchaser in execution of the 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 debt for which the decree was passed, and in satisfaction whereof the sale took place.[1]

xi. Principle of succession: nearness of kin.

13. The principle which underlies the *selection* of heirs seems to differ in the three systems of Law. The Hindu Law mixing its principles with religion selects its heirs on the principle of religious efficacy, that is, on the right of one to offer funeral oblations to the deceased: and he who offers the most efficacious oblations is considered the nearest heir.[2] The Mahamadan and English laws, however, do not found their rules of succession on principles of religious efficacy, but upon nearness of relationship to the deceased.

xii. The doctrine of *return* and *increase*.

14. What is technically called the *Return* or *Increase* is peculiar to the Mahamadan Law, and does not find a place in other systems.

Where there are a certain number of legal sharers each of whom is entitled to a specific portion, and it is found on distribution of the shares into which it is necessary to

1. I. L. R., VII. A. S., 826; See also *Ibid* 716.

2. So under the Dayabhoga. Under the Mitakshara the principle is nearness of relationship.

divide the estate, that there is not a sufficient number of shares to satisfy the just demands of all the claimants, the process of increasing the number of the shares is applied: but what is known as a *Return* is what is appropriated by the sharers in the absence of Residuaries; and it has been held that a widow has no claim to share in the Return or residue of the husband's estate as against other heirs.[1]

The Hindu and Mahamadan laws contrasted.

15. It may be interesting to note that the Hindu Law also divides heirs into three classes known as (1) Sapindas, (2) Samanodacas, and (3) Bandhus. But the Hindu Law excludes females from inheritance, an exception being made in the case of a widow or daughter, who succeed in the absence of sons (including under the term sons, grandsons and great grandsons) in some cases. Some other important points of difference, have also been noted already: but it may be stated, in passing, that the Mahamadan Law pays attention to the interest of those whom Nature places in the first rank of our affections, while the Hindu Law, basing its rules on principles of religious efficacy, prefers the sons to the daughter, and classes a sister simply as a Bandhu. The English Law, to a certain extent, resembles the Hindu Law in the selection of heirs, though differing in the principle upon which they are selected.

General observations abstracted

16. The following passage taken from

1. I. L. R., XI. C. S., 14.

from *Baillie's work.*

BAILLIE'S introduction may be read with advantage:—

"Of the rules regarding intestate succession or inheritance it is proper to observe, in the first place, that they make no distinction between movable and immovable property, and do not recognise the right of representation and primogeniture. So that a person who would be an heir of another, if he survived him, does not transmit any right to his or her own heirs or representatives, if he died before the other. But a preference is so far allowed to the male over the female sex, that the share of a male is usually double that of a female in the same circumstances.

There are three kinds of heirs; *Zuvool furaiz* or *sharers*, *usubat* or *agnates*, and *Zuvool urham* or *uterine relatives*. The *sharers* and *agnates* commonly succeed together: but, as it is only the surplus that is left after satisfying the shares of the *sharers* that passes to the agnates, they have been from that circumstance styled "*residuaries*." In like manner, as it is only when there is neither sharer nor residuary, that there is any room for the succession of the uterine relatives, they have been from that circumstance styled "*distant kindred*." It is so seldom that the distant kindred can have any interest in a succession that they may be left out of consideration in this place. The term, *distant kindred*, comprises all those relations who are neither legal sharers nor residuaries; and, in their default, the property goes to the *successor by contract*, and to *persons of acknowledged, though not proved, consanguinity*. And in the absence of all these the Government succeeds as ultimate heir.

The sharers are twelve in number; of whom four are males, *viz.*, the husband, the father, the grandfather and the half-brother by the mother: and eight are females, *viz.*, the wife, the daughter, the son's daughter, the mother, grandmother, the full-sister, and the half-sister on the father's or mother's side. The residuaries are of two kinds, *viz.*, *by descent* and *for special cause*. The former are (1) the *residuary in his own right*, (2) *the residuary by*

another and (3) the *residuary with another*. The first, who is by far the most important class, is defined to be "every male into whose line of relation to the deceased no female enters;" and these are:—

(*a*) The lineal *descendants*, or sons, and son's sons, how low so-ever.

(*b*) The lineal *ascendants*, or father, or father's father how high so-ever.

(*c*) The lineal *collaterals*, and their descendants in the same way, and without an apparent limit, the full blood being always preferred to the half, but the half if nearer in degree being preferred to the full when more remote.

Of the heirs above mentioned, *i. e.*, the sharers and the residuaries by descent, there is an inner circle immediately connected with the deceased, who are never entirely excluded from the succession, though their portions are liable to reduction in some cases. These are the husband or wife, the father, the mother, son and daughter. Of heirs beyond the circle, the grandfather or grandmother are merely substitutes for the father and mother, and the remainder are entirely excluded whenever there is a relative within the circle, through whom they are connected with the deceased, or one nearer in degree to them than themselves. These rules are however subject to some qualifications.

Limitation Act, Articles 127, 141 and 144 interpreted.

17. As regards the question of limitation, it was held in a recent case that Article 141 of the Limitation Act does not apply to suits by an heir-at-law for possession of immovable property in that character, but only to a suit by a Hindu or Mahamadan who, prior to the death of a female occupied the position of remainder-man, or reversioner, or a devisee, and on the death of the female sues on the basis of that character. Accordingly where a suit was brought by the plaintiffs for their share in the estate of their

deceased mother after twelve years from the date of her death it was held that the suit was not barred, that the Article of the Limitation Act that applied to the case was 144 or 127, and that it lay on the defendant to show either that by relinquishment, formally made and clearly and satisfactorily established, they have abandoned their interest in the property, or that by adverse position for a period of more than 12 years prior to the date of the suit, he has obtained a proprietory right to their shares.[1]

The case law.

18. The following is an abstract of the case law on the subject of inheritance :—

1. *General.*—The Mahamadan Law recognizes three different kinds of heirs, *viz.*, (1) *Sharers*, (2) *Residuaries*, and (3) *Distant kindred.*

The heirs of a missing person are not as such entitled to divide the estate among themselves, either as a trust or otherwise before his death, natural or legal.[2] There is no representation in matters of succession, and whatever may be the position and rights of the husband being the only surviving heir of his wife, those rights do not descend to the heirs of a husband who has predeceased the wife, and who are themselves no relations to the wife. In fact after the dissolution of a marriage contract by death or otherwise, the parties or their heirs bear no more relation to one another than the heirs of a *quondam* partner in the same mercantile house.[3] The daughters of a deceased brother of a person who demises cannot take any share of such person's property so long as a brother and sister, or only a brother, survives.[4] An adopted son cannot inherit.[5] Illegitimate sons can claim

1. I. L. R., III. A. S., 43.
2. 5 N. W., 62.
3. 1 W. R., 152.
4. 10 W. R., 306.
5. 9 W. R., 502.

no relationship with their father's family.[1] The children of fornication or adultery (*wahid-wz-zina*) have no *Nasab* or consanguinity. Hence the right of inheritance being founded on *Nasab*, one illegitimate brother cannot succeed to the estate of another.[2] A Hindu family having embraced the Mahamadan religion is bound by the laws of that religion as regards succession, and a daughter was therefore held entitled to inherit from her father.[3]

The Mahamadan Law is not applicable to the illegitimate child of a Mahamadan brought up and dying a Christian: and so it was held that the state (and not the mother of an illegitimate Christian child) was entitled to succeed to the property of that child dying intestate after he has attained to man's estate, and having neither wife nor legitimate child:[4] mental derangement is no impediment to succession under the Mahamadan Law:[5] want of chastity in a daughter before or after the death of her father, whether before or after her marriage, is no impediment to her inheritance.[6] Regarding the custom of primogeniture and the exclusion of females and other heirs from inheritance, the two cases noted below may be studied with advantage.[7]

In a case where marriage was performed between minors in the *fazolee* (nominal) form, the girl's father being dead and the marriage being contracted by her paternal grandmother, it was held to be invalid on the death of the girl without afterwards meeting or communicating with her husband, because after arriving at puberty she had never expressed in any way assent to or dissent from the marriage, and that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate, that the mother as her surviving parent was entitled

1. 13 W. R., 265.
2. 12 W. R., 512; 14 W. R., 125.
3. 2 Agra, 61.
4. 1 W. R., 272.
5. 2 B. L. R. A. C., 306; 11 W. R., 212.
6. 6 W. R., 303.
7. I. L. R., 3 A. S., 723, and 25 W. R., 199.

to a third share thereof and that her half brothers and sisters (without prejudice to any claims by third parties) to the residue.[1]

It is not consistent with Mahamadan Law to limit an estate to take effect after determination on the death of the owner of a prior estate, by way of what is known in the English Law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate.[2] There may be a renunciation of the right to inherit, and such a renunciation need not be expressed but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another.[3]

2. *Sharers.*—According to the law of the Shiah sect a childless widow is not entitled to share in the immovable property left by her deceased husband, but only in the value of the materials of the houses and buildings upon the land :[4] and a widow having no child alive by her deceased husband inherits nothing of the land which he leaves.[5] A widow and two daughters are entitled between them to 19/24 of the property of their deceased husband and father in the proportion of 1/8 and 2/3.[6] By the custom of the Khoja Mahamadans, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband, and if no blood relations of her deceased husband are forthcoming, the property left by the widow belongs to the *Jamat*.[7]

A widow has no claim to share in the return or residue of her deceased husband's estate as against her other heirs,[8] though she is entitled to it in default of other

1. 26 W. R., 26.
2. I. L. R., 11. C. S., 597; L. R., 12. I. A., 91.
3. 17 W. R., P. C., 108.
4. 3 Agra, 13.
5. 20 W. R., 297.
6. 5 W. R., 221.
7. 2 B. H. C. R., 292.
8. I. L. R., 11 C. S., 14.

sharers and in the absence of the distant kindred to the exclusion of the first.[1]

A sister is entitled to obtain a share of the estate left by her deceased brother.[2] And where a man dies leaving no children a sister's son can claim his inheritance after the widow has obtained her one-fourth share.[3]

3. *Residuaries.*—The succession of residuaries in their own right is as unlimited in the collateral as in the direct line, where it is expressly said to be how high and how low so ever.[4] Descendants in the male line of the paternal great grandfather of an intestate are within the class of residuary heirs, and entitled to take to the exclusion of the children of the intestate's sisters of the whole blood.[5] Descendants of a paternal grandfather's brother are entitled to rank among residuaries and as such are preferable heirs to grand daughters.[6] A step-sister of a deceased proprietor is one of his heirs and in the category of his residuaries.[7] A suit by a Mahamadan widow (legal sharer) against her sons, (Residuaries) for her share of the property left by her deceased husband is no bar to a suit being brought by some of the sons against the others for their shares.[8] Where there are no residuaries, the principle of the return provides that the surplus of the shares of the sharers shall revert to them in proportion to their shares, except in the cases of husband and wife.[9]

4. *Distant kindred.*—The distant kindred come after the Residuaries. Where surviving kindred are related in like degree to a deceased party, the males are entitled to a double share of the inheritance.[10]

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1. I. L. R., 3. C. S., 702; 17 W. R., P. C., 108.
2. 17 W. R., 140.
3. 5 W. R., 23.
4. 21 W. R., 371.
5. 1 M. H. C. R., 92.
6. 8 W. R., 39.
7. 2 Agra, P. 2., 162.
8. 11 B. H. C. R., 104.
9. 11 W. R., 220.
10. 10 W. R., 315.

5. *Presumptions of joint family not applicable among Mahamadans.*—Where the members of a Mahamadan family live in commensality, they do not form a *joint family* in the sense in which that expression is used with regard to Hindus, and in Mahamadan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly.[1] But additions made to the joint estate by the managing member of a family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share.[2] When a purchase is made during the father's lifetime in the name of his son, while living in the father's house, there is no such presumption as arises in the case of a similar purchase made in the lifetime of the father of a joint Hindu family; and the onus is not on the son to prove that the purchase was not made really for and by the father, but by the son for himself and with his own funds:[3] In a suit by a member of a Mahamadan family to recover possession of a share in landed property alleged to be ancestral, where defendant claimed the same as his separately acquired property, it was held that it was not necessary for defendant to show that he had funds sufficient to enable him to obtain the property, and that the burden of proving that the property was acquired for and enjoyed by the whole family jointly was upon the plaintiff.[4] In a recent Calcutta Case, it was held that there being no allegation that the parties who are Mahamadans had adopted the Hindu Law of property the Judge had cast the onus on the wrong party by applying to the Mahamadans the presumption of Hindu Law.[5] A debt incurred for the price of cloth supplied to a person for his marriage was held not to be incurred in a matter necessary to the existence of the family, but for the individual benefit of himself, and that as in a Maha-

1. 9 M. I. A., 195, I. L. R., 8 C. S., 823.
2. 2 M. H. C. R., 414.
3. 7 W. R., 489.
4. 14 W. R., 374.
5. I. L. R., 10. C. S., 562.

madan family the individual benefitted and not the family is liable for the expenses incurred for the benefit of any particular member, he alone was liable for the debt. This decision was come to notwithstanding that there was an agreement between two members, who were living together at the time of separation, that they should be jointly liable for debts due on account of the time they were jointly living; and it was further held that the agreement had reference only to such claims as the family were jointly liable for.[1] Where a Mahamadan lady with her daughters was found to be living with her brother, and to be supported by him from the proceeds of the patrimonial estate, the correct and proper inference to be drawn is that the lady and her daughters were in possession along with the brother who was the Manager of the property.[2] The separate registry of the names of the sharers in the Zemindar's "Serishta" is not proof of separation of their shares.[3] In a dispute between two grandsons as to proprietory right in a Village which had been registered in the name of a member of the elder branch of the family, the Privy Council held that the *ratio decidendi*, according to which the legal presumption was in favour of one grandson claiming against another, and the *onus probandi* placed on the one claiming to be the sole possessor, was more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. Registration of landed property in the name of one member of a family is not conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property.[4]

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1. 8 C. L. R., 378.
2. 11 W. R., 45.
3. 13 W. R., 124.
4. 14 M. I. A., 401.

CHAPTER VIII.

MAINTENANCE.

MAINTENANCE:—Grounds of liability for

1. There are only three grounds of liability for maintenance, *viz.*, (1) *Zowjeeut*, or the relation of a husband to his wife; (2) *Kurabut*, or the relationship by blood, and (3) *Milk*, or property. Poverty is a condition to a right to maintenance, while ability to give on the part of *Moonfik* (or maintainer) is a condition to the liability to give maintenance.

Maintenance of a wife.

2. The conditions under which maintenance is due by a husband to his wife are two; (i) a permanent contract of marriage; (ii) *Tumkeen*, or such a placing of herself by the wife in the power of her husband as to allow of his free access to her at all times. A wife, however, is not entitled to maintenance if she is too young for conjugal intercourse, or when she has departed from the husband's roof without his permission, unless it be in performance of some incumbent duty such as *Hujj* or pilgrimage. As to quantity, it should be determined by the woman's requirements in respect of food, condiments, clothing, residence, &c., due regard being also had to the custom of her equals. In other words, the woman should have as much as is necessary. The maintenance of a wife has precedence over the maintenance of relatives, because her maintenance is in the nature of an exchange for her subjection to his (the husband's) will, and is established as a debt against him.

Maintenance of others.

3. Beyond the ascendants and descendants, the liability for giving maintenance does not extend to any other relation, such as, brother, sister, &c., though it is becoming and proper for a person to maintain them also, particularly where he is one who would inherit from them if they had property. Maintenance of a child is incumbent first on its father, or the father's father, how remote soever in ascent, then on the mother, her father, and mother, how high soever, the nearer being always liable before the remote. A person liable for maintenance may be compelled to pay it by imprisonment or by sale of his property.

The law of Maintenance more comprehensive under the Hindu Law.

4. The Hindu Law of maintenance is more comprehensive. Under it, not only ascendants and descendants are liable to be maintained, but a number of other relations; in fact every member of a joint family and the dependents of each member have to be maintained. This arises from the nature of the joint family. Here it is only necessary to point out, that a Hindu wife is entitled to arrears of maintenance and to future maintenance up to her death, while under the Mahamadan Law arrears of maintenance could not be claimed under an order of a Judge, and the right to future maintenance extends only to the continuance of the marriage relation.[1]

The case law.

5. The case law on this subject is not much,

1. I. L. R., VI. C. S., 630.

but the following decisions would be found useful:—

Until there has been an ascertainment of the rate at which maintenance is payable, no right to maintenance accrues to a wife on which she can found a suit.[1] A decree should not award past maintenance to a wife but maintenance should be made payable only from the date of the decree, and future maintenance should be given only during the continuance of the marriage and not during the term of the plaintiff's natural life.[2] Where a wife in reconveying to her husband the property received from him in lieu of dower, took from him a written agreement in which he covenanted to pay her a certain sum of money annually, without objection or demur, it was held that the husband could not avoid payment on any of the pleas, on which a Mahamadan husband would avoid the payment of maintenance to a wife.[3] When a wife though legally married has not attained the age of puberty, it was doubted whether there was a liability on the part of the husband to support her as long as she remains under the roof of her father.[4] Under the law of the Shiah sect a mutta wife is not entitled to maintenance but such a provision of the law does not interfere with the statutory right to maintenance given by Section 536 of the Code of Criminal Procedure:[5] and though a civil court could not grant an injunction restraining the Magistrate from enforcing the order for maintenance, the plaintiff was entitled to ask the Magistrate to abstain from giving further effect to his order, after the civil court had found that the relationship of husband and wife had ceased to exist.[6]

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1. 2. N. W. H. C. R., 173.
2. I. L. R. 6., C. S., 631.
3. 15. W. R., 296.
4. 24. W. R. Cr., 44.
5. I. L. R., 8. C. S., 730.
6. I. L. R., XIV. C. S., 276.

CHAPTER IX.

WILLS.

1. A will is the declaration of a man's intention, which he wishes to be performed after his death, and which is revokable until such event.

Definition of, and the power of, a Mahamadan to make a will.

"With regard to testate succession" MR. BAILLIE observes, "a person cannot dispose of more than a third of his property by will when he has any heir. When he has none besides the public treasury, he may dispose of the whole. To the extent of a third, the heirs have an incohate interest in his estate from the commencement of any disease that terminates in death. It follows, therefore, that any gratuitous act of a sick person which affects his property, is not valid beyond a third of his whole estate, unless he recovers from his illness, or the excess is allowed by his heirs. Marriage is not a gratuitous act, and may be contracted in death illness. But in that case the dower must not exceed the proper dower.

Bequests are valid as far as a third of the testator's property, whether made orally or in writing; and the presence of witnesses is not required in either case as a necessary formality. They are constituted by the words, "I have bequeathed," or by any other words commonly used for the purpose; but are not completed so as to vest an interest in the legatee without occupation after the death of the testator."

"The disposition of a testator" says MACNAUGHTEN, "being legally restricted to one-third of his estate, but little uncertainty can exist on the doctrine of wills and testaments. If the legacies exceed the amount above specified, the will is considered inofficious, and its provisions will be carried into effect *pro tanto* only. The law of Scotland also restricts a person, who leaves a widow and children, from disposing of more than a third part of his movable property by will. *Nuncupative* and *written* wills are of equal validity, and the same degree of evidence is required

to prove them as is necessary to the establishment of any other ordinary transaction between man and man."

Who can make a will and in whose favour it could be made.

2. Any person who is free, sane and adult, whether man, or woman, is competent to make a bequest. And it may be added that a married woman is equally competent to do so with one that is unmarried.

A bequest may be made to any one, even to a child in the womb. The individual or individuals to whom a bequest is made may be specially indicated, as by name or otherwise, or only referred to by a general description. In the former case it is necessary that they be in existence at the time of the bequest; in the latter case it is sufficient if they are in existence at the time of the testator's death. Thus, a bequest to a child in the womb is valid only if he is born within six months from the time of bequest; while a bequest to "the sons of such an one," who has no sons at the time of bequest, is valid, and takes effect in favor of any who are subsequently born to him before the death of the testator. Anything that is property may be the subject of bequest, though it does not actually belong to the testator, or even if it is not in existence at the time of making the will. And the substance of the thing may be bequeathed to another, or usufruct or produce alone may be bequeathed.

Wills under English Law.

3. Under the English Law, every person of age, who is not specially incapable by law or custom, has full power to will away all the

real and personal estate to which he may be entitled at the time of his death, and what is not so bequeathed would go, to his heirs, or executors or administrators. A married woman can will away her property, which she can otherwise alienate during her life-time. A will, whether it relates to personal or real property, must be in writing and signed by the testator and attested by witnesses. All verbal wills are invalid, except when made by soldiers in actual military service, or by mariners or seamen at sea relative to their personal property, but their wills relating to their wages, &c., must be in writing and attested. A will may be revoked expressly or impliedly, and it requires the appointment of one or more executors, and if none are so appointed, the Court must appoint an executor.

Wills under Hindu Law.

4. The following is a short epitome of the Hindu Law relating to wills abstracted from MAYNE'S valuable treatise:—

"The idea of a will was unknown to Hindu Law and the native languages do not even seem to possess a word to express the idea; but whether from the influence of the English lawyers of the Supreme Court or from Brahminical influence in favour of religious gifts—gifts to religious men or Brahmins—the power of devise by will has become established; and it is now beyond dispute that in Bengal a father as regards all his property, and a co-heir as regards his share, may dispose of it by will as he likes, whatever may be its nature. A minor is incapable of making a will and a married woman could make a will only of property which is absolutely at her disposal, but cannot will away property inherited from males since her

interest in it ceases at her death. The same principles appear to have been gradually recognised in Madras and Bombay, and in *Vellinayagam* v. *Pacheche*[1] it was declared that the legal right to make a will is allowed co-extensively with the independent right of gift or other disposal by act *inter vivos*, which a native possess in Madras: but it is not settled that a man may devise whatever he may give; and in *Vitla Butten* v. *Yamenamma*[2] it was held that a devise was invalid as against rights of survivors, and that a co-parcener though he could alienate his own share during his life-time, could not do so by will as "the title by survivorship being the prior title takes precedence to the exclusion of that by devise:" and the same decision was arrived at in Bombay.[3] It may therefore be stated that the right of devise is co-extensive with that of alienation, except where in an undivided family, the right of devise conflicts with the law of survivorship, in which case the former gives way. The person who is to take must be capable of taking, and the estate which is given must be an estate recognised by the Hindu Law, and not encompassed with limitations or restrictions opposed to the nature of the estate given; and though trustees may be employed to facilitate a legal form of bequest, they cannot be made use of so as to carry out indirectly what the law does not allow to be done directly.[4] The donee must be a person capable of taking at the time when the bequest takes effect and must either in fact or in contemplation of law be in existence at the death of the testator (that is, the donee must be in *embryo* at the death, or adopted subsequently to death, under authority given before it). Trusts for illegal purposes, and directions for accumulation of property, and conditions imposed in contravention of the objects for which the property exists, or contrary to the policy of the law, or forbidding alienation within

1. I. M. H. C. R., 326.
2. 8 M. H. C. R., 6.
3. Vide *Narottam Jagivan* v. *Narasandas*, 3 B. H C. R., A. C., 6.
4. The Tagore Case, 9 B. L. R., 377.

the limits incidental to the estate created, are all *void*, and could not be enforced. No special form is necessary for a *will*, and the intention of the parties will be the chief guide of interpretation; but if the intention of the testator is so vaguely expressed that it is impossible to ascertain the testator's objects, or if it is to do something illegal, the will would not be given effect to, and in such a case the property devised passes to the heir as if there was no devise.

Distinctions between the Mahamadan and Hindu Laws.

5. It may not be unimportant to note the following points of difference between the Hindu and Mahamadan Laws.

(1) Legacies cannot be made, according to Mahamadan Law, to a larger amount than one-third of the testator's estate without the consent of heirs, but no such limitation is placed by the Hindu Law.

(2) While the power of alienation by devise is apparently co-extensive with the owner's power of alienation *inter vios*, the Mahamadan Law does not seem to recognise the principle of survivorship, which under the Hindu Law, (except in Bengal) defeats an alienation by devise. This difference arises from the principle of the Hindu Law that the sons obtain by birth a vested interest with the father in ancestral property, which vested right is not recognised in heirs by the Mahamadan Law.

(3) The rule of Mahamadan Law that a legacy cannot be left to one of the heirs without the consent of the rest is not recognised by the Hindu Law; nor does the other rule founded on the former find a place in Hindu Law;

viz., where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.

(4) Under the Mahamadan Law married women have larger powers of devise by will than under the Hindu Law.

The general rules for the construction of wills and as to enforcing of conditions drawn from the English and Roman Laws, would apparently be followed in case of Mahamadan and Hindu Wills.

"The policy of the Mahamadan Law appears to be" say the Lordships of the Privy Council[1] "to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his life-time the whole or any part of his property to one of his sons, provided he complies with certain forms."

Powers of an executor under Mahamadan Law.

6. The following summary of the powers of an executor under the Mahamadan Law abstracted from BAILLIE's *Digest* may not be uninteresting.

"An executor may be appointed by words of bequest or agency, and acceptance seems to be necessary in both

1. *Ranee Khujoorconissa* v. *Mussant Roushee Jehan* L. R. III. I. A. 307.

cases; but it is not necessary that the acceptance should be after the testator's death, as in the case of an ordinary bequest; for the acceptance could be made during his life. An executor who has once accepted cannot withdraw from the office after the testator's death, though he may be *relieved* of it by the Judge, or *removed* out of it for malversation. An executor may take possession of the whole of his testator's rights and property, and of the property of any other person that was in deposit with him at the time of his death. He may also exact and receive payment of debts due to him, give directions for his funerals and pay debts and legacies. But if he pays a debt without proof, or pays one creditor in preference to another without the authority of the Judge, he is responsible to the other creditors, though he may sell a part of the estate to a creditor in exchange for his debt. For the payment of debts and legacies an executor may sell the whole of his testator's movable property, and also so much of the *akar* or immovable property, as may be required for the purpose; but if he actually make sale of *akar* for the payment of debts, the sale is lawful, though he should have other property in his hands adequate to the purpose. He may also do whatever is further required for the conservation of his testator's property. But with the powers above mentioned his proper functions as executor cease. Still he is the representative of the testator, and may do in that capacity with respect to the remainder of the property after payments of debts and legacies, which now belongs to his heirs, whatever the testator himself might have done with respect to the property of the same persons had he been alive. In this way the powers of a father's executor exceed those of a mother's, or any other relatives, and while the powers of a father's executor appear to extend over the whole property of the heirs, whether derived from the father or not, those of the mother's executor seems to be restricted to the property derived from her. Where there are two or more executors, one cannot take possession of the property or deposits of the deceased, or receive payment of his debts, or apparently dispose of any part of his pro-

perty beyond what may be necessary for his funerals, without the concurrence of the other, though he may make delivery of specific bequests, and pay debts out of assets of the same description as the debts. And if one of them should happen to die, his powers do not pass to the survivor, who is incompetent to act alone without the authority of the Judge."

The case law on the subject of Wills.

7. The following is an epitome of the decided cases on the subject of *Wills* under Mahamadan Law.

1. *Will without consent of heirs not valid beyond a third part of the estate.*—A will which has never received the assent of the heirs of the testators is in-operative to alter their rights to succeed according to the general law of inheritance[1]: and a *Wasi-ut-namah*, or will, diverting all the property from the next heirs, is illegal[2]. A legacy cannot be left to one of a number of heirs without the consent of the rest[3]: a person cannot devise more than one-half of his estate to his daughter, and a will devising more to her is invalid[4]; and a bequest by a married woman of the whole of her estate to her brother, without the assent of her husband, is invalid[5]. A testator may, however, bequeath one-third of his estate to a stranger, though he cannot leave a legacy to one of his heirs without the consent of the rest: a will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, was held to be an attempt to give, under color of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs[6]. In another case where the plaintiffs

1. 2 Agra, 154.
2. 2 W. R., Mis., 49.
3. 9 W. R., 257.
4. 2 W. R., 181.
5. 2 B. H. C. R., 53.
6. I. L. R., II. C. S., 184.

claimed as purchasers from the daughters (as heirs) and the son, intervening, was made a party, and set up a will executed by his father, under which a large portion of the estate was endowed for charitable purposes and the rest divided among the heirs, it was held that the will having been put in issue, it was necessary to inquire whether the heirs were consenting parties to it, for the bequest by one of more than one-third of his estate without the consent of his heirs is invalid[1]. In another suit for an undivided share of property claimed by the plaintiffs as heirs of the deceased owner, where the defendants pleaded possession under a *Wasi-ut-namah*, or will, it was held, that the Court could not tell how far the will was valid or invalid under the Mahamadan Law, which allows a testator to give away from his heirs only one-third of his property, and that the onus was on the defendant to furnish a complete statement of the testator's property at the time of his death; failing which the plaintiff's claim must prevail[2]. A gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one-third of the deceased's whole property, the remaining two-thirds going to the heirs, while in the absence of heirs a will carries the whole property[3].

2. *The consent of heirs must be given after death of testator.*—The consent of the heirs can validate a testamentary disposition of property in excess of one-third of the property of the testator, if the consent be given after the death of the testator. But if the consent be given during the life-time of the testator it will not render valid the alienation, for it is an assent given before the establishment of their own rights[4]. To establish the consent of an heir to a will, evidence of some act done at the time of its execution, or some act done subsequently, amounting to a ratification of it, is necessary: and the

1. 10 W. R., 375.
2. 22 W. R., 400.
3. I. W. R., 152.
4. 2 M. H. C. R., 350. *Vide* also 15 W. R., 146.

Court will not presume the consent of an heiress to a will, even although she continues to reside in a dwelling house assigned to her by the will in question[1]. A will is valid as against an heir if he affixed his signature to it as a consenting party thereto without undue influence.[2]

3. *Form of will: no writing necessary.*—It is an universal rule that the Mahamadan Law does not require a will to be in writing. The omission to write the wish, where there was ample time for that purpose, may throw doubt on the fact of the words being used as the expression of the testator's last will; but if the Court finds that the testator expressed his will, and that this was his last will, the omission to render it into writing will not deprive it of legal effect[3]. A nun-cupative will by one of the Shiah sect bequeathing property less in amount than one-third of his estate was held to be valid and effect was given to the bequests, and the suggestion was further thrown out that such verbal bequests would have been valid even if beyond a third of the testator's estate, provided the heirs concurred in the bequests[4]. Where a testatrix devises a certain disposition of her whole property in the course of a *Wajib-ul-urz* relating to only a portion of it, and independent testimony of her intention to make this disposition was produced, it was held that the disposition was valid against a claim of possession set up by a rival claimant[5]. An assignment of one's property in favour of his wife and his two sons, reserving to himself full power over it during his life-time, and restricting the son's right to alienate during their mother's life, as she was to enjoy it in lieu of her dower, was held to be a disposition of a testamentary nature and void of the requisites of a sale.[6]

4. *Construction of wills.*—A devise by a female under a will disinheriting her nearest relations and leaving her whole estate to her nephew from generation to generation

1. 1 I. J. O. S., 119.
2. 4 W. R., 36.
3. 2 N. W., 55.
4. 5 M. I. A., 199.
5. 25 W. R., 121.
6. 3 Agra, 288.

was held to be absolute to him and not to extend to his sons in case of his death before his aunt.[1] Words such as "always" and "for ever" used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life. Where an instrument in the nature of a will gave shares in a man's property to his surviving widow, son, and grand children, devoted a share to charitable purposes, and directed that his son should continue in possession and occupancy of the full sixteen annas of all the estates.....all the matters of management in connection with this estate should necessarily and obligatorily rest "always" "and for ever" in his hands, and the sons of that son, who retained possession till his death, claimed to retain possession of the property in order to carry out the provisions of the will, it was held that on a true construction of the will, the plaintiff, a sharer under it, was entitled to a full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.[2] Persons not in existence at the death of a testator are incapable of taking any bequest under his will. Where a man bequeaths some property to the lawful son (if any) of his son M. whom he disinherits, and no son of M. was living at the time of the testator's death, it was held that a son of M. born some years after the testator's death could not recover the bequest, not having been in existence at the date of the testator's death.[3] In a will 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. But where the will is in the native language, and the word "dharm" or "daram" is used, it was held that the word is too vague and uncertain for the gift to be

1. 4 W. R., 66.
2. I. L. R., VIII A. S., 39 S. C. L. R., XII I. A., 159.
3. I. L. R., IX B. S., 158.

carried into effect by the Court, the word "dharm" or "daram" including many objects not comprehended in the word "charity" as understood in English Law.[1] Where a person by his will bequeathed the rents of a certain house in trust for his children, and directed that, after the death of his last surviving child, such rents should be paid to the Committee of the District Charitable Society, it was held that the gift to the District Charitable Society failed, as the gift to the children, being a gift to the heirs of the testator to which there was no assent, was invalid.[2] Where a testator by will directed that his movable estate should not be divided or alienated by any of his heirs, and directed his executor to appropriate the net income, among certain specified persons in certain shares, it was held that the intention of the testator was to endeavour to prevent any partition of the estate, and not to convert his heirs-at-law into mere annuitants taking grants from him, that the executor held the estate in trust to pay the profits in certain defined shares to the heirs, and their representatives could not plead adverse possession against them so as to bar their claims by lapse of time.[3]

5. *The executor's powers.*—An executor is entitled to nominate a successor to carry out the purposes of a will under which he was made an executor[4]. The powers of a Khoja Mahamadan executor or administrator, like those of a Cutchi Mahamadan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts. Where a will gave the executor full powers with regard to the payment of the testator's debts, it was held that an administrator with the will annexed, who was a Khoja Mahamadan, succeeded to those powers, and, in a suit brought against him as such administrator by an alleged creditor of the testator's estate, represented all the persons interesed in the estate[5].

1. I. B. H. C. R., 71.
2. I. L. R., IX C. S., 66.
3. 17 W. R., 190.
4. 4 N. W., 106.
5. I. L. R., VI. B. S., 703.

The appointment of an infidel executor does not invalidate the will. All the acts of such an executor, and his dealings with the property under the will, until he is removed and superseded by the Civil Court, are good and valid. But it is a question of doubt whether, if an application were made by a person interested in the will to have the infidel executor removed, and a proper person appointed in his place, the application would be granted[1].

CHAPTER X.

SALE.

1. The provisions of the Mahammadan Law relating to sale are more a matter for curious research than of useful study, as the provisions of the Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882) on the subject of sale, would apply to all sales whether made by Hindus or Mahamadans; but the following remarks by MACNAUGHTEN are worth extracting.[2]

The provisions of the Contract Act and the Transfer of Property Act override the provisions of the Mahamadan Law relating to Sale.

"The provisions regarding purchase, sale, and similar transactions, are extremely simple and certain in their nature. There is no distinction made between sale and permutation; a barter of one commodity for another being designated a sale. Even according to our own law, the distinction is merely nominal, and there is no difference as to the legal provisions relative to sales and exchanges. The principal points of difference seem to be, the absence of any discrimination in the Mahamadan Law of sales of real and personal property, and its recognising verbal contracts as of equal validity with written ones. Another essential point of difference is, that the maxim of *caveat emptor* finds no place in this Code.

"The most efficient safeguards against the effects of improvidence in purchasers are established, so much so, as

1. 10 W. R., 185.
2. Pre. Re. xii.

almost to exclude the possibility of circumvention. A warranty is implied in every sale and a reasonable period of option may be stipulated, during which it is lawful to annul the contract. Where property has been purchased unseen it may be returned, if it does not fully answer the description, and the seller may at any time be compelled to receive back the property and refund the purchase-money, on the discovery of a blemish or defect, the existence of which, when in the possession of the seller, may be susceptible of proof.

"In exchange, where the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition to the validity of the contract, and no term of credit, on either side, is admissible, which would be advantageous to one of the parties, and savour therefore of usury; but where goods are sold for money, or money is advanced for goods, a term may be stipulated for the payment of money or for the delivery of the goods. So tenacious, however, is the law, of certainty, that it will not admit of any, the least, indefiniteness in the term. The date must be specified. From the above observations it will be seen, that the Mahamadan Law of sales does not differ very materially from the Civil Law, to which the provisions of the Scottish Code bear a close resemblance."

Section 54 of Act IV. of 1882 and Section 77 of Act IX of 1872.

2. The provisions of the Transfer of Property Act (Chapter III) and of the Indian Contract Act (Chapter VIII) will have to be followed in cases of sales of immovable and movable properties respectively: and the rules of the Mahamadan and Hindu Laws on this subject are therefore not of any use hereafter except as matters of curious research.

It may not be out of place to point out here that under Section 54 of Act IV of 1882 a *sale* is defined to be "a transfer of ownership in exchange for a price paid or promised or part paid and part promised:" such transfer,

in the case of tangible immovable property of the value of one hundred Rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument: while in the case of tangible immovable property of a value less than one hundred Rupees, such transfer may be made either by a registered instrument or by delivery of the property: and delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Under Section 77 of the Contract Act (Act IX of 1872) a sale is defined to be the exchange of property for a price; and it involves the transfer of the ownership of the thing sold from the seller to the buyer: and a sale is effected by offer and acceptance of ascertained *goods*, (which term includes every kind of movable property) for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods, or with tender, part payment, earnest, or part delivery, or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed. This is not the place to state the provisions of the law as embodied in these Statutes and the reader is referred to the Chapters above noted.

CHAPTER XI.

PRE-EMPTION.

The Remarks of MacNaughten on pre-emption.

1. MACNAUGHTEN says[1] "sales of land and other immovable property are clogged with an incumbrance, which is not, however, peculiar to this Code. I allude to the Law of pre-emption. This confers the privilege on a partner or neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has

1. Pre. Rem. xiv—xx.

declared himself willing to receive for the property to be disposed of. In the Jewish Law allusion is made to the custom, but it is not to be found among the ordinances of the Quoran. On the authority of Puffendrof it would appear that the right in question was not unknown to the ancients . . . In the Hidaya, the right Shoofaa is declared to be but a feeble right, as it is the disseizing another of his property, merely in order to prevent apprehended inconvenience; its extension to all cases of neighbourhood cannot fail to depreciate the value of landed property. . . . . There are numerous devices by which a claim founded on the right of pre-emption, may be avoided, and the law itself, admitting its weakness has annexed hard conditions to the establishment of its validity."

Pre-emption. What it is, what is its cause, and under what conditions does it exist.

2. The original meaning of Shoofaa, is conjunction. In Law it is a right "to take possession of a purchased parcel of land, for a similar (in kind and quality) of the price that has been set on it to the purchaser." The cause of it is the junction of the property of the Shoofee, or person claiming the right, with the subject of purchase. Among its conditions BAILLIE mentions the following:—

(1) There must be a contract of exchange, *i. e.*, a sale or something that comes into the place of a sale, otherwise there is no right of pre-emption.

(2) There must be an exchange of property for property.

(3) The things sold must be *akar* (immovable property) or what comes within the meaning of it, whether the *akar* be divisible or indivisible as a bath, or well, or a small house.

(4) There must be cessation of the seller's ownership in the subject of sale.

(5) There must also be an entire cessation of all right on the part of the seller. There is no right of pre-emption for an invalid sale.

(6) There must be *milk* or ownership of the Shoofee, or pre-emptor, at the time of the purchase, in the thing on account of which he claims the right of pre-emption.

(7) There should be no acquiescence by the Shoofee or pre-emptor in the sale or its effect either expressly or by implication.

(8) Movables are not directly or by themselves proper objects for the right of pre-emption. When a partition is made by partners of immovable property, the neighbour has no right of pre-emption.

(9) The right of pre-emption as founded on contract and neighbourhood is confirmed by *Tulub*, or demand, and *Ishhad* or invocation, and is perfected by taking possession. It is not incumbent on the pre-emptor to produce the price at the time of making his claim, but he should produce it after the decree.

3. In a recent case [1] it was decided by the Calcutta High Court, that in order to sustain

The ceremonies of *Talab-i-Mawasabat* and *Talab-ishtahad* (imme-

1. *Jarfan Khan* v. *Ja bbar Meah*. I. L. R., X. C. S., 383.

diate demand and demand with invocation) are essential.

a claim for pre-emption it is essential that the ceremony of *Tulub-i-mowashibat* (also spelt *Talab-i-Mawasabat*) should be properly performed. "By that ceremony is meant that, when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right it is lost;" and accordingly where the plaintiff on hearing the fact of sale, entered his house, opened his chest, took some rupees, called the witnesses, proceeded to the premises the subject of sale, and there cried the following words "that he has the right of pre-emption to purchase the said land and he shall exercise the said right let the Defendant, No. 2, receive the refund of the consideration money and make over the land to him," it was held that the right was lost because the plaintiff did not, on hearing of the sale, immediately call witnesses to attest the immediate demand and he made a delay, went into the house, got the money and then called the witnesses. From the same case it also appears that there are two ceremonies. "The *Tulub-i-mowashibat* or immediate demand which is first necessary, then the *Tulub-i-shad* or demand with invocation, if at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of

these, and had called on witnesses to attest the immediate demand, it would suffice for both demands and there would be no necessity for the other." In an earlier case[1] it was held that the ceremony of (Tulub-ish-had) also spelt (Talab-i-ishtahad), or affirmation before witnesses, may, at the option of the pre-emptor, be performed in the presence of the purchaser only, though he has not yet obtained possession, because he is the actual proprietor, and all that the law requires to give validity to the Tulub-ish-had is, that it be made in the presence of the purchaser or seller, or of the premises which are the subject of sale.

Pre-emption not recognized under the Hindu Law but upheld there as custom.

4. The Hindu Law does not recognise anything like the right of pre-emption, but it has been upheld where custom is shown to prevail, and when there is a special agreement between the claimant and the seller.

The history and nature of the right of pre-emption.

5. In an elaborate Judgment[2] Justice MAHMOOD discusses the history and nature of the right of pre-emption and the conclusion arrived at by him is as follows:—

"The right of pre-emption is, not a right of "re-purchase, either from the *vendor* or from the *vendee* involving any new contract of sale, but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendor's name were

1. *Janger Mahamad* v. *Mahamad Arijad* I. L. R., V. C. S., 509.
2. I. L. R. VII A. S., 775.

rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property, by the so-called re-purchase from the vendee, would be subject to another pre-emptive claim, dating, not from the original sale, but from such "re-purchase," a state of things most easily conceiveable where the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that pre-emptive litigation could never end."

"The law of pre-emption" says Justice MAHMOOD "is essentially a part of Mahamadan jurisprudence. It was introduced in India by Mahamadan Judges who were bound to administer the Mahamadan Law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Mahamadans and Hindus, because in this respect the Mahamadan Law makes no distinction between persons of different races or creeds. . . . In course of time, pre-emption became adopted by the Hindus as a custom. There has never been such a right as pre-emption recognised by the Hindu law, though I cannot forget that the rule of that Law which prohibits any member of a joint undivided family from selling his share in the joint property without the consent of his co-parceners, aims at a result not dissimilar to that which the Mahamadan Law of pre-emption is intended to achieve. . . . . There can be no question that the Mahamadan Law of pre-emption must be administered in cases in which all the parties concerned are Mahamadans. The question whether it should be administered in a case in which only the vendee is a Hindu must be answered in the affirmative. . . . . .

In all cases of pre-emption, there are three parties to be considered, the pre-emptor, the vendor, and the purchaser. . . . . The pre-emptive rights and obligations between the Mahamadan co-parcener and neighbours being mutual, the principle of the maxim *qui sentit com-*

modum sentire debet et onus applies, but it would not apply in the case of a Hindu where no such reciprocity exists. And if the Hindu purchaser is to be affected by the Mahamadan pre-emptive claim, it would be on the principle of a cognate maxim that land passes with its burdens, *terra transit cum onere*, and there would be no violation of the notions of justice, equity, and good conscience. . . . . The question whether the Mahamadan Law of pre-emption applies to a case where a pre-emptor and vendor are both Mahamadans and the only non-Mahamadan is the vendee must be answered in the affirmative. . . . Pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary 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.....I may observe that the *nature* of the right, partakes strongly of the nature of an easement,—the "*dominant* tenement" and the "*servient* tenement" of the law of easement being terms extremely analagous to what I may respectively call the "*pre-emptive* tenement" and the "*pre-emptional* tenement" of the Mahamadan law of pre-emption. Indeed, the analogy goes further, for the right of pre-emption, like an easement, exists before the injury to that right can give birth to a cause of action for a suit,—sale in the one case corresponding to the invasion of the easement in the other. In short, I maintain that, under the Mahamadan Law, the rule of pre-emption, proceeding upon a principle analogous to the maxim *Sic utere tuo ut alienum non lædas*, creates what I may call a legal servitude running with the land; and the fact that that law has ceased to become the general law of the land, cannot alter the *nature* of the servitude, but only renders its enforcement dependent upon the religion of the party who claims the servitude and of the party who owns the property subject to that servitude. The cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement; its object is to obviate

the inconvenience or disturbance which would arise by the introduction of strangers; and the right exists antecedently to sale and the sale is a condition precedent, not to the *existence* of the right, but only to its *enforceability*.

The Mahamadan law nowhere recognises any right of *veto* in the pre-emptor, nor does it impose any positive legal disability on the vendor in this respect. . . . In the case of pre-emption, the object of the right is to prevent the intrusion not of all purchases in general, but only of such as are objectionable from the pre-emptor's point of view. Again, the right (unlike the right of *veto* possessed by the members of a joint Hindu family with respect to the sale of his share by any one of them) is not free from definite qualifications, among which the most important is, that the pre-emptor complaining of the intrusion of the purchaser, should place himself absolutely in the position of the purchaser with reference to the terms of the contract of sale, such as the amount and payment of the price, &c. It is obvious, then, that before a pre-emptor can make up his mind to assert his pre-emptive right, he must *exnecessitate rei* know definitely who the purchaser is, and under what terms he has purchased the property, because it may well be that, on the one hand, he may have no objection to such purchaser and on the other hand, even if he does object, he may not be in a position to pay the price which the purchaser has paid. . . . . Therefore a sale irrespective of the pre-emptor's consent is not void in law. The pre-emptive right may or may not be asserted or enforced; and therefore a pre-emptor is incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place. . . . The right of pre-emption is not an absolutely unqualified disability for it does not absolutely prohibit sale without the consent of the pre-emptor. But that it amounts to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and thus affects his title, which would otherwise amount to absolute dominion, cannot, in my opinion, be doubted....The law does not oblige the vendor to give notice of the projected

sale to the pre-emptor nor does it vitiate a sale executed without his permission. The opinion of MITTER, J. in Sheikh Kudratulla's case[1] "that pre-emption is a right feeble and defective," because on the one hand it is lost if not immediately asserted, and on the other hand it can be defeated by "tricks and artifices", is next disputed: and Justice MAHMOOD goes on to add "the object of the Mahamadan Law in rendering the immediate demand of pre-emption, a condition precedent to the exercise of the right, is to render it, obligatory on the pre-emptor to give the earliest possible notice to the vendee, not to rely upon his purchase for making improvements, &c., or otherwise dealing with the purchased property. The rule is a very salutary restriction of right, which might otherwise be very capriciously enforced under a system of law which recognised no rule as to the limitation period for enforcing claims. Indeed, the rule rests much upon the same consideration as the doctrine of "notice" and the principle of acquiescence amounting to estoppel in equity jurisprudence. But such restrictions do not derogate from the right of pre-emption any more than another equitable rule of the same right, that the pre-emptor, in enforcing his right, cannot break up the bargain of sale by pre-empting only a portion of the property sold to one purchaser. The law of pre-emption is *full of* equitable considerations of this nature. The assertion that pre-emption could be defeated by "tricks and artifices" arises from confounding the rules of the Mahamadan Law of evidence and procedure with the rules of substantive law, and not paying sufficient attention to the distinction between moral behests and legal duties."

Case law on the subject of Pre-emption.

6. The following is an abstract of the case law on the subject. There are a number of cases reported and these have been arranged in some order:—

(a) *The origin of, and the requisites for, a right of pre-emption.*—The right of pre-emption arises from a rule of

1. 4 B. L. R., 134.

law by which the owner of the land is bound; and it exists no longer if there ceases to be an owner who is bound by the law either as a Mahamadan or by custom.[1] This right does not arise until the seller's right of property has been completely extinguished.[2] There is no right of pre-emption where there has not been a real *bonâ fide* sale.[3] A transfer without money or other consideration, and which is in fact a gift, is held not to be a sale to which the right of pre-emption attaches.[4] In a suit claiming a right to pre-emption, where it was found as a fact that the sale had not been completed, and that there had not been cessation of the vendor's right, it was held that, whether under the ordinary principles which relate to contracts of sale or under the principles of Mahamadan law, no right could arise in favor of the pre-emptor. The privilege of *Shuffa* refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor.[5] The right of pre-emption applies to sales only, and cannot be enforced with reference to leases in perpetuity like a *mokurrari*, which (however small the reserved rent) are not sales, and in which there is no "Milkyut" or ownership on the part of the *Shuffa* or pre-emption.[6] In a case of private sale the right of pre-emption must be based on usage or contract, and an instance of pre-emption in an auction-sale is not sufficient.[7] The right of pre-emption may be exercised upon a re-sale of the property, after a previous sale which has fallen through, and with respect to which no claim of pre-emption was made.[8] It cannot be exercised by a judgment-creditor in respect of the sale of property in execution of his decree.[9] When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner

1. 24 W. R., 95.
2. 10 W. R., 246, 20 W. R., 216.
3. 2 W. R., 78.
4. W. R., 1864, 239.
5. 8 W. R., 255.
6. 25 W. R., 43.
7. 1 Agra, 258.
8. Marsh, 11. 1 Hay, 32.
9. Marsh, 555. 2 Hay, 651.

has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply.[1] The right of pre-emption does not arise where the seller or buyer repudiates the sale as there is no sale in such a case.[2] The right of pre-emption when once allowed and exercised by the pre-emptor cannot be disputed at subsequent occasions of sale, and neither manhood, puberty, justice nor respectability of character, are conditions of pre-emption under the Mahamadan Law.[3] Nor is indebtedness of the pre-emptor.[4] In a suit to enforce a right of pre-emption where there is other evidence, and the Court can come to a distinct finding upon it, it is not incumbent on the Court to put the purchaser upon his oath.[5] Where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very evenly balanced.[6] This right is not matter of title to property, but is rather a right to the benefit of a contract; and when a claim is advanced on such a right it must be shown that the defendant is bound to concede the claim either by law, or by some custom to which the class of which he is a member is subject on grounds of justice, equity, and good conscience.[7] It is not one which attaches to property, and the obligation it implies may be limited to the residents of a district, or to a family or to any particular class of persons, it being for the claimant in each case to show that it attaches to the defendant.[8] It is very special in its character and is founded on the supposed necessities of a Mahamadan family arising out of their minute sub-division of ances-

1. 1 B. L. R.; A. C., 105; 10 W. R., 165.
2. W. R., 1864, 219.
3. 1 Agra, 236.
4. 2 Agra, 76.
5. 7 W. R., 211.
6. 7 W. R., 211.
7. 8 W. R., 446.
8. 15 W. R., 223.

tral property; and as the result of its exercise is generally adverse to public interest, it will not be recognised by the High Court beyond the limits to which those necessities have been judicially decided to extend;[1] a solitary case or two is not sufficient to prove the custom in a locality where the privilege is not binding upon the parties by positive law.[2] It cannot be held upon decisions that were in conflict with other decisions of the same district, that the custom of pre-emption prevailed there; though decisions tending the same way, would be satisfactory proof of the fact.[3] When pre-emption exists among Hindus, it is a matter of contract or custom agreed to by the members of the village or community. Such a custom is not properly described as attached to the land, and as soon as any member of a Hindu community, who have agreed to be governed by it, sells to any one who is a stranger to the agreement, the land is no longer subject to it.[4] Unless a prescriptive usage and local custom be clearly established, a Hindu defendant is not bound by the Mahamadan Law in a case in which a Mahamadan seeks to enforce his right of pre-emption.[5] A claim for pre-emption cannot be maintained against a Hindu purchaser.[6] A Hindu purchaser is not bound by the Mahamadan law of pre-emption in favour of a Mahamadan co-partner, although he purchased from one of several Mahamadan co-parceners; nor is he bound by the Mahamadan law of pre-emption on the ground of vicinage. A right of pre-emption in a Mahamadan does not depend on any defect of title on the part of his Mahamadan co-partner to sell except subject to the right of pre-emption, but upon a rule of Mahamadan law, which is not binding on the Court, nor on any purchaser other than a Mahamadan. Wherever a Mahamadan co-sharer or neighbour has a right of pre-emption and his pro-

1. 8 W. R., 309.
2. 1 Agra, 243.
3. 9 W. R., 537.
4. I. L. R., 7. A. S., 916.
5. 8 W. R., 204. 2 I. J. N. S., 249.
6. 7 N. W., 147.

perty is sold by his neighbour or co-sharer, also a Mussúlman, his right is not defeated by the mere fact that the purchaser is a Hindu.[1] Where the vendor is a Hindu, a suit to enforce the right of pre-emption, founded upon Mahamadan Law is not maintainable.[2] It was held by the full Bench of the Allahabad High Court that in a case of pre-emption, where the pre-emptor and the vendor are Mahamadans and the vendee a non-Mahamadan, the Mahamadan Law is to be applied to the matter in advertence to the terms of Section 24 of the Bengal Civil Courts Act (VI of 1871): and two Judges were of opinion that by the provisions of that Section the Court was not bound to administer the Mahamadan Law in claims for pre-emption, but that on grounds of equity, that law had always been administered in respect of such claims as between Mahamadans, and it would not be equitable that persons who were not Mahamadans, but who had dealt with Mahamadans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahamadan Law, be permitted to evade those conditions and obligation. Justic MAHMOOD, however, was of opinion that by a liberal construction, the rule of the Mahamadan Law as to pre-emption is a "religious usage or institution" within the meaning of Section 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts. The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of "*Substitution*," entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title[3]. Where the custom of pre-emption prevails among Hindus, it does not necessarily follow that the person claiming pre-emption must fulfil all the con-

1. 4 B. L. R. F. B., 134. 13 W. R. F. B., 21.
2. I. L. R. 1. A. S., 564.
3. I. L. R. VII. A. S., 775.

ditions of the Mahamadan law regarding pre-emption. It should be determined whether the custom is a custom under which it is incumbent upon him to fulfil those conditions.[1] Where a Mahamadan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom and the formality of "*ishtihad*," or express invocation of witnesses, required by Mahamadan law of pre-emption, was not one of the incidents of such custom, it was held that the circumstance that the plaintiff was a Mahamadan did not preclude him from claiming to enforce such right against the defendants, who were Hindus; and that the formality of "ishtihad" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right[2]. The custom of pre-emption has been recognised among Hindus in the province of Behar[3]. A native of Lower Bengal seeking his fortune in Behar would not be bound by the rule of Mahamadan law of pre-emption if nothing were shown to the contrary[4]. There is no judicial finding to the effect that the custom of pre-emption is recognised among the Hindus of the province of Behar. It is doubtful whether, even under Mahamadan law the owners of two adjacent lakhiraj estates, wholly unconnected with one another, could either of them claim a right of pre-emption on the ground of vicinage. No such right of pre-emption on the ground of the mere vicinage has been known to exist among Hindus[5]. A right or custom of pre-emption is recognised as prevailing among Hindus in Behar and some other provinces of western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved; such custom, where it exists, must be presumed to be founded on, and co-extensive with, the Mahamadan law upon that subject, unless the contrary be shown. The

1. 7 N. W., 1.
2. I. L. R. 5. A. S., 110.
3. W. R., 1864, 259.
4. 24 W. R., 95.
5. 2 B. L. R. A. C., 330; 11 W. R., 251.

Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahamadan law of pre-emption; but the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in Mahamadan Law.[1] The custom of pre-emption, as applicable to Christians in Bhangulpore, must be proved on the same principle as has been applied to Hindus in Behar.[2] The right of pre-emption arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court held that there was no right of pre-emption.[3] Conflicting decisions of the subordinate Courts held not to prove that the custom of the right of pre-emption under Mahamadan Law prevails among the Hindus of Chittagong.[4] In another case the existence of a local custom as to the right of pre-emption among the Hindus of Guzerat was recognised and it was held that such a custom, where it exists, is regulated by the rules and restrictions of the Mahamadan Law.[5] The Mahamadan doctrine of pre-emption is not Law in the Madras Presidency[6] nor in Sylhet. The Mahamadan Law nowhere recognises the right of pre-emption in favour of a mere tenant upon the land[7].

(*b*) *Co-sharers.*—A shareholder in the property sold has the first or strongest right of pre-emption. A private partition, though not sanctioned by official authority, if full and final as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption.[8] When part of

1. B. L. R. S. V. 35., W. R. F. B., 143.
2. 6 W. R., 250.
3. 10 B. L. R. 117., 18. W. R., 440.
4. 1 W. R., 234.
5. 6 Bom. A. C., 263.
6. 6 M. H. C. R., 26.
7. 8 W. R., 437.
8. 2 W. R., 47.

an estate is sold in execution of a decree, a co-sharer in the estate is a partner in the thing actually sold and is entitled to the right of pre-emption[1]. Under Shiah law the authorities leave the point doubtful whether there can be any right of pre-emption in respect of property where there are more than two partners, but the Court held in accordance with the practice of the Courts in which no claim for pre-emption had ever been defeated on that ground[2]. Where there is a plurality of persons entitled to the privilege of pre-emption the right of all is equal without reference to the extent of their shares in the property[3]. Under the Sunnie law the right of pre-emption may be exercised by one or more of a plurality of co-sharers[4]. The proprietor of a divided one anna share in a four anna share of an estate is not entitled to a right of pre-emption as a *Shafee Khalit* in the remaining three annas share. It was however, not decided in the case whether, if there remained any adjoining ground in which the community of interest still continued since the separation, he would be entitled in right of vicinage to pre-emption.[5] A sharer in the appendages has not an equal right to pre-emption with a sharer in the body of the estate.[6] In order to establish a right of pre-emption on the part of a sharer, it is not necessary that the property sold should be actually separated or defined.[7] The word "*Khalit*" is not improperly used in a plaint in a pre-emption suit to designate a *Sharik* or partner, in the substance of a thing; and if it is not clear whether the plaintiff claimed pre-emption as *Khalit* or *Sharik*, it may be shown by express words, or it may be inferred from the written statement, whether the plaintiff claimed on the one or on the other ground. Where the intention of the co-proprietors of an estate is, to make a complete batwara of the whole, but an inconsiderable part is by

1. 5 N. W., 170.
2. 2 N. W., 360.
3. 3 W. R., 71.
4. I. L. R., 10. C. S., 1008.
5. 7 B. L. R., 45. 11 W. R., 169.
6. 17 W. R., 343.
7. 14 W. R., 365.

oversight or accident left out of the division, that will not have the effect of giving one co-proprietor a claim of pre-emption on the sale to a stranger by another co-proprietor of his share or division of the estate. Where an integral portion or property, as a wall, is left purposely joint and undivided the community of interest continues.[1] In a suit to recover by right of pre-emption, on the ground that plaintiff was in the position of a co-partner in the property to be sold, notwithstanding a private separation having taken place between the share-holders, inasmuch as he was still liable for arrears of Government Revenue and might still apply for a public Batwara, it was held that as plaintiff had divided off his own share by regular metes and bounds and made himself in every respect independent of his co-partners so far as lay in his power to do so, he had by his own act deprived himself of an advantage which the law might have given him under different circumstances.[2] The term "*Sharik*" cannot be restricted to cases in which the parties enjoy the properties jointly. In the contemplation of Mahamadan Law those who occupy other houses in the same mansion are regarded as partners together with the person the sale of whose share in a house gives rise to the question of pre-emption[3]. No right of pre-emption can exist as against a co-parcener[4]. There is no rule of Mahamadan law giving one co-parcener any right of pre-emption where another co-parcener is the purchaser.[5] If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned[6]. The law of pre-emption was never intended to apply to a case in which the purchaser is not a stranger, but one who is already either a shareholder or a

1. 7 B. L. R., 42.
2. 11 W. R., 215.
3. 13 W. R., 124.
4. 6 W. R., 250.
5. I. L. R. 4. C. S., 831. 2 C. L. R., 319.
6. I. L. R. VII. A. S., 118

neighbour[1]. This right attaches to the sale of the share of the Zamindari in the case of a co-sharer, though it may not attach on the ground of vicinage[2]. A co-parcener has a higher right of pre-emption than a neighbour, and there is nothing in the Mahamadan law to prevent his enforcing his right when the purchaser happens to be a neighbour.[3] One of the two joint sharers has no preferential title to this right in his capacity of neighbour, but is equally entitled with his co-sharers to the privilege of pre-emption, without regard to the extent of their shares.[4] A partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such a right on the ground of vicinage.[5] Where two persons have by vicinage an equal right of pre-emption the property is to be decreed to them in halves, on payment of their respective moities of the purchase money.[6] Mere possession gives no "*Huk Shuffa*;" there must be ownership (*Mileck*) in the contiguous land, the onus being on the plaintiff to prove ownership.[7] The owner of land is not entitled to pre-emption of a house standing thereon 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.[8] A claim to a right of pre-emption on the ground of vicinage alone will not lie in the case of large estates, but only when either houses or small holdings of land make parties such near neighbours as to give a claim on the ground of convenience and mutual service.[9] The Mahamadan Law of pre-emption on the score of vicinage applies only to houses or small plots of land, and not to large estates, or to a claim based on partnership when it is in proof that a separation of the estate has been effect-

1. 7 W. R., 260.
2. 15 W. R., 223.
3. 16 W. R., 107.
4. 7 W. R., 150.
5. 6 B. L. R., 41. 14 W. R. F. B., 1.
6. 2 N. W., 257.
7. 9 W. R., 455.
8. 2 N. W., 100.
9. 2 W. R., 261.

ed.[1] The right of pre-emption on the ground of vicinage is limited to parcels of land and houses and does not extend to the purchase of an entire estate, even though it be entirely surrounded by the lands of the would-be-pre-emptor.[2] This right exists whether the parcel of land sold, and in respect of which the claim is made, be large, or small.[3] It extends to agricultural estates and is not merely confined to urban properties or small plots. Where there are several properties to which a common appurtenance in the shape of an undivided plot of land, a few trees and tanks, is attached, partners in the appurtenance can claim pre-emption in respect of the properties.[4]

If a sharer in an estate alienates his interest to a co-sharer and a stranger, the purchasing sharer, by joining an outsider in the purchase, forfeits his right as a sharer, and another co-sharer has the right of pre-emption. In the case of a joint purchase made by two persons of shares in two villages, in one of which one of the purchasers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares in the aggregate purchase would not affect the rule.[5] In a certain case where A and B had certain proprietory rights in an eight annas putti of a certain mehal, C and D had no rights in that putti, but D had a small share in the remaining eight annas putti, a private partition between the putties having taken place C and D's brother lent to B two sums by deeds dated 12th and 21st June 1876 and C and D subsequently instituted foreclosure proceedings and on the 5th May 1884 were put into possession of B's share in the first mentioned putti in execution of a decree which they had obtained, and A brought a suit against C and D to enforce his right of pre-emption on the 18th April 1885, it was held that though the co-parcenery could not be said to have ceased to exist, or those who were co-parceners be said

1. 8 W. R., 413.
2. 2 B. L. R. A. C., 63 : 10. W. R., 356.
3. 6 B. L. R., 42.
4. 6 N. W., 377.
5. I. L. R., XV C. S., 224.

to have become strangers to one another, yet, there being a finding that the putties were separate, it was not necessary, in order to establish A's preferential right, that a partition by metes and bounds should be shown to have taken place; but that a private partition if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that A's claim must therefore succeed. It was further held in that case that the suit was not barred by Limitation, it being governed by either Article 10 of the second Schedule of XV of 1877 which gave the plaintiff a year from the 5th May 1884, the date on which the mortgagee obtained possession, or by Article 120, under which the right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure and there would be 6 years allowed from that time.[1] In a suit by the plaintiff to enforce her rights of pre-emption in respect of a share in a village of which she alleged herself to be a co-sharer with the vendors, it was held that the plaintiff being out of her possession of her share at the time she instituted the suit for pre-emption was immaterial, and that it would be sufficient if the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen, and all that was necessary is that the pre-emptor should have, in the pre-emptive tenement, a vested ownership, and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership.[2] A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption, so as to enable him upon the strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder, who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character.[3]

1. I. L. R., XIV C. S., 761.
2. I. L. R., X A. S., 472.
3. I. L. R. IX. A. S., 480.

(c) *Pre-emption in Towns.*—Wherever the custom of pre-emption exists in towns or amongst Hindus, the presumption is, until the contrary be shown, that the custom is based upon the Mahamadan Law of pre-emption. Therefore, where a person owns the lower floor of a house, and another person owns the upper floor, with a right of way to it through the house of a third party, and sells the upper floor with its right of way, the owner of the house in which the way lies has under such custom a right of pre-emption of the upper floor preferable to the right of the owner of the lower floor.[1] Where a dwelling house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, it was held that the right of pre-emption attached to such house.[2] The owner of the land, through which the land in respect of which a right of pre-emption is claimed receives irrigation, has a preferential right to purchase over a mere *neighbour*.[3]

(d) *Pre-emption in mortgages.*—In the case of a mortgage the right of pre-emption does not arise until the equity of redemption is finally foreclosed.[4] On the foreclosure of a mortgage, after the expiry of the year of grace, but before a decree for possession had been obtained by the mortgagee, a suit to enforce this right in respect of the property mortgaged is maintainable.[5] In a suit for a declaration of the plaintiff's right of pre-emption in a property which had been originally mortgaged, but which ,owing to a subsequent arrangement, had not passed from the mortgagor to the mortgagee, it was held that as the ownership was still with the mortgagor, who could redeem his property within a stipulated period, no right of pre-emption had arisen.[6]

(e) *Waiver of right or refusal to purchase.*—Where one

1. 5 N. W., 31.
2. I. L. R. 2. A. S., 99.
3. 3 B. L. R. A. C., 296 : 12 W. R., 162.
4. B. L. R. S. V., 166 : 2 W. R., 215.
5. 6 B. L. R. A. pp., 114.
6. 11 W, R., 282.

of two neighbours has sold his land to a stranger, and the other neighbour has thereupon claimed a right of pre-emption, no subsequent dissolution of the contract affects the right of the pre-emptor which has once accrued and been duly asserted.[1] Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, he could not set up his right of pre-emption after a sale to a stranger.[2] Where a Mahamadan offered to sell his share of certain property to a partner and on the refusal of the latter to purchase the same, sold it to a stranger, it was held that the partner could not sue to enforce his right after the sale.[3] Where A and B, Mahamadan co-sharers of a Talook, made separate agreements to pay rent to the Zemindar, each shareholder being liable for his own share of the rent merely, and subject to this arrangement the lands continued *ijamali*, it was held that on a sale by A of part of his share to a stranger, who was also a Mahamadan, B was entitled to premption.[4] Where a condition for pre-emption contained in a record of rights was intended to take effect at the time of sale, and its language implied that the co-sharers in whose favor it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the conditions to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage.[5] The heirs of a Mahamadan have no legal interest or share in his property so long as he is alive, and cannot therefore be regarded as in any sense co-sharers or co-parceners in his property, so as to be entitled to claim the right of pre-emption in case of a sale by him of his property. Where a husband sold his share of an undivided estate to his wife, it was held

1. 4 B. L. R., A. C., 219.
2. 7 I. L. R., 19: 15 W. R., 247.
3. 9 B. L. R., 253: 18 W. R., 401.
4. 3 C. L. R., 166.
5. I L. R., I. A. S., 207.

that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale; and where a husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower, it was held that such transfer was a "*sale*" within the meaning of the Mahamadan Law of pre-emption and gave rise to that right.[1] This right may be claimed after a sale notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property.[2] But where the plaintiff in a suit to enforce this right alleged that the true consideration for the sale was less than the amount stated in the sale deed, and it was found that he made no communication to the vendor after he became aware that a sale was being negotiated, and that he did not make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and vendee, it was held that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his rights of pre-emption.[3] If a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right. Where in a suit to enforce the right of pre-emption, it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and that the latter paid the price and

1. I. L. R. 5. A. S., 65.
2. I. L. R. I. A. S., 521.
3. I. L. R. VII., A S., 23.

purchased the property for themselves, it was held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it.[1]

(*f*) *Pre-emption as to portion of property.*—In the absence of sufficient ground for refusing to take the whole of the lands to be sold, the right of pre-emption cannot be asserted as to a portion only[2]. This right cannot ordinarily be claimed in respect of only a portion of any property conveyed away in a single sale; but this rule holds good only when the property sold is one entire property. Where a single sale embraces two distinct properties, in respect of one of which a right of pre-emption resides in any person who has not a similar right in regard to the other, it was held that it would be equally unreasonable to rule that he could claim both, and that he would claim neither, the only reasonable rule being that he could claim as much as he could take by a decree if it were separately sold.[3] Every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right; [4] where under a deed of sale the vendor conveyed to the purchaser five lots of land and a suit was brought by a third party to enforce a right of pre-emption in respect of one out of the five plots, it was held that he could divide the bargain and sue on the ground of pre-emption for a portion only of the property covered by the deed of sale.[5] Where the property of several co-sharers, some of whom were minors, was sold to a single purchaser under a deed of sale, which contained a covenant by the vendors who

1. I. L. R., 8. A. S., 275.
2. 2 W. R., 285.
3. 25 W. R., 500.
4. I. L. R. 6., A. S., 423.
5. 6 B. L. R., 386 : 14. W. R, 469.

professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur, should the minors when they came of age not ratify the sale, and a suit was brought to enforce the plaintiff's right of pre-emption in respect of the land sold, it was held that the plaintiff was bound to claim her right against all the shares and could not enforce it in respect of some only[1]. Where the plaintiffs who were shareholders in a particular "Mouzah," sued to enforce a claim to a right of pre-emption upon sale under a *Kobala* for a particular sum of money by another shareholder of a share in the "Mouzah" along with other properties, with which, the plaintiffs had no concern, to a third person who was not a shareholder, it was held that as the plaintiffs were entitled to claim a right of pre-emption in respect of the Mouzah only and that as the Mouzah was distinct from the other properties sold the suit was maintainable.[2] The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption by suing for a portion only of the property sold[3].

(*g*). *Ceremonies.*—The right of pre-emption being a right weak in its nature, where such right is claimed under Mahamadan Law, it should not be enforced except upon strict compliance with all the formalities which are prescribed by that law.[4] In the case of pre-emption strict proof is necessary of the performance of the preliminaries.[5] There are certain ceremonies to be performed in order to lay a foundation for the establishment in a Court of law of a right of this kind, when it is menaced.

It is a general rule of pre-emption that any act or omission on the part of a duly authorised agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-

1. 1 B. L. R. A. C., 78. 10. W. R., 111.
2. 13 C. L. R., 45.
3. I. L. R. 6. A. S., 455.
4. I. L. R. I. A. S, 283.
5. W. R., 1864, 117.

emptor himself.[1] The legal forms to be observed by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person.[2] The affirmations by witnesses need not be made by the claimant of the right of pre-emption in person but may be made by a duly constituted agent[3]. To entitle a person, otherwise favourably situated, to the right of pre-emption, two conditions must be fulfilled: first (*Talab-i-Mawasabat*), on receiving information of the sale he must immediately declare his intention to assert his right, and secondly (*Talab-i-ishtahad*), he must, as soon after as possible, make the demand of the vendor or purchaser, or upon the premises, and in the presence of witnesses[4]. In order to sustain a claim for pre-emption it is essential that the ceremony of (*Talab-i-Mawasabat*) should be properly performed.[5] Under Mahamadan Law the (*Talab-i-Mawasabat*), or immediate claim to the right of pre-emption, should be made as soon as the fact of the sale is known to the claimant, otherwise the right is lost; and it was consequently held that the plaintiff having failed to make the (Talab-i-Mawasabat) until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption.[6] On hearing of a sale, the pre-emptor must immediately make his demand called *Talab-i-Mawasabat*. Where a pre-emptor on hearing of the sale of a property to which he had a right of pre-emption, went to the property in dispute and there declared his right as pre-emptor,[7] it was held that such delay was fatal to his claim. The mere fact of the pre-emptor taking a short time before performance of the *Talab-i-Mawasabat*, for ascertaining whether the information conveyed to him was correct or not does not invalidate his right. The Mahamadan Law allows a short time

1. I. L. R. VII. A. S., 41.
2. I. L. R., 1. A. S. 521.
3. W. R., 1864., 219.
4. 10 W. R., 119.
5. I. L. R., 10. C. S., 383.
6. I. L. R. I. A. S., 283.
7. 4 B. L. R. A. C., 216: 13. W. R., 259.

for reflection before performance of the first demand.[1] The act of a claimant rising from his seat to claim his right of pre-emption instead of claiming it as he sat, is not a delay sufficient to entail a forfeiture of his right.[2] Although, according to Mahamadan Law books, it is not necessary, in respect to the *Talab-i-Mawasabat*, or first preliminary required to establish a right of pre-emption, that witnesses should hear the exclamation it involves, yet it does not follow that, as matter of evidence, courts of law are bound to decree a suit to establish such a right simply on the deposition of the plaintiff.[3] To establish a claim to pre-emption it is not enough to prove that the ceremony of *Talab-i-Mawasabat* was performed; it is also necessary to prove the *Talab-i-ishtahad*.[4] The "*Talab-i-ishtahad*" is a preliminary act as essential as the *Talab-i-Mawasabat*, to secure to the claimant the right of enforcing pre-emption. There should always, therefore, be a distinct finding as to whether it was properly made or not.[5] It is essential to this right to prove the performance of the *Talab-i-ishtahad*.[6]

To the due performance of the ceremony of Talab-i-ishtahad, it is not necessary that any particular form of words should be employed.[7] To establish this right, it is necessary to show that the ceremony of *Talab-i-ishtahad* has been observed, which requires the pre-emptor to make an affirmation, not necessarily in the precise words of the form given in the Hedaya, but in substance, to the effect of declaring, before witnesses, that the earlier preliminary, *viz.*, *Talab-i-Mawasabat* has already been performed.[8] To the ceremony of ishtahad or "*Talab-i-ishtahad*," it is essential that there should be an express invocation of witnesses.[9] Strict adherence to the rules for

1. 4 B. L. R. A. C., 203: 13. W. R., 299.
2. W. R., 1864, 294.
3. 11 W. R., 404.
4. 11 W. R., 307.
5. 8 W. R., 463.
6. W. R. 1864., 60.
7. 8 B. L. R. 455; 17. W. R., 265.
8. 24 W. R., 462.
9. 2 B. L. R. A. C., 12.

the performance of the *Talab-i-ishtahad* is especially necessary. In performing the *Talab-i-ishtahad*, the pre-emptor must clearly declare his right and invoke witnesses. He must declare that, "he has a right of pre-emption to which he has laid claim and, that he still claims it" and invokes witnesses "to bear witness therefore to the fact."[1] It is essential to the performance of the *talab-i-ishtahad*, that third persons should be formally called upon, either in the presence of the purchaser or on the land; or if the vendor is in possession in the presence of the vendor to bear witness to the demand.[2] The ceremony of *Talab-i-ishtahad* or affirmation before witnesses, may, at the option of the pre-emptor, be performed in the presence of the purchaser only, though he has not yet obtained possession.[3] To establish this right the *Talab-i-ishtahad* or affirmation before witnesses, must be performed in the presence of the person in possession of the lands, whether it be the vendor or the purchaser.[4] Where a person claiming a right of pre-emption made the *Talab-i-Mawasabat* in the presence of witnesses, but when doing so was neither at the place, the subject of this right, nor was he in the presence of the vendor or vendee, it was held that the right of pre-emption could not be claimed as it was found that the Talab-i-istahad was invalid on the ground that there was no evidence of a demand with invocation of witnesses having been made.[5] In a suit to establish this right where the witnesses said that on the refusal of the vendor the pre-emptor had nominated them witnesses, the lower Courts were held to have been justified in their inference that he had complied with the exigency of the Mahamadan Law.[6] Where the first talab (Talab-i-Mawasabat) is made in the presence of witnesses, and the witnesses are then called to bear testimony to the fact, it is

1. 4 B. L. R. A. C., 171; 13. W. R., 177.
2. 6 B. L. R., 165; 14 W. R., 265.
3. I. L. R. 5 C. S., 509; 5 C. L. R., 370.
4. 16 W. R., 3.
5. I. L. R. 10, C. S., 581.
6. 22 W. R., 184.

not necessary to invoke witness on the occasion of the second Talab (Talab-i-ishtahad.)[1] Where a person seeking pre-emption declared his right thereto when he first heard of the sale, in the presence of witnesses, and as soon as was possible on the same day, in the presence of the same witnesses, demanded his right from the vendors and the purchasers, it was held that it was unnecessary that he should again state, when making his demand, or that his witnesses should testify to the fact, that he had declared his right as soon as he heard of the sale. The principle of the law of pre-emption is, that the pre-emptor should assert his right as soon as he heard of the sale; that he should demand his right from the vendor or purchaser, or on the ground, in the presence of witnesses; and this assertion and demand may be simultaneous, but if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before witnesses that he asserted his right when first he heard of the sale.[2] To entitle a person to a right of pre-emption, it must be shown that the *Talab-i-ishtahad* was made as soon as possible.[3] It is not a binding rule of law that the *Talab-i-ishtahad* by a pre-emptor, if made within a day after the receipt of intelligence of the purchase, is necessarily in time for the preservation of the right of pre-emption. The due and sufficient observance of the formality of *Talab-i-ishtahad* as to time, is a question to be decided in each case by the Court which has to deal with the facts.[4] The personal performance of the *Talab-i-ishtahad* or demand for pre-emption by the pre-emptor, depends upon his ability to perform it. He may do it by means of a letter or messenger, or may depute an agent, if he is at a distance and cannot afford personal attendance.[5] A delay of one day is not such a delay as to interfere with this right. The demand by affirmation should be made with the least

1. 3 C. L. R., 166.
2. I. L. R., 10. C. S., 1008.
3. 12 C. L. R., 312.
4. 8 B. L. R., 160; 16 W. R., F. B., 13.
5. 4 B. L. R. A. C., 139; 12 W. R., 484.

practicable delay. The ceremony of affirmation should be carried out before either the vendor or the purchaser, or be performed on the premises.[1] A claim to pre-emption should be made as soon as the claimant becomes aware of the completion of the sale.[2] When a person claims a right of pre-emption it is necessary to the validity of his claim that he should promptly assert, after the completion of the sale, his willingness to become a purchaser.[3] The first thing to be done by the claimant of pre-emption is to make the preliminary declarations. First going to his house to get the money is not a compliance with the law.[4] In the absence of evidence of any special custom different from, or not co-extensive with, the Mahamadan Law of pre-emption, the requirements of that law as to immediate and confirmatory demands must be complied with: and it was held that a suit for pre-emption must be dismissed where there was no evidence that the plaintiff had satisfied these requirements, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the contract price.[5] A contract having been entered into for sale and purchase of certin property, the plaintiff, the pre-emptor, was not bound to defer the enforcement of his right of purchase till the bill of sale had been delivered or registered, or payment made.[6] The parties to pre-emption, being Mahamadans, must be bound by the strict conditions of law of pre-emption and the offer to purchase before the Registrar at the time of registration of the sale-deed was not a sufficient compliance with the provisions of that law.[7] It is not incumbent on a pre-emptor to tender the price

1. 6 W. R., 173.
2. 7 W. R., 428.
3. 5 N. W., 11.
4. 5 W. R., 203.
5. I. L. R., IX A. S., 513.
6. 8 W. R., 500.
7. 1 Agra, 184.

at the time of making his claim.[1] In a suit for pre-emption, it is unnecessary to prove a tender of the actual price paid for the property claimed, it being sufficient if the person claiming this right states that he is ready to pay for the land such sum as the Court may assess as the proper price for the property.[2] The right of the first purchaser is simply a vendor's lien, *i. e.*, to retain the property until he has the money from the party claiming pre-emption. It is no part of the Mahamadan Law that the claimant of a right of pre-emption must carry the money in his hands and tender it to the first purchaser. A right of pre-emption may be decreed in respect of land within the putti of the party claiming such right.[3] As soon as a contract 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. A pre-emptor is not required to tender the purchaser's price, or any price, at the time of making his demand; and so long as a party claiming a right of *shuffa* pays the amount which the Court considers to be the proper price, he brings himself in Court within a reasonable time. On the question of pre-emption the Court must act in strict accordance with the provisions of the Mahamadan Law rather than on what it thinks just and equitable.[4] The right of pre-emption is lost where there is a dispute as to the purchase money, if the plaintiff (instead of offering by his plaint to pay the real amount whatever it may be) claims to purchase a specific quantity of land at a specific price and that right is shown to have no existence.[5] In suits for pre-emption where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price by reason either that the vendor and vendee refuse to disclose the same by their own evidence, or their

1. 10 W. R., 211.
2. I. L. R. 10 C. S., 1008.
3. 2 W. R., 10.
4. 22 W. R., 4.
5. 2 W. R., 38.

evidence cannot be believed, the Court should ascertain if possible what was the market price of the property in dispute at the time of the sale, and accept that market price as the probable price agreed upon between the parties. It is for the plaintiff either to show what was the actual contract price, or to give substantial evidence on which the Court can act, showing what was the market value at the time of the sale.[1]

A purchaser is entitled to the profits of the property purchased by him accruing between the time of purchase and subsequent transfer to a pre-emptor.[2] Where two rival pre-emptors, each having an equal right, to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights, in the absence of any thing to the contrary in the *wajib-ul-arz*, the rule of Mahammadan Law must be observed, and however the property might be divided by the decree of Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on default of the one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought. Accordingly where in two rival suits for pre-emption the Court gave one claimant a decree in respect of a three annas share and the other a decree in respect of two annas ten pies share of certain property, each decree being conditional on payment of the price within thirty days, and the Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default, and both pre-emptors made default of payment within the thirty days but one of them within the further period of fifteen days paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share, it was held that the claim was inadmissible, since to allow it would

1. I. L. R., IX. A. S., 471.
2. 1 Agra, 30.

have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt.[1]

CHAPTER XII.

GIFT.

The Mahamadan Law is extremely favorable to the donor and a gift can be revoked easily.

1. "The Law is extremely favourable" says MacNaughten, "to the donor where property is gratuitously conveyed. A gift should always be accompanied by delivery of possession." But the Mahamadan Law differs from the other laws in giving to the donor the power to demand restoration even where the gift may not have been attended by any disqualifying circumstances, such as false pretence, legal incapacity, &c. According to the English Law a gift is revocable only under circumstances which would equally have operated to avoid any species of contract. According to the Civil Law there are three causes only which would justify the revocation of a gift. But according to the Mahamadan Law, there are only seven circumstances under which a gift is not revocable; these are:—

(1) the incorporation of an increase with the gift;
(2) the death of the donee;
(3) the donee giving the donor a return or consideration;
(4) the alienation of the gift;
(5) the parties being husband and wife;
(6) relation within the prohibited degrees;
(7) destruction of the thing given.

1. I. L. R. X. A. S., 182.

The Hiudu Law does not allow the donor to revoke his gift.

2. The Hindu Law, however, seems to give no power of revocation in the donor. For as observed by Mr. Mayne "a gift once completed by delivery, or its equivalent, is binding upon the donor himself and upon his representatives, and is valid even against his creditors, provided it was made *bonâ fide*, *i. e.*, with the honest intention of passing the property, and not merely as a fraudulent contrivance to conceal the real ownership.[1]

Death-bed gifts treated as legacies under the Mahamadan Law.

3. According to the Mahamadan Law a gift made on a death-bed, though not made in contemplation of death, is nevertheless not considered as a gift *inter vivos* but has the effect of a legacy only, and consequently cannot extend to more than a third of the donor's estate. But under the Hindu Law the rule is different, and a *donatio mortis causa* revocable if the donor should recover from an illness is valid.[2]

Gifts to relations generally irrevocable.

4. Under the Mahamadan Law though gifts to relations are generally irrevocable, yet a gift by a father to a minor son is revocable at the pleasure of the former. The right of a husband to revoke a gift to his wife and *vice versâ* does not appear to be recognised, as it is in the Roman and the Scottish Laws. These rules find no counterpart in the Hindu Law.

Gifts cannot be suspended on a condition though they could be made subject to a condition.

5. A gift under the Mahamadan Law cannot be contingent or suspended on a condition but it may be made subject to a condition. In the first place it corresponds to condition, in the

1. Mayne, s. 329.
2. VI. M. H. C. R, 270.

other to the *modus* of the civil Law. The distinction between them is that in the first case the condition being essentially future, the act, which is made dependent on it, is necessarily suspended until the occurrence of the condition, while in the second case the act, which is made subject to the condition, takes effect immediately, with an obligation on the person benefitted by it to fulfil the condition. The Hindu Law does not seem to recognise this distinction.

The thing to be given must be in existence at the time of the gift.

6. Under the Mahamadan Law a gift cannot be made of anything to be produced in future. The subject of the gift must be actually in existence at the time of the donation, and a gift cannot be referred to take effect at any future period. The Hindu Law does not recognise this distinction, for whether the gift be in *praesenti* or *in futuro* it is sufficient that the donee is in existence and capable of accepting the gift at the time it takes effect, *viz.*, the date of the gift if *inter vivos*, or the death of the testator if by *will*.[1]

Whole property could be given as gift under Mahamadan Law.

7. Under the Mahamadan Law a man could make a gift of the whole of his property. But the rule seems to be different under the Hindu Law, for "though where property is absolutely at the disposal of its owner, as being the property of a father under the Bengal Law, or the separate or self-acquired property of any person, he may give it away as freely as he may sell or mortgage it, subject to a certain

1. I. L. R. II. C. S., 265, and I. L. R. IV. C. S., 455.

extent to the claims of those who are entitled to be maintained by him," still a man's power to make a gift of his share in undivided family property is very doubtful and seems to be denied under the Mitakshara.

Possession necessary for the validity of a gift and it cannot be made to take effect at a definite or indefinite future time.

8. Under the Mahamadan Law a gift is not valid unless it is accompanied by possession; nor can it be made to take effect at any future definite period; and accordingly it was held that a document containing the words "I have executed an Ikharar to this effect, that so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death, you will be the owner and also have a right to sell or make a gift after my death," was an ordinary gift of property "in future" and as such invalid under Mahamadan Law.[1] Gifts to take effect at an indefinite future time are also void.[2] Though the Hindu and Mahamadan Laws agree, in requiring that possession should be given to the donee of the thing given, the Mahamadan Law requires that the subject of the gift must be separated from, and emptied of the property and rights of the donor; and so when an undivided share of a thing, as a half, or a third, &c., is the subject of the gift, the gift is unlawful and invalid; but the Hindu Law is satisfied if the change of possession is such as the nature of the case admits of; and it has been held that a gift would be valid even though the donor

1. *Yusufali* v. *Collector of Tippera*, I. L. R. IX. C. S., 138.
2. I. L. R. X. M. S., 196.

retain possession, if it was expressly stated in the deed that he was holding the property as a loan from the donee; but possibly where the donee is incapable of taking possession, as being a minor or a lunatic, the possession of the donor is enough, if it is expressly asserted to be in trust for the donee both under the Mahamadan and Hindu Laws.[1] It was held in a recent case that the rule of Mahamadan Law that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made, has relation, so far as it relates to land, to cases where the donor professes to give away the *possessory interest* in the land itself, and not merely a reversionary right in it; that what is usually called possession in this country is not only *actual or khas possession*, but includes the receipt of the rents and profits; that there is nothing in Mahamadan Law to make the gift of a Zemindary, a part or the whole of which is let out on lease to tenants, invalid; that there is no principle by which to distinguish *malikana* rights from the right to receive rents or dividends upon Government securities; that gifts of such a nature may be legally conferred under the Mahamadan Law; and that the doctrines of Mahamadan Law, which lay down that a gift of an undivided share in property is invalid, because of *mooshaa* or confusion on the part of the donor, and that a gift of property to two donees without first separating or dividing their shares is bad because of *mooshaa* on the part of

1. Punjab Customs, 75.

the donees, apply only to those subjects of gift which are capable of partition.[1]

The provisions of the Mahamadan Law regarding gifts not affected by the Transfer of Property Act. Chapter VII of that Act abstracted.

9. The Transfer of Property Act, Section 129, enacts that "nothing in this Chapter (Chapter VII) relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mahamadan Law, or, save as provided by Section one hundred and twenty-three, any rule of Hindu or Buddhist Law." That is a short Chapter of 8 Sections and an abstract of it would be useful.

Section 122 defines a gift to be "a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called the donor, to another, called the donee, and accepted by or on behalf of the donee." Such acceptance must be made during the life-time of the donor and while he is still capable of giving, and if the donee dies before acceptance, the gift is void. Accordingly a gift comprising both existing and future property is void as to the latter (Sec. 124): and a gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted (Sec. 125). A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. The donor and donee may agree that on the happening of any specified event which does not depend upon the will of the donor a gift shall be suspended or revoked: but a gift which the parties agree shall be revoked wholly or in part at the mere will of the donor is void wholly or in part, as the case may be. A gift cannot be revoked save as aforesaid (Sec. 126). Where the gift is in the form of a single transfer to the same person of several things, of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless

1. I. L. R., X. C. S., 1112

he accepts it fully: but where the gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous. A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance; but if, after becoming competent to contract and being aware of the obligation, he retains the property given he becomes so bound. (Sec. 127.) Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein, subject to the provisions of Section one hundred and twenty-seven. (S. 128.)

It remains only to quote the provisions of Sec. 123 which states how the transfer should be effected. That Section makes a distinction between gifts of movable and immovable properties and requires a registered instrument or delivery in the case of movables but enforces a registered instrument for immovables. That Section says "for the purpose of making a gift of *immovable* property the transfer *must be* effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. For the purpose of making a gift of *movable* property, the transfer *may be* effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered." And delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer or of any person authorized to hold them on his behalf, (*vide* Sections 90, 91 and 92 of the Contract Act IX of 1872).

The Hindu Law on the subject of gifts abstracted.

10. The following abstract of the Hindu Law on the subject of gifts abstracted from MAYNE's valuable treatise on Hindu Law would repay perusal.

Where property is absolutely at the disposal of its owner, as being the property of a father under Bengal

Law, or the separate or self-acquired property of any person, he may give it away as freely as he may sell or mortgage it, subject to certain extent to the claims of those who are entitled to be maintained by him. But as regards a man's share in an undivided family governed by the Mitakshara Law the Law cannot be stated to be settled. The dictum of the Madras High Court "that the Law is settled that a Hindu can make a gift to the extent of his power"[1] has been recently overruled on the principle that the equity to enforce a partition which exists in favor of a purchaser for value cannot arise in favor of a mere donee.[2] In another case it was held that though a father could, during his life, have given away his share of the family property, yet that his devise was not valid to the same extent as his gift would have been, because at the moment of death the right of survivorship is in conflict with the right by devise and that then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise.[3] The Bombay High Court, however, while favoring the rights of a purchaser for value, show no indulgence to a volunteer; they hold that an undivided co-parcener cannot make a gift of his share, or dispose of it by will. In both points they agree with the High Court of Madras, no doubt on the ground, that in the case of a gift there is no equity upon which a decree for partition would depend. The High Court, however, put their decision upon the simple ground that they were not disposed to carry the assignability of the share of a co-parcener in undivided family property any further than they felt compelled to do by the precedents referred to, and by the traditions of the Supreme Court and Suddar Adalut in the Bombay Presidency. No decision has yet been given by the Privy Council as to the validity of a gift of his share by a co-parcener, though the leaning of their Lordship's minds seems rather to be against it. When we come to the Bengal Court, and that

1. 2 M. H. C. R., 417.
2. I. L. R. VII M. S., 357, *Ibid* IX, 273.
3. VIII M. H. C. R., 6.

of the North-West Provinces, there is a complete unanimity in affirming the early doctrine, that is against the validity of a gift by an undivided co-parcener of his share: and it was decided by a full Bench of the Calcutta High Court that in cases "governed by the Mitakshara Law, one sharer had no authority, without the consent of his co-sharers to dispose of his undivided share, in order to raise money on his own account, and not for the benefit of the family:" and therefore he could not make a gift of it,[1] though subsequent cases decide that the share of the co-parcener should be held liable for the personal debt of the man as he could at any moment claim a partition and the equities of the creditor are such as to entitle the creditor to this relief.[2] But under the Bengal law (the Dayabaga) the co-parcener has a full right to dispose of his share by gift, because in Bengal the right of every co-parcener is to a definite share though to an unascertained portion of the whole property and this right may be disposed of by each male proprietor just as if it were separate or self-acquired property. It may therefore be stated that a gift by a co-parcener of his own share in undivided family property is valid in Madras and by the Bengal Law but invalid in Bombay and under the Benares Law.[3]

Where a gift is valid, it may be accompanied with conditions, such as the donor should be maintained by the donee during his life-time, and that his exequial ceremonies should be performed after his death in consideration of the gift; that the donee should forego claims against the donor, and should defray expenses of the worship of the idol; that the property should pass to another in a particular event. So *a donatio mortis causâ* revocable if the donor should recover from an illness, is valid. But a gift will be invalid which creates any estate unknown to, or forbidden by, Hindu Law. Provisions which are repugnant to the nature of the grant,

1. 3 B. L. R. (F. B.) 31: 12. S. W. F. B., 1.
2. 12 B. L. R., 90.
3. Mayne's 4th Edition, paras. 332, 335, 337, and 348.

such as a restraint upon alienation or partition are invalid. So are all conditions which are immoral or illegal. Where the gift is in itself good, conditions which are repugnant or illegal or immoral are ineffectual, but the gift itself remains good. Where the illegal condition is the consideration for the gift, and therefore forms an essential part of it, both will fail. Where a gift is already complete so that the property has completely passed from the donor to the donee, any conditions that may be subsequently added, are absolutely void, since the person who attempts to impose them has ceased to have any right to do so. Where a gift to A for life is followed by a gift of the remainder of the estate to B, if the gift to A is void the estate of B is accelerated, and takes effect at once.

Few propositions have been laid down with more confidence than the doctrine that under Hindu Law a gift is invalid without possession. Yet Hindu Law, properly so called, appears to lay little stress on any such rule as specially applicable to gifts. Gifts have been always favoured by the Brahmin lawyers for the obvious reason that they were generally made to Brahmins. It is probable that the rule that actual possession is necessary to give validity to a gift arose, not from any special doctrine of Hindu Law, but from the general principle common to all systems of law, that a voluntary promise cannot be enforced, though the voluntary act, when completed, is irrevocable. To this extent the doctrine received very early recognition in our courts, and has long since been enforced. Whether the English doctrine of Equity that a declaration of trust, not amounting to a legal transfer, can be enforced in favour of the object of the trust would be extended to cases governed by Hindu Law is undecided. It is quite certain that no promise to confer a future benefit upon a priest, however holy, would be enforced by the secular courts. Where, however, the donor has done everything in his power to complete the gift, and the resistance to his attempts to give it full effect arises from a third person, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. To com-

plete a gift there must be a transfer of the apparent evidences of ownership from the donor to the donee. It is, however, sufficient if the change of possession is such as the nature of the case admits of. Therefore, where the gift is of land, which is in the possession of tenants, receipt of rent by the donee is enough, even though it is received through a person who received it formerly as agent for the donor; or delivery to the donee of the deed of gift, and of the counterpart lease executed to the donor by the tenants. The gift of an incorporeal right will be sufficient if it is made in such a manner as would suffice for the transfer of cases in action. Whether the gift be *in presenti* or *in futuro* the donee must be a person in existence, and capable of accepting the gift at the time it takes effect. The only exceptions are the cases of an infant in the womb, or a person adopted after the death of the husband under an authority from him. Such persons are by a fiction of law considered to have been in existence at the time of the death. A gift once completed by delivery or its equivalent is binding upon the donor himself, and upon his representatives, and is valid even against his creditors; provided it was made *bonâ fide*, that is, with the honest intention of passing the property, and not merely as a fraudulent contrivance to conceal the real ownership.

There are several texts which prohibit the gift of property to such an extent as to deprive a man's family of the means of subsistence, but the penalties suggested seem to be rather of a religious nature punishing the act than of a Civil nature invalidating it. But having regard to the recent decision of the Madras High Court [1] that a right of maintenance is a real right (*jus re*) it would seem that a donee will take the gift only subject to the right of maintenance of the person liable to be maintained.

The case law on gifts summarised.

11. The following abstract of the case law on the subject of gifts under the Mahamadan Law will be found useful in practice. It will

1. I. L. R. XII M. S., 260.

be noted that the cases are arranged under five different heads, *viz.*, (1) The Law applicable to gifts. (2) Construction; that is the meaning to be attached to the words of a particular instrument and whether those words are such as to make it a gift or a will as there is an essential difference between the two. (3) *Validity of gifts:* cases showing what conditions are necessary to make it enforceable or what circumstances would invalidate it; under this head will also be noted cases dealing with the question of possession and *moosha.* (4) Gifts made during illness whether in contemplation of death or not: and (5) Revocation of gifts.

1. *Law applicable to.*—The application to Mahamadans of their own laws in cases other than those coming under the denomination of inheritance, marriage, and caste, (*e. g.*, in case of gifts), is the administering of justice according to equity and good conscience.[1] Under Section 24 of Act VI of 1871, Mahamadan Law is not strictly applicable to questions relating to gifts arising in suits, but it is equitable as between Mahamadans to apply that law to such questions.[2]

2. *Construction.*—The donee holding from a Mahamadan widow does not acquire a better title to the property than the donor himself had.[3] Where one of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one-fourth of her husband's share of the family inheritance, and the widow, without relinquishing her right to claim her share, in lieu thereof received an allowance of cash and grain, and the surviving brother made an arrangement with her which was carried into effect by two documents by one of which he granted two villages to her, while by the

1. W. R., 1864, 185.
2. 2 Agra, F. B., 286.
3. 1 Agra, 67.

other she accepted the gift, giving up her claim to any part of the ancestral estate of her husband, and the first instrument, *inter alia*, stated as follows: "I declare and record that the aforesaid sister-in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue," it was held that these words did not cut down previous words of gift to what in the Mahamadan Law is called an *ariat*; that the transaction was neither a mere grant of license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow; that it was a *hibbah-bil-iwaz*, or gift for consideration, granting the villages absolutely.[1] Where the owner of a house made a gift thereof to certain persons for their residence, and that of their heirs, generation after generation, declaring that if the donees sold or mortgaged the house, he and his heirs should have a claim to the house, but not otherwise, it was held that under Mahamadan Law, whether that by which the Shiahs or that by which the Sunnis were governed, the house passed by the gift to the donees absolutely, the declaration by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself.[2] A document to the following effect was held to be a deed of gift and not a will, *viz.*, "I have no children. Therefore my own brother M. in his life-time placed in my lap his infant son, R. of his own free will and accord. From that day, having taken the said R. into my family, I adopted him as my son. Consequently he is being brought up entirely by me, and he alone is also my heir and I have appointed him the owner of all my goods and property..... I have made over the same to the possession of the said R..... I have a share in the goods and property of my husband, A. The owner thereof also is the same R. Therefore in my life-time should this property come into my hands, I will also deliver the same into the possession of the said R. Be-

1. I. L. R., 3 A. S., 490; L. R., 8, 1. A., 25.
2 I. L. R., 5 A. S., 505.

cause the said R. being the heir of all my goods and property I have constituted him the possessor thereof by virtue of ownership. He is therefore the owner. And after me, should this property be divided, then the said R is the owner and absolutely entitled to receive my portion by the aforesaid right, by the right of ownership of my share, from the court. No one shall oppose him." And it was held further, that even if the direction in the above document as to making the grantee of the document the owner of the grantor's share in her husband's property be regarded as a declaration of title, such declaration had no validity to create a proprietary right in the said share after the grantor's death.[1] Where by a deed duly executed and registered certain property was given to the plaintiff's father and the document stated that the plaintiff's father had always protected the donor (a female) and that she gave him the property in full confidence that he would continue to do so, it was held that the gift, if not a simple gift, was at any rate, a "gift on stipulation", that such a gift in order to be valid required that seizure should be given to the donee and that the registration of the deed of gift does not cure the want of *delivery by the donor*.[2]

3. *Validity.*—Where a conveyance between Mahamadans, though in form a deed of sale, is in reality a gift, its validity should be tested by the rules of law applicable to gifts, and not by those applicable to deeds of sale. In determining whether a transaction is one of sale or gift, the intention of the parties, rather than the form of the instrument used should be considered. A deed of gift, in English form, of a house to three persons as joint tenants (without discrimination of shares) is good according to Mahamadan Law, as it shows an intention on the part of the donor to give the property in the whole house to each of the donees. A gift by a Mahamadan in Bombay which contravenes the principles of English Courts of Equity with regard to gifts to persons standing in a fiduciary relation to the donors will not be upheld[3]. Where a Maham-

1. I. L. R., VII. B. S., 173.
2. I. L. R., XI. B. S., 517.
3. 7. B. H. C. R. O. C., 27.

dan transferred certain property (Company's paper) to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intestato*, it was held that the transaction could not be impeached on moral grounds, as a design to alter the disposition of property so as to defeat a succession by an alienation, which the law allows, is simply a design to conform to the law while working out an unforbidden object; and it was held, also, that the intention of the parties did not violate any provisions of the Hedâya, and the transfer was complete and the gift valid.[1] A *hiba-bil-iwaz* differs from an out and out sale as well as from a gift, while it partakes of the character of both, and, if supported by sufficient consideration, is binding upon the heirs of the party executing such deed.[2] A gift is not necessarily *hiba-bil-iwaz* by an allusion in the deed to the good behaviour of the donee, and his supplying a certain amount to the donor to enable the latter to do some act in respect of the property.[3] A Mahamadan lady can sell or give away her property, as she pleases. When a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent, so far as it affects the plaintiff's right of inheritance, so long as the mother is alive and admits the execution of the deed of gift, the plaintiff is not in a position to disturb it; and it is quite immaterial in such a case whether the plaintiff's consent was or was not given.[4] A Mahamadan widow, or any other woman, holding property in her own right, may give it away to whomsoever she pleases, unless she delays the gift till upon her death bed, when such a gift would be looked upon as a will and be inoperative beyond a certain limit.[5] Where a Mahamadan lady executed a deed of gift in favour of the plaintiff,

1. 10 W. R. P. C. 25; 11 M. I. A., 517.
2. 16 W. R., 175.
3. 3 Agra, 237.
4. 1 W. R., 79.
5. 8 W. R., 84.

who was at the date of its execution a minor, of certain lands (including the land in dispute) of which she professed to have obtained possession under a decree against her co-parceners, and the plaintiff, on the strength of the deed of gift sued for declaration of his right to the land alleging that the donor had actually recovered possession in execution of her decree, and the Courts found that the defendant was, at the date of the deed of gift, in actual possession under a mortgage executed by the donor's co-parceners, and that she had failed, in executing her decree, to eject the defendant, it was held that at the date of the deed of gift the donor was simply the owner of property which was in the possession of a mortgagee, and could not make a gift of it, although she could sell the same.[1] When the donee is a minor, possession may be had by a trustee on his behalf.[2] One of two sharers can give over his share to the other even before partition.[3] Where there is, on the part of a father, or other guardian of the minor, a real and *bonâ fide* intention to make a gift to the minor, the Mahamadan Law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor. Where the subjects of a gift are definite shares in certain Zemindaries, 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 share of the rents from the ryots, and having a right to this definite share, and no more, the rule of the Mahamadan Law as to *musha*, which makes the gift of undivided property invalid, does not apply. It was not however, decided whether the law relating to *musha* applies to those cases in which the owner gives away all his interest in undivided property.[4]

1. I. L. R. VI. B. S., 645.
2. I. L. R. VI B. S., 650.
3. 3 W. R., 37.
4. 15 B. L. R., 67; 23 W. R., 208; L. R. II. I A., 87.

The rule that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made, has relation, so far as it relates to land, to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it. What is usually called possession in this country is not only *Actual* or *Khas* possession, but includes the receipt of the rents and profits. There is nothing in Mahamadan Law to make the gift of a Zemindari, a part or the whole of which is let out on lease to tenants, invalid. Nor is there any principle by which to distinguish *malikana* rights from the right to revenue-rents or dividends upon Government securities, and gifts of such a nature may be legally conferred. The doctrines of Mahamadan Law which lay down that a gift of an undivided share in property is invalid because of *musha* or confusion on the part of the donor, and that a gift of property to two donees without first separating or dividing their share is bad, because of *musha* on the part of the donees, apply only to those subjects of gift which are capable of partition.[1] A gift of land made by a Mahamadan is invalid if the interest of each of the donees is not defined by the gift. The continued receipt by the donees of the rents of land, which had been let by them as the Managers of the donor, is not a sufficient taking possession to satisfy the requirements of the Mahamadan Law.[2] In a suit upon a hibbanama alleged to have been executed by the husband of the plaintiff, giving her twenty-two shares in a village as a gift in lieu of dower, it was held that the suit was maintainable, the instrument expressing plainly the specific shares of the property, and the gift was made in lieu of the whole dower, and there being no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration.[3] A deed of gift of his estate,—executed by a person of somewhat weak mind, in favor of two of his

1. I. L. R., X. C. S., 1112.
2. 6 B. H. C. R., A. C., 25.
3. 4 M. H. C. R., 115.

sons, one an adult and the other a minor, without division or detail of their respective shares, whereby a younger son and several daughters were excluded from inheritance,—was set aside by the Court under the general rule, that anything which is capable of division, when given to two persons, should be divided by the donor at the time of gift or immediately subsequent thereto and prior to the delivery to the donees, and the special rule that a gift of undivided properties is absolutely invalid where one of the donees is a minor son; justice, equity, and good conscience not requiring, under the circumstances of the case, that the deed should be maintained. Where K devised a certain estate to his son Z; but directed that the devise should only take effect on his death in respect of a portion of the property, which was rent free land, and that, with regard to the remainder, his son A should hold possession for the purpose of collecting and paying the Government revenue due on both portions without rendition of accounts, until such time as Z should have a son competent to manage lands paying revenue; and Z executed a deed of gift of his estate, but never came into possession of the second portion of the property, it was held with reference to the question whether the donor had fulfilled the requirements of Mahamadan Law by putting the donees into immediate possession, that the deed, having operated in respect of the first portion of the property which Z had become possessed of under the will, operated in respect of the second.[1] The rule that an undefined gift of joint undivided property, mixed with property capable of division, is invalid, does not apply to a gift by a father to a minor son.[2] A defined share in a landed estate is a separate property, to the gift of which the objection which attaches to the gift of joint and undivided property is inapplicable.[3] Where a Mahamadan bequeathed his property to his two nephews, R and A, as joint tenants, and A died, leaving a widow and a daughter, who conti-

1. 6 N. W., 338.
2. W. R. 1864, 121.
3. I. L. R. II. A. S., 93.

nued to be joint tenants with R, but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in, or a charge upon, it, and R, by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff, it was held that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamia Code, that the gift of a share in undivided property, which admits of partition, is certainly invalid, or, at least, forbidden, has no application to the gift of property so circumstanced.[1] In another case where B owned a one-twelfth share of an estate and a dwelling-house, and as owner of the dwelling-house, she owned a share in a staircase, privy, and door, which were held by her jointly with the owners of adjoining dwelling-houses, and she made a gift of her property, transfering the dominion over it to the donees, but reserving the income of the share of the estate for life, and stipulating against its alienation, it was held that the gift of the one-twelfth share of the estate, being a gift of a specific share, was not open to objection, that such a gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation, and that the gift was not invalid so far as it related, to the staircase, privy, and door, as those things, though undivided property, were incapable of division and gift of part of an indivisible thing was valid.[2] Where the plaintiff, during his son's minority, gave certain property to him, and on the delivery of possession got from him a document stipulating (1) that he would not alienate; and (2) that at his death the property should return to the father, which document was deposited with the father, and not heard of until the property was taken in execution for the son's debts, many years after the gift, it was held that, by Mahamadan Law, as well as by the general principles of law, such a restriction on alienation, especially after the gift had

1. I. L. R. V. B. S., 238.
2. I. L. R. V. A. S., 285.

become complete long before, is absolutely invalid.[1] Where a testatrix was entitled to Government notes under a gift coupled with the condition that she 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, it was doubted whether the gift made to the testatrix was not a gift to her absolutely, the condition being void.[2] To make a deed of gift valid possession is necessary; and if the donor is not in possession at the time, the gift is void.[3] Under the law of Sherra, gifts are not valid until possession is given by the donor and taken by the donee.[4] Possession is absolutely necessary to establish the validity of a *hibba*.[5] A gift cannot depend upon a contingency or be postponed, but possession must be immediate.[6] A gift is invalid when the donor is to remain in possession during his life-time.[7] The policy of the Mahamadan Law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his life-time the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given, so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself in *præsenti* of the property, and to confer it on the donee. It is incumbent on those who set up transactions of this nature to show

1. 6 M. H. C. R., 356.
2. I. L. R. VIII. C. S. 1; L. R. VIII. I. A., 117.
3. 9 W. R., 257.
4. 16 W. R., 88.
5. 22 W. R., 314.
6. 5 W. R., 4.
7. W. R., 1864, 185.

very clearly that the forms of the Mahamadan Law, whereby its policy is defeated has been strictly complied with.[1] A gift is not valid, unless it is accompanied by possession nor can it be made to take effect at any future definite period. A document containing the words: "I have executed an ikrar to this effect, that so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death you will be the owner, and also have a right to sell or make a gift after my death," was held to be an ordinary gift of property "*in futuro*," and as such invalid.[2] Gifts to take effect at an indefinite future time are void.[3] For the purpose of completing a gift of immovable property by delivery and possession, no formal entry or actual physical departure is necessary; it is sufficient if the donor and donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested.[4] Where property, the subject matter of a gift made by a Mahamadan during his death illness (*Murg-ul-mant*), was in the hands of the donee as manager or agent of the donor, it was held that the possession of the donee as such manager or agent was not such possession as would render it necessary to the validity of the gift, but that there should have been an actual or formal delivery to him of possession of the property.[5] On an issue whether an oral gift of an estate consisting of certain talookas and mouzahs has been made by a Mahamadan proprietor in favour of his wife, it was held that the possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it even without consideration; and it was held on the evidence, that the gift was effectively made.[6] Where the plaintiff's deceased sister in her life-time was

1. I. L. R. II. C. S., 184; 26 W. R. 36; L. R. III. I. A., 291.
2. I. L. R. IX. C. S., 138.
3. I. L. R. X. M. S., 196.
4. I. L. R. IX. B. S., 146.
5. 5 C. L. R., 91.
6. I. L. R. III. A. S., 266.

the owner of three and a half undivided shares in a village, which she mortgaged in 1846, upon the terms that the mortgagee should be put into possession, and that he should credit the produce of two shares on account of the mortgage debt, and should pay the mortgagor one share and a half for her maintenance; and subsequently, in 1853, she made an absolute gift in writing of three of the shares to the fourth defendant and his mother and the produce of the shares was applied during the life-time of the donor after the gift just as it had been before the gift, it was held that there was no such surrender and delivery of the property to the donee as is requisite to make a valid gift.[1] A deed in which the donor declared: "I have adopted A B to succeed to my property" was held to be neither a deed of gift nor a testimentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seisin by the donee.[2] "*Tamlik*," or assignment of ownership, is a term of general import applying to the various modes of acquisition of property recognised by Mahamadan Law, but forms no separate and distinct mode of acquiring property. When applied to gift it does not avoid the legal requirements of acceptance and seisin. Where an instrument called a "tamliknama," purported to give S, in consideration of her devotion and affection, to the executant, the executants' property, and provided that the executant should during her life enjoy the income from the property, that at her death S should have the proprietory possession and enjoyment of the property, just like the executant, that the executant should effect mutation of names in respect of the property in S's favor, that the property should not belong to any other person but S, and that any transfer by the executant to any other person should be void; and after giving S the power to transfer the property by sale, mortgage, gift, "tamlik," &c., it proceeded in manner following: "But S, or her transferee, shall get possession of the said share only

1. 5 M. H. C. R., 114.
2. 6 W. R. P. C., 46; 3 M. I. A., 245.

after my death. On my death S and her heirs shall become the owners of this share;" it was held that the deed could only have validity as a will, and that as a deed of gift it was wholly invalid.[1] Where a husband executed a "*hibba*," or deed of gift, without consideration, in favor of his wife, comprising a house in which they were residing at the time, with its furniture, and two other houses, and at the same time delivered the *hibba* and the key of the houses to his wife and quitted the house of residence, leaving her in possession of the same, it was held that the requirements of the Mahamadan Law, with regard to gifts without consideration, *viz.*, acceptance and seisin on the part of the donee, and relinquishment on the part of the donor,—had been complied with, though the husband shortly afterwards returned to the house, resided there with his wife till his death, and received the rents of other parts of the property comprised in the *hibba*. The continued occupation or residence and receipt of rents were in such circumstances to be referred to the character which the donor bears of husband, and to the rights and duties connected with that character.[2] Where the plaintiff, the nicka wife of a Mahamadan, sued for a declaration of her absolute title to certain premises, for possession of certain other premises, for delivery to her by defendant of the title-deeds of the premises, and for cancellation and delivery up of certain documents purporting to be alienations of the same under a gift to her by her husband, it was held that a complete gift had been made and not revoked: that it was valid against the creditors of the donor, and also against subsequent purchasers for valuable consideration from the donor: Under Mahamadan Law "in the instance of a wife who may give a house to her husband the gift will be good, although she continues to occupy it along with her husband and keep all her property therein, because the wife and her property are both in the legal possession of the husband. So also it has been held by some that if a father transfers his house to his

1. 7 N. W., 313.
2. I. B. H. C. R., 157.

minor son, himself continuing to occupy it and to keep his property therein, the gift is valid, on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son." Reason requires that the same principle should be applied to the case of a gift by a husband to his wife. The wife may hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be necessary that the gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with, the continuance of the relation of husband and wife.[1] It was not necessary that possession should follow to complete a gift by a father to his infant child.[2] No formal delivery and seisin are necessary to the validity of a gift of property by a father to a minor son. Where a son has divested himself in favor of his father of all interest in property which had been given to him by his parents, before any legal effect can be given to such a transfer, the clearest proof is necessary of good faith and joint dealing between the parties, and also that the father's influence was not unduly exercised for his own advantage.[3] In another case a gift by a father to his son was held not valid as being followed by no real change in the nature of the enjoyment of the property, and merely nominal.[4] Where a *hibanama* gave an undivided share in Mokurari and Zemindari holdings, besides other property not reduced into possession, the whole of which had, as a matter of title devolved upon the donor as a member of a family of which the donees were also members, it was held (1) that the hibanama did not infringe the doctrine of *Musha*, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division whence it followed that one of three

1. 6 M. H. C. R., 455.
2. 1 Agra, 238.
3. W. R., 1864, 127.
4. 1 Agra, 250.

sharers might give his share to the other two: and (2) that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the donees had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In that case it was further held that an issue as to whether a deed of gift was genuine should not be joined to an issue as to whether there was undue influence, and that on an issue of undue influence the Court should consider whether the gift in question (*a*) is one which a right minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor, and (*d*) whether the intention to make the gift originated with the donor, the principles being the same, although the circumstances may differ.[1] Where one who was entitled to a portion only of a pension executed before his death a deed of gift in favor of his wife assigning the whole pension, it was held in a suit by the man's sister to set aside the document (1) that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto and the defendant could take nothing more than the donor's own interest, (2) that whatever might be the Mahamadan Law apart from the Pensions Act, under Sec. 7 of the Act the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have pension paid, (3) that there was no force in the contention that the gift became void because the right was not divided, inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs become at once divided and separate at the death of the sole owner; and in this case the shares were definite and ascertained and required no further separation than was already effected upon the sole owner's death, (4) that the rule of the Mahamadan Law as to the invalidity of gifts purporting to pass more

1. I. L. R. XV. C. S., 684.

than the donor was entitled to, was based upon the principle of *musha* or undivided part, and had no application to cases where the donor's interest itself was separate; and that even if it were the strict Mahamadan Law that where a man having a definite ascertained interest in a pension and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, he failed to give her any interest at all, Section 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Mahamadan Law as to gifts in transactions of modern items, (5) that although possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of title connected with the pension or assigning the right to receive the pension, that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee, and that the mutation of names was merely a thing which would follow on the perfection of the title and did not in itself go to make or form part of the title.[1]

4. *Gifts in contemplation of death or during illness.*—In order to make a gift operate as a *donatio mortis causâ*, the delivery must be upon the condition that it should become effectual as a gift on the death of the donor. Where, therefore, it was found, that a deed of gift was executed in the last illness of the donor, and was in the possession of the donee after her death, it was held that this was not enough to make it operate as a *donatio mortis causâ*, but that it was necessary to find the further fact whether the deed was delivered by the donor before her death, and whether such delivery was in contemplation of death, and with the intention that it should become effectual on the death of the donor.[2] A gift on a death-bed is viewed in the light of a legacy.[3] A gift made in contemplation of death, though not operative as

1. 4. L. R., IX. A. S., 213.
2. Marsh, 315; 2 Hay, 163.
3. 2 Hay, 345.

a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one-third of the deceased's whole property, the remaining two-thirds going to the heirs. In the absence of heirs a will carries the whole property.[1] If a person executes a gift while labouring under a sickness from which he never recovers, and which ultimately proves fatal to him, effect can be given to the instrument only to the extent of one-third.[2] A deed of gift, such as a *tuluknamah*, executed at a time when the grantor was labouring under sickness from which he never recovered, cannot operate save as a will. If such a death-bed gift or will is made in favor of one who is an heir, the will or gift, so far as it relates to that heir, will be inoperative without the consent of the other heirs.[3] A *mokurari* lease extended where the grantor was dangerously ill and in contemplation of death, was held to be a death-bed gift, and his natural heirs declared incapable of taking anything under it except their shares of the defendant's property.[4] The term "*murg-ul-maut*" is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person afflicted with the disease an apprehension of death. A person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was first attacked by it. When a gift is made by a person labouring under such a disease, it is good to the extent of one-third of the subject of the gift, if the donee has been put into possession by the donor.[5] A gift by a sick person is not invalid if at the time of such gift his sickness is of long continuance, *i. e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. Where at the time of a gift the donor had suffered from a certain sickness for more than a year and was in full possession of his

1. 1 W. R., 152.
2. W. R., 1864., 221.
3. 1 W. R., 17.
4. 3 W. R., 40.
5. 6 N. W., 159.

senses and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, it was held that under these circumstances, the gift was not invalid.[1] A gift by a sick person is not invalid if at the time he made it he was in full possession of his senses, and there was no immediate apprehension of death.[2] The provisions of the law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale.[3] Where a man executed in favor of his wife an instrument which purported to be a deed of gift of all his property, when he was suffering from an illness likely to have caused him to apprehend an early death, and he did in fact die of such illness that day, and there was no evidence that any of his heirs had consented to the execution of the deed, it was held, in a suit by his brother to set aside the will as invalid, that the instrument though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed gift or will, subject to the conditions prescribed by the Mahamadan Law as to the consent of the other heirs, and those conditions not having been satisfied it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all.[4]

5. *Revocation.*—In a suit for arrears of rent due on defendant's putnee talook, though the rate was admitted it was pleaded that, in consequence of a dacoity having taken place in the defendant's house, she had been allowed by the plaintiff (her brother-in-law) a remission of rent annually for a certain number of years, and the defendant professed her readiness to pay if the remission were allowed. Plaintiff's agreement set forth that, in consequence of defendant's house having been plundered, she was entitled to assistance to enable her to replace

1. I. L. R., III. A. S., 731.
2. I. L. R., IX. B. S., 146.
3. I. L. R., II. A. S., 854.
4. I. L. R., IX. A. S., 35.

what she had lost, and that the rajah (Zemindar) not being able to make good the amount at once took this method of assisting his connexion: it was held that the gift (or remission of rent for the years in suit) was complete at the termination of each year; in other words, delivery had been made to the donee, and it could not be recalled under the Mahamadan Law, which is precise as to the impossibility of revoking a gift after delivery without the decree of a Judge or the consent of the donee.[1] Where certain lands, choultries and movable properties, had been by instrument in writing given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries and affording strangers the charity of shelter, and, if circumstances permitted, food also, as well as for supplying the wants of the donees, with clauses restraining alienations by them, it was held that the instrument effected a transfer of the property to the donees subject to the trust of applying the profits of the lands, &c., in perpetuity to certain charitable purposes and was not revokable whether the transaction be viewed as a pure trust or as a gift. The power of revoking gifts is given only in the case of private gifts for the donees own use; no relationship existing between the donor and the donee.[2] There can be no revocation of a gift by a father to a son when the donee has alienated the thing given.[3] A *hiba-bil-imaz*, or deed of gift made in contemplation of marriage is not a revocable instrument.[4]

CHAPTER XIII.

ENDOWMENTS.

Endowments at present governed by Act XX of 1863.

1. "The rules relative to endowments" says MacNaughten[5] "are worthy of attention; under the existing Regulations, it is true, that a check

1. 11 W. R., 320.
2. 4 M. H. C. R., 44.
3. W. R., 1864, 121.
4. 1 Hyde, 150.
5. Mac. Nau. Pre. Rem., p. XXXVI—VII.

has been put to appropriations of land for pious purposes; but there still remain many ancient endowments scattered over different parts of India, which the liberality of the British Government has permitted to continue devoted to the purposes designed by their founders. The authority, which the State has reserved to itself over these institutions, is merely intended for the purpose of preservation, and is consistent with what the Mahamadan Law itself permitted to the ruling power." Mac-Naughten was here thinking of Regulation XIX of 1810; but by a later policy the British Government has withdrawn its connection from the superintendence of religious endowments, and the matter is now regulated by Act XX of 1863. Under this Act religious endowments, both Mahamadan and Hindu, are divided into two classes; (1) those in the appointments of the Superintendents of which the Government exercised no control, and (2) those in which it had control. A committee called the Temple Committee exercises control over the latter class of institutions. The executive exercises no sort of control over these institutions, and their better management is left to be guided by a suit in the Civil Courts.

A Wakf defined.

2. A *Wakf* means, literally, *stoppage* or *detention*: but, as defined in Law, it is a devoting or appropriating of the profits or usufruct, or property, in charity, on the poor, or other good objects. The property is itself supposed to remain vested in the appropriator, according to

one opinion, while according to another, though the appropriator's right abates, it is supposed to abate in favour of *Almighty God*, and does not pass to a human substitute. Appropriation may be constituted by words *inter vivos* or by bequest. But when it is constituted by bequest, the property which is the subject of it must not exceed one-third of the testator's estate, unless the excess is assented to by the heirs. The proper subjects of appropriation are lands, houses, and shops, or immovable property generally, and any movables that may be attached to it. Movables, with a few exceptions, cannot by themselves be made the subjects of appropriation. With regard to its objects two conditions are required. There must be some connection between them and the appropriator; and they must be of such a nature that, taken together, they can never fail. The poor are held to answer both these conditions .....According to *Abu Haneefa* and *Mahamad*, it is necessary that a perpetual succession of objects should be mentioned in the act of appropriation. But this was not required by *Abu Yusuf*, who held that the poor are always to be implied when other objects fail. And his opinion has been preferred, and is said to be valid.[1]

The ingredients necessary for the creation of a valid Wakf stated.

3. To constitute a valid *Wakf* there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. The principle underlying a *Wakf* is charity,

1. *Baillie's Introduction*, pp. 35—36.

and the ultimate application of property, the subject of *Wakf*, must be to objects which never become extinct, and those objects are all of a religious and charitable character: but appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations, under the designation of a *Wakf*, where the term *Sadukah* is used. To validate a *Wakf*, by making a settlement of his property on himself or his descendants, a man must, in the view taken by the prophet, reduce himself to a state of absolute poverty. Accordingly where a Mahamadan settled a portion of his immovable property as follows: "I have made a *Wakf* of the remaining four annas in favor of my daughter B and her descendants, as also her descendant's descendants how low soever, and when they no longer exist, then in favor of the poor and needy;" it was held that this settlement did not create a valid *Wakf*, and that the poor are not in such a case absolutely excluded from all benefit in the appropriation, but only so long as the descendants survive.[1] In another case[2] where a Mahamadan created a *Wakf* of all his property and appointed his minor grandson Mutavali, providing that during the minority, the property should be managed by the minor's father, the deed containing a provision that in the first place certain debts should be paid, and

1. *Mahommed Hamidulla Khan* v. *Lotful Hug*, I. L. R. VI. C. S., 744.

2. *Luchmiput Singh* v. *Amir Alum*, I. L. R. IX C. S., 176.

then that the property should be applied towards the religious uses created, and the maintenance of the settlor's grandson's and their male issue, it was held that the *Wakf* was valid, notwithstanding the provisions of payment of debts and maintenance.

JUSTICE TOTTENHAM observed:—"There has always been a good deal of controversy in the Courts as to what is essential, and as to what will invalidate a *Wakf*. On the one hand it has been contended that no *Wakf* is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all times; and on the other hand, there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid *Wakf*. . . . . The Bombay High Court has, by a full Bench, decided that, to constitute a valid *Wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes.[1] That view has been endorsed by a division Bench of this Court.[2] This definition must seem to exclude from Judicial recognition a *Wakf* of which one object is a provision for the family of the creator of it. . . . But without saying whether or no, we are prepared on further consideration to adopt to the full the ruling above mentioned, we can treat this *Wakf* as actually fulfilling the condition prescribed, for the maker of the *Wakf*, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the musjid and the tombs of the holy personages of his family, the servants of the *asthana*, and for performing the *urs* and *fateha*, at the tomb. These are the objects of the *Wakf*, and they are all distinctly religious. They also involve to some extent charity to the poor. The subsequent direction that the manager shall maintain the future male descendants of the maker of the *Wakf* does not necessarily

1. 10 B. H. C. R., 13.
2. I. L. R. VIII. C. S, 164.

alter its character. Whether or not the provision or direction can be lawfully carried out, it is not necessary for us now to decide."[1]

A summary of the Hindu Law on religious and charitable endowments.

4. The following summary of the Hindu Law on religious and charitable endowments is appended for purposes of comparison, as there does not seem to be much difference in the rules relating to endowments in the two laws.

Gifts for religious and charitable purposes are favoured by the Hindu Law. They are more favoured than gifts *inter vivos*. They may be made by a sick man and often are so made. Delivery of possession is not necessary in the case of such gifts, for according to Katyayana if the donor dies without giving effect to his intention his son shall be compelled to deliver it. The Bengal Pandits state that this principle applies even against a son under the Mitakshara Law but they limit the application of the rule to a gift of a small portion of the land. In the North-West Provinces the Court affirmed the right of a father, even without his son's consent, to make a permanent alienation of part of the ancestral property as provision for a family idol, provided the grant was made *bonâ fide* and not with an intention to injure the son. In Western India grants of this nature have been held valid even when made by a widow, of land which descended to her from her husband, and to the prejudice of husband's male heirs; apparently the same would be the case in this Presidency. The principle that such gifts could be enforced against the donor's heirs led to the practice of making them by will; and the right of a Hindu to assign the whole of his property by will to an idol was recognized early in Calcutta. The English Law which forbids bequests for superstitious uses, does not apply to grants of this character in India, even in the Presidency Towns, and such grants have been repeatedly enforced by the Privy Council. Nor are they invalid for transgressing against the rule which forbids the

1. I. L. R. IX. C. S., 176.

creation of perpetuities. But where a will, under the form of a devise for religious purposes, really gives the beneficial interest to the devisees, subject merely to a trust for the performance of the religious purposes, it will be governed by the ordinary Hindu Law; any provision for perpetual descent, and for restraining alienation, will, therefore, be void; and the will will be set aside as regards the descent of the property, leaving the heirs at law liable to keep up the idols, and defray the proper expenses of the worship.

As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expenses of worship. Such a trust is valid if perfectly created, though, being voluntary, the donor cannot be compelled to carry it out, if he has left it imperfect. Where the property is devoted absolutely and in perpetuity for religious purposes, the trustee has no beneficial interest in the property beyond what he is given by the express terms of the trust. He cannot encumber or dispose of it for his own personal benefit, nor can it be taken in execution for his personal debt; but he may do any act which is necessary or beneficial, in the same manner and to the same degree as would be allowable in the case of the manager of an infant heir; but he may within these limits incur debts, mortgage and alien the property, and bind it by judgments properly obtained against him. He may lease out the property in the usual manner, but he cannot create any other than proper derivative tenures and estates conformable to usage; nor can he make a lease, or any other arrangement, which will bind his successor, unless the necessity for the transaction is completely established. In the case, however, where the founder applies his own property, to the creation of a pagoda, or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands, there is no unrevocable trust created in favor of the idol, and the character of the property will remain unchanged, and its application will be

at his own discretion, so much so that he might diminish the fund so appropriated at pleasure, or absolutely cease to apply them to the purpose at all. But another state of things arises, where land or other property is held in beneficial ownership, subject merely to a trust as to part of the income, for the support of some religious endowment: here the land descends and is alienable and partible in the ordinary way, the only difference being that it passes with the charge upon it.

The devolution of the trust, upon the death or default of each trustee, depends upon the terms upon which it was created, or the usage of each particular institution, where no express trust deed exists. The property passes with the office, and neither it nor the management is divisible among the members of the family. In no case can the trustee sell or lease the right of management, though coupled with the obligation to manage in conformity with the trusts annexed thereto, nor is the right saleable in execution under a decree. It has, however, been held in Bombay that there is no objection to an alienation of a religious office, made in favor of a person standing in the line of succession, and not disqualified by personal unfitness; such an alienation is in fact little more than a renunciation of the right to hold the office. Unless the founder has reserved to himself some special power of supervision, removal, or nomination, neither he nor his heirs have any greater power in this respect than any other person who is interested in the trust; and such powers, when reserved, must be strictly followed. But where the succession to the office of trustee has wholly failed, it has been held that the right of management reverts to the heirs of the founder. A trust for religious purposes, if once lawfully and completely created, is of course irrevocable. The beneficial ownership cannot under any circumstances, revert to the founder or his family. If any failure in the objects of the trusts takes place, the only suit, which he can bring is to have the funds applied to their original purpose, or to one of a similar character.[1]

1. Mayne's Hindu Law, Chap. XII, 359—369.

The case law on the subject of Mahamadan Endowments.

5. The following abstract of the case law on subject of endowments would be found interesting:—

A valid endowment may be verbally constituted without any formal deed.[1] The primary objects for which lands are endowed are to support a mosque and to defray the expenses of worship therein. The mere charge upon the profits of an endowed estate of certain items which must in time cease, and the lapse of which will leave the whole profits available for the purposes of the endowment, does not render an endowment invalid.[2] The chief elements of *Wakf* are special words declaratory of the appropriation and a proper motive cause; and where the declaration is made in a solemnly, published document, the *Wakf* is completed.[3] The payment of expenses of a mosque out of the rents of certain property is not proof of itself that the property is endowed.[4] Grants to an individual in his own right and for the purpose of furnishing him with the means of subsistence, do not constitute a work for endowment.[5] Where a Mahamadan settled a portion of his immovable property as follows: "I have made *Wakf* the remaining four annas in favour of my daughter B, and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favour of the poor and needy," it was held that this settlement did not create a valid *Wakf*. To constitute a valid *Wakf*, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designations of *Wakf* where the term "*Sadakah*" is used. Even supposing they could be so treated, it would be necessary, in order to validate a *Wakf* by making a settlement of property on

1. 2 Hay, 415.
2. 13 W. R., 235.
3. 16 W. R., 116.
4. 25 W. R., 447.
5. 8 W. R., 313.

himself or his descendants, for a man to reduce himself to a state of absolute poverty.[1] To constitute a valid *Wakf*, it is not sufficient that the word "*Wakf*" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God, or to religious and charitable purposes. A Mahamadan cannot therefore, by using the term "*Wakf*" effect a settlement of property upon himself and his descendants, which will keep much property inalienable by himself and his descendants for ever. It was held that the plaintiffs, who were sons of a daughter of one of the original settlors, did not come within the meaning of the term "*aulad-dar-aulad*" or the term "*warrasan*" used in the instrument of settlement.[2] To constitute a valid "*Wakf*" or grant made for charitable and religious purposes, it must, according to the doctrine of the Shias, be absolute and unconditional and possession must be given of the "*Mowkoof*" or thing granted. Where a Mahamadan lady executed a deed conveying her property on trust for religious purposes, reserving to herself for life, two-thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust, it was held that the deed must be considered invalid with respect to that portion of the income reserved by the grantor to herself for life; but as to the rest, that the deed operated as a good and valid grant.[3] In a certain case the facts were as follows:—A Mahamadan of the *shafi* sect, by a deed of settlement executed in 1838, called a *wukfnamah*, settled moieties of his estate on his two wives, their daughters and the descendants of the donees in each line so long as it should subsist, with cross remainders, on the extinction of either line, to the representatives of the other, with final remainders, on the extinction of both, to the heirs of the settlor. The settlor constituted himself the *nazer* or *mutwalli* (superintendent or trustee) of the estate during his life,

1. I. L. R. VI. C. S., 744; 8 C. L. R., 164.
2. 10 B. H. C. R., 7.
3. 4 N. W. H. C. R., 155.

and nominated A and B to act as such after his death with the consent of his wives. In 1840 the settlor died, A died in 1865 and B survived. The wives and daughters of the settlor also died. The representatives of one of the settlor's daughters sued the defendant to recover a part of the estate, which had been sold to him by the Civil Court, as the property of another of the daughters, on the ground that the estate on the death of that daughter passed as wakf to her surviving sister. It was held that supposing the wakf to have been validly created, the right to bring the suit belonged, not to the heirs or descendants of the settlor, but to the *Mutwallis* (superintendents) jointly. On the death of one of the *Mutwallis*, a successor to him should have been appointed in the first place by the settlor, and, failing him, by his executor, if he had appointed any, otherwise by the Court on the application of the parties beneficially interested in the estate. In that case the question whether a *wakf* could be created for the purpose merely of conferring a perpetual and inalienable estate on a particular family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries was raised but not decided.[1] A wakf, the purpose of which is to create a mere family settlement without a charitable object, is invalid.[2] Where a Mahamadan created a wakf of all his property and appointed his minor grandson *Mutwalli*, providing that during the minority the property should be managed by the minor's father, and the deed contained a provision that, in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue, and where in execution of a decree against the minor's father, the endowed property was attached and sold, it was held, in a suit by the minor through his sister, as guardian, to recover possession of the property, that the suit was maintainable as framed, and that, notwithstanding the povisions for payment of debts

1. I. L.R., III. B. S., 84.
2. 9 C. L. R., 66.

and maintenance, the wakf was valid.[1] Where a certain village was granted by the Mogul Government in inam to two persons and their "*aulad va ahfad*" for the maintenance of a durga (mausoleum) of a *pir* (saint), and the plaintiff sued the defendant for the recovery of the profits of a one-fourth share in the inam, claiming to be entitled thereto through his mother and grand-mother, who was a daughter of the son of the great grandson of one of the two original grantees, it was held, that the plaintiff was entitled to share both in the offices of the durga and the endowment, though he was not the lineal male descendant of the grantee. "The term "*ahfad*" being a term of the largest and most general signification, includes the descendants of females as well as of males. The primary object of the grant was to provide for the *tavlyat* and the office of *sajjadanashin* of the *mausoleum* of the saint, and with that view to supply the means for the maintenance of the person who should perform the offices, as well as for the ordinary expenses of keeping up the *mausoleum*. A female could not be the *sajjdanashin*, whose duties were of a strictly spiritual nature requiring peculiar personal qualifications so as to exclude female descendants from participating in the endowment; but it would not follow that males, who established their descent from the *propositus* through females, should be excluded. Had the intention of the grant in the present case been to limit the class of descendants exclusively to persons claiming through males, the expression "*aulad dar aulad*" would have been used instead of the general expression "*aulad va-ahfad.*"[2]

Where by a sanad a gift was made of the then income of certain villages with a specification that one-third of it was for the defrayal of the expenses of the servants of a mosque, and fursh and light, &c., one-third for expenses of a *Madrassa*, and the remaining one-third for the maintenance allowance of the Mutwalli, it was held that the gift complied with four essential conditions necessary to

1. I. L. R. IX. C. S., 176; 12 C. L. R., 22.
2. I. L. R. X. B. S., 119.

create a valid *wakf*, and that, in the absence of any express direction as to what was to be done with any surplus profits of the dedicated property, the reasonable presumption is that the improved value of the dedicated property, or any excess of profit over and above the amount stated in the sanad, was intended by the grantor to be devoted to the same purpose for which the amount, which was the actual value of the property at the time of the gift was expressly assigned.[1] In another case a sanad in the following terms: "Let the whole village above mentioned, as well as the above mentioned lands, be hereby settled and conferred as above, manifestly and knowingly as a help for the means of subsistence for the children of the above mentioned Sayad Hasan without restriction as to names, in order that, using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government," was held not to constitute wakf, or a religious endowment, making the Village descendible to the issue of the donee *per stirpes* (that is allowing representation) rather than according to the ordinary Mahámadan law; and the direction that the donee and his issue were to pray for perpetuity of the then existing Government meant no more than an inculcation of gratitude for the gift, and that neither neglect to fulfil the direction nor the downfall of the Government would work a forfeiture or avoidance of the grant. Although a *wazifa* grant may be a religious endowment, such is neither necessarily nor even generally its nature: hence the use of the term "*Mauzif*" *alias* ("wazif" or "wazifa") with regard to the grant of a village, does not stamp the grant as a *wakf* or religious endowment.[2] A wakf must be certain as to the property appropriated, unconditional and not subject to an option. It must have a final object which cannot fail and this object must be expressly set forth. When a *wakf* is created, the reservation in the deed of the settlement of the annual profits of the pro-

1. I. L. R. X. C. S., 533.
2. I. L. R., VI. B. S., 88.

perty to the donor for life does not invalidate the deed. If, however, there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor, the settlement is invalid. If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of the English law; but according to the Mahamadan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated. The rule against perpetuities extends to a colony in which English law is enforced only so far as it is adapted to the circumstances of the community. The case of the "charities useful and beneficial" to the community is an exception to this rule. It is for the Courts to pronounce whether any particular object of bounty falls within this class. In order to decide this question, they must in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to Mahamadan law. A trust for the benefit of the poor, for aiding pilgrimages and marriages and for the support of wells and temples, is a charity amongst Mahamadans. The law and opinions of Mahamadans regard such a trust as a charity; and granting there is a charity, the objection to a perpetuity fails according to the principles of English law. Where the proposed object of the endowment is one which is directly contrary to the public law of the State, the above rule does not apply. In that case the facts were as follows: by an indenture of voluntary settlement dated 16th March 1866, a Mahamadan girl of the age of fourteen, conveyed certain immoveable property in the islands of Bombay to trustees upon trust. (1) During her life-time to pay the rents and profits to her for her sole and separate use without power of anticipation. (2) After her death to pay the rents and profits to her children and

descendants as she might by deed or will appoint. In default of appointment the trustees were to pay life allowances to such descendants at their discretion. The rents and profits only were to be thus distributed among such descendants for ever, the *corpus* of the property being kept intact. (3) In case there should be no such descendants, or in the event of failure of such descendants, the rents and profits were to be expended on charitable purposes, such as expenses of poor pilgrims going to Mecca, building mosques, funeral and marriage expenses of poor people, sinking wells and tanks or in such other manner as the trustees should think fit. Shortly after the execution of the settlement, the trustees took possession of the property, and for fifteen years continued to pay the rents and profits to the settlor. The settlor was married in 1866 to H. and there was issue of the marriage only one son, who died in 1872, an infant under the age of five years. H. died in 1872 and the settlor remained a widow. In 1881 she became desirous of revoking the above settlement, and under Section 527 of the Civil Procedure Code (Act X of 1877) she stated a case for the opinion of the Court, contending that she could lawfully revoke the trusts declared by the said indenture; that, if she could not revoke, then that the trust therein declared in favor of charity was void for remoteness; and generally that she was under the circumstances, entitled to have the property reconveyed to her by the surviving trustee. It was held in that case (1) that the settlement was irrevocable. The dedication having been once made could not be re-called. The interposed private interests, which might or might not endure did not avoid the ultimate charitable trust. The latter gave effect to the former: should the intermediate purposes of the dedication fail, the final trust for charity did not fail with them. It was but accelerated, being itself regarded as the principle object in virtue of which effect was given to the intervening disposition. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognised in the grantor: and (2) that although the dedication

by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having been questioned by her husband during his life, and she having for fifteen years confirmed her own act by a continued acceptance of the profits of the estate from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects or of a want o an accompanying volition.[1] A valid wakf cannot be affected by revocation or by the bad conduct of those responsible for the carrying out of the appropriator's behests, nor can it be alienated.[2] According to Shiya law, a man who devotes his property to charitable or other uses, and transfers the proprietory right therein to a trustee, cannot at his pleasure take it back from the trustee whom he has constituted the owner, and give it to another person, unless on the creation of the trust he has reserved to himself the right to do so in express terms[3]. If "*Mutwallis*" failed to act up to the directions of the endowment, the grant does not necessarily revert to the heirs of the grantee[4]. Since the passing of Act XX of 1863 a *mutwalla* or manager of an endowment, cannot be considered to hold the position he was taken to have in the judgment of the Privy Council,[5] as an officer appointed by the Government; and therefore the ordinary rules of limitation are applicable to such cases.[6] Land granted for the endowment of a *Khalibe*, or other religious office, cannot be claimed by right of inheritance. Where such a grant has been made, the members of the grantee's family have no right at his death to a division amongst them, of the income derivable from the lands. The right to the income of such land is inseparable from the office for the support of which the land was granted.[7] Where

1. I. L. R. VI. B. S., 42.
2. 16 W. R., 116.
3. 2 N. W. H. C. R., 420.
4. 12. W R., 132.
5. 6 W. R. P. C., 3.
6. 17 W. R. 430.
7. 2 M. H. C. R., 19.

property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established, whether such rules are defined by writing or are to be inferred from evidence of usage. Where so far as the will of the founder can be ascertained from the usage of former days, it seemed to authorize a mode of succession originating in an appointment by the incumbent of a successor, the Court would not be authorized to find in favor of any rule of succession by primogeniture solely from the circumstance that the persons appointed were usually the eldest sons.[1] Although the founder of a *wakf* has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (*e. g.*, from amongst his relations), he cannot afterwards name a person as manager not answering the proper description. After the death of the founder the right to nominate a manager of the wakf vests in the founder's vakils or executors, or the survivor of them for the time being. The term "*Akriba*" (relations), though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity. The wife or widow of the founder is not included among his "*Akriba*".[2] Where the *mutwalli* of an endowment sought to recover his *surburakari* right in two villages, of which he had been dispossessed by a person who had obtained a decree against him personally, and taken out execution against the endowment; and the said judgment creditor contended—(1) that the proceeds of the endowment had been appropriated to other purposes than those specified in the firman creating it; (2) that as the firman contained no rule of succession by inheritance or otherwise, the plaintiff could not claim to be Mutwalli simply in virtue of his being a descendant of

1. 8 M. H. C. R., 63.
2. 9 B. H. C. R., 19.

the original Mutwalli; and (3) that the use of the term "inam" in the firman showed that the grant was in the nature of a personal endowment; it was held (1) that the nature of the firman removed all doubt of the wakf character of the endowment, (2) that the misappropriation of wakf funds might form the subject of a suit to compel the Mutwalli to do his duty but could not alter the essential nature of his trust, (3) that the question of the right of the plaintiff to succession, could not, for the first time, be raised in this stage of the case, and (4) that a grant should be construed according to the intention of the founder and not according to the strict interpretation of any particular word: the word "*inam*" being indiscriminately applied to personal grants and religious endowments.[1] When a plaintiff sued to recover certain lands which had been appropriated to religious and charitable purposes by the father of her deceased husband, and urged that she had been ousted by defendant, who was the son of a half-brother of her husband, but the defendant contended that he had been put in possession as manager by plaintiff herself and other widows of the plaintiff's deceased father-in-law all which widows had some interests in the land under various deeds by which additions had been made to the original endowment; and defendant further pleaded that, under the original deed of appointment, plaintiff's husband could not alienate the property, that the plaintiff's possession would be a virtual alienation, that the plaintiff's claim was barred by limitation, and that she could not hold the land without the sanction of the Government under Act XX of 1863; it was held that although plaintiff's original appointment by her late husband during his life-time was unauthorised, yet, as alienation in such a case would mean alienation of the subject of the endowment rather than its transfer to plaintiff, whose possession was not an adverse possession, plaintiff's possession did not defeat the purposes of the original appropriator, and could not be regarded as an alienation; and that in these circum-

1. 25 W. R., 557.

stances, even though the property were Wakf, there could be no defect in plaintiff's title. An appropriator of land to special purposes can, under the Mahamadan law, confer the office of superintendent on another at any time. It was found in this case that defendant, as a descendant of the original appropriator, had succeeded to other properties which were quite distinct from the land in suit.[1] An appointment as manager by the trustee for the time being of a Mahamadan religious endowment, was not effectual beyond the incumbency of the nominator.[2] The fact of a person being a Shiah does not disqualify him for the supervision of a Wakf made by a Sunni.[3] In a Mahamadan religious endowment when it is essential that the superior or the manager should have certain qualifications which succession by descent would not always ensure, the theory of hereditary succession is most unlikely and out of place.[4] Offices like that of *suffada-nasheen* should descend to persons in the male line, and those who are descended from females are regarded as not belonging to the family of the founder, but strangers. Where such an office has been once diverted for sufficient cause (*e. g.*, default of male issue) from a particular line of descent, it is liable to be brought back into the line of a previous holder when the person claiming under that holder is a descendant in the female line.[5] A woman may manage the temporal affairs of a Mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications.[6] The office of Mutwalli is a trust which a woman, equally with a man, is capable of undertaking, but it is a personal trust, and the office may not be transferred, nor the endowed property conveyed, to any person whom the acting Mutwalli may select. The word "deputy" in Book 9, Chapter V, page 591 of BAILLIE'S

1. 25 W. R., 542.
2. 6 W. R., 277.
3. 16 W. R., 116.
4. W. R., 1864., 327.
5. 16 W. R., 193.
6. 4 M. H. C. R., 23.

Mahamadan Law, signifies some one who, as an agent, may be employed to perform the duties of the office, as to collect rents and to assist the Mutwalli in expending the proceeds of the endowed property for charitable purposes.[1] A woman is not competent to perform the duties of *mujavar* of a durga which are not of a secular nature.[2] A Wakf or endowed property is alienable. Wakf property is not the less Wakf property, because of the use of the words "*inam*" and "*altamgha*" in the grant, provided the grant clearly appears to have been intended for charitable purposes. A *Mutwalli* or superintendent of an endowment, is not barred by limitation if he sues to recover possession of endowed property within twelve years from the date of his appointment.[3] In dealing with the *Mutwalli* of an endowment, it is not necessary for the purchaser to look further than to the power of the *Mutwalli* under his deed of trust. If the deed gives the *Mutwalli* the power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not.[4] The trustess of an endowment cannot create a valid *Mirasi* tenure at a fixed rent by granting a lease of any portion of the *wakf* property.[5] Where the whole of the profits of the land are not devoted to religious purposes, but the land is a heritable property burdened with a trust, *e. g.*, the keeping up of a saint's tomb,—it may be alienated subject to the trust.[6] Where property is endowed (made *wakf*) by the proprietor, and as such devolves to his widow as trustee (*Mutwalli*), it cannot be sold in satisfaction of a claim against him.[7] The fact that a mortgage is in existence over property at the time when it is set apart as an endowment, does not invalidate the endowment. It is an endow-

1. I. L. R. 8. C. S., 732; 10 C. L. R., 529.
2. I. L. R., 3. M. S., 95.
3. 6 W. R. P. C., 3; 2 M. I. A., 390.
4. W. R., 1864, 242.
5. 5 W. R., 158.
6. 10 W. R., 299.
7. 15 W. R., 75.

ment subject to a mortgage. If after a mortgage the mortgagor endows the land and dies leaving sufficient assets, his heirs are bound to apply those assets to the redemption of the mortgage so that the endowment may take effect freed from the mortgage by the application of other assets of the endower. But, if necessary, the mortgagee may enforce the mortgage by sale of the land, and the endowment will be rendered void as against the purchaser under the mortgage, but not as against the heirs of the endower; as against the latter the surplus sale proceeds will be subject to the endowment.[1] Where a *Mutwalli* was proved to have been guilty of waste, the High Court ordered him to file in Court every six months a true and complete account of his income, expenditure and dealings with the property belonging to the endowment.[2] If a superintendent of an endowment misconducts himself, the Mahamadan law admits of his removal, and this is sufficient to protect the objects for which the trust was created.[3] The rule of Mahamadan law that a *Mutwalli* or superintendent of an endowment, is removable for mismanagement, does not apply to the case of a trustee, who has a hereditary proprietary right vested in him. It is essential, for the exercise by the donor of the power of removing a superintendent, that such power be specially reserved at the time of the endowment.[4] Where the plaintiff sued to recover certain property as *wakf*, on the ground that the *Mutwalli* and his ancestor (a former *Mutwalli*) had misconducted themselves by selling to some of the defendants the property which was the subject of the endowment—, it was held that as plaintiff had shown no title, either as heir or otherwise, to partake of the benefit of the endowment, he had no right to recover possession, and that the utmost he could ask for, was to have the *mutwalli* who had misconducted himself removed, and a new *mutwalli* appointed, provided he showed circumstances which,

1. 4 B. L. R., A. C. 86; 12 W. R., 498.
2. 23 W. R., 150.
3. 2 N. W. H. C. R., 420.
4. 4 M. H. C. R., 44.

according to law would justify the Court in selecting a *mutwalli*.[1] In a suit by the superintendent of a Mahamadan religious establishment to eject defendant M from the office of *takheadar* and from certain lands thereto appertaining, on the ground that he had by the authority vested in him already discharged M from employment in consequence of disobedience, the alleged cause of action being an order passed by the Civil Court decreeing to the defendant a quality of land belonging to the establishment, notwithstanding the superintendent's objection that M was no longer *takheadar*, it was held that the plaintiff's cause of action was correctly stated, for it was by the order in question that his nominee was put aside, and the defendant declared to have a right to the land as takheadar; and that the defendant's claiming to hold independently of the superintendent was an act of the gravest disobedience warranting the plaintiff's interference and the exercise of his authority. It was held, too, that the suit was not barred by limitation, as the defendant held his office subject to the general control and authority of the superintendent, both parties executing the same trust.[2]

Where the father of three defendants executed an instrument purporting to be a *wakfnama* in favor of his heir and descendants generation after generation, retaining the office of *mutwalli* for himself for life and in the event of his death he appointed his wife and youngest son *Mutwallis* with certain powers of delegation and under certain conditions, and further directed that the property was not to be held or mortgaged, and two of the defendants mortgaged the properties to the plaintiff who sued upon it, it was held (1) that the document of the defendant's father was valid as a *wakfnama*, (2) that the mortgaged property being *wakf* the plaintiff acquired no right under his mortgage which would extend beyond the life-time of his mortgagor, (3) that in such property no one has any interest as the heir of the appropriator, that (4) it is neither

1. 10 W. R., 458.
2. 11 W. R., 333.

the subject of ownership nor heritable, but that each object of the charity who brings himself or herself within the term of the endowment is entitled to receive the benefits which the founder had marked out for him.[1]

CHAPTER XIV.

DEBTS AND SECURITIES.

The Mahamadan law is extremely lenient to debtors but its provisions have been modified by the provisions of the Indian Contract Act.

1. The rules of the Mahamadan Law on this subject are not, perhaps, of much interest in these days, as the question would more properly be guided by the rules of the Contract Act. The Mahamadan Law expressly prohibits the receipt of interest on money, and all usurious contracts: but this rule would not be followed now. The rule of the Mahamadan Law that if two persons jointly contract a debt, and one of them dies, the survivor will be held responsible for a *moiety* only of the debt, would not, it appears, be strictly applied by our courts, for under the Contract Act (IX of 1872, S. 43), when two or more persons make a joint promise, the promisee may, *in the absence of express agreement to the contrary*, compel any one of such joint promisors to perform the whole of the promise. In other words, the Contract Act looks upon every joint promise as both joint and several and makes each of the joint promisors entirely liable to the whole at the option of the promisee, in the absence of an express agreement to the contrary.

"The rules relative to debtors, in general," says MacNaughten,[2] "are extremely lenient: perhaps the most

1. I. L. R. XI B. S., 492.
2. MacNau. Pre's Re: XXXVII.

prominent instance of this, which can be cited, is the case of several persons contracting a joint obligation in favor of another. As the principles of the Mahamadan Code exactly coincide with those of the Civil law, I cannot exemplify the rules on the subject more effectually than by extracting the following passage from *Pothier*, "Solidity may be stipulated in all contracts of whatever kind; but regularly it ought to be expressed; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. And this is confirmed by Justinian in the Novel. The reason is, that the interpretation of obligations is made, in cases of doubt, in favour of debtors, as has been shown elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjusted that the fourth, by ratifying the sale was not to be considered as having sold *in solido* with the others; for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido*." Numerous other examples might be adduced to show that the law leans entirely in favour of those against whom a claim may be made, and who may have committed no wilful wrong. This system, if not in all cases reconcilable with strict justice is at least captivating, from the apparent benevolence of the motives by which it is governed."

The Mahamadan law does not recognize a joint family and each is liable only for his own debts under that law.

2. There is very little of difference between the Hindu and Mahamadan Laws on this subject, except that in a Hindu family a joint family being recognized, those who are not parties to the debt are often made liable to the debt which they did not contract. The Hindu Law enjoins on a son the duty of paying his father's debt and that not only to the extent of the father's share, but the son's share of the ancestral property is also made liable for the father's

debt, unless it was incurred for an immoral or illegal purpose: but these distinctions do not find a place in the Mahamadan Law, under which the heir is entitled to a share only in the property which is left after paying the debts of the deceased. And it has been held that when the members of a Mahamadan family live in commensality, they do not form a 'joint family," in the sense in which that expression has been used with regard to Hindus; and that in Mahamadan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of several members are made for the benefit of the family jointly.[1]

A creditor cannot follow his debtor's estate in the hands of a *bona fide* purchaser for value from the heir at law.

3. In *Syud Bazayet Hossein* v. *Doolichund*,[2] the Privy Council ruled as follows: "a creditor of a deceased Mahamadan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heirs-at-law. But it does not follow from this that such a creditor, under all circumstances, can follow the estate in the hands of a purchaser, who had notice of his claim. The purchase with notice is not absolutely void, but the purchaser takes the property subject to the rights of the creditor whatever they are. The Mahamadan Law on this subject is that, out of the assests of a deceased person, funeral expenses should be defrayed first, then the debts and then the legacies. The residue is to be distributed

1. *Hakim Khan v. Gookhan*, I. L. R. VIII. C. S., 826, doubting the case in 3 *Ibid*, 97.

2. I. L. R. VI. A. S., 222.

among the heirs. Therefore, if the assets in the hands of an executor or the heirs-at-law are not sufficient to discharge a particular debt, the creditor may follow any property in the hands of a purchaser from the executor or heirs-at-law with notice of his claim." And this ruling was followed by the Calcutta High Court in a case[1] where A purchased in execution of a money decree against the heirs of a deceased Mahamadan for a debt incurred by him, certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance, but previous to the purchase, the widow had mortgaged the same property to B, who at the time of the mortgage knew of the debt for which the decree was obtained, and in a suit by B against A on the mortgage, it was held that B was entitled to recover, as it was not shewn that there were not assets in the hands of the heirs-at-law to satisfy the debts due to A's vendor.

A suit by a creditor of a deceased Mahamadan against the heir in possession is considered an administration suit.

4. It has been held by the Calcutta High Court that when a creditor of a deceased Mahamadan sues the *heir* in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit, and those heirs of the deceased, who have not been made parties, cannot, in the absence of fraud claim anything but what remains after the debts of the testator have been paid.[2] In that case after the death of a Mahamadan,

1. *Narsingh Doss* v. *Naj Moddin Hossein*, I. L. R. VIII. C. S., 20.
2. *Muttyjan* v. *Ahmed Ally*, I. L. R. VIII. C. S., 310.

several of his creditors sued his widow and daughter, and obtained decrees, against the assets of the deceased, which assets had come into the possession of the mother and daughter, and in execution of these decrees portions of the properties were sold, and thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and the daughter, sued as heirs of the deceased to recover their shares of the property sold, and their suit was dismissed on the ground that they had no claim, as the property of the deceased had been attached and sold in payment of his debts. MORRIS, J., observes :—

The only point, therefore, now in issue, is whether the sisters are entitled to the declaration which they seek. This subject has been dealt with from different points of view in the decisions of our Courts. They all support the contention now raised on behalf of the Respondents, that the sisters cannot obtain their shares of the property sold. The first is that of *Mussamut Nuzeerun* v. *Moulvie Ameeroddeen*[1] according to which, following the analogy of the Hindu Law in the case of a Hindu widow, the Defendants in the former suit may be considered as having been sued in their representative character only, and what passed at the sale in execution was the property of Mahamad Wasil. A second case[2] ignores the extension of this principle of Hindu Law to Mahamadans, and approves of the procedure provided in the *Hedaya* for the guidance of Mahamadan Law officers, and the Judgments thereon are apparently to the effect that one of the heirs in possession may stand as litigant on behalf of all the other heirs with respect to anything done to or by the deceased,

1. 24 W. R., 3.

2. *Assamathemnessa Bibee* v. *Roy Lutchmeeput Singh*, I. L. R. IV C. S., 142.

whether it be debt or substance. The third view is opposed to dealing with this question on either of these grounds, but recognizes all creditor's suits as in the nature of Administration suits. . . . We think that this is the proper principle that must guide us in the decision of the present suit, because in the former suits by the creditors, the property of the deceased Mahamad Wasil was attached and sold in payment of his debts.

The liability of one person to pay the debt of another under the Hindu law discussed.

5. The question as to how far one member of a joint Hindu family is liable for the debts contracted by, or is bound by the alienations of, another member is of importance and not free from difficulty. The difficulty arises from the character of the Hindu joint family, the rights of the several co-parceners thereof *inter se*, the powers of the person purporting to act as the manager of the family, and last though not least, the religious and moral obligation of the son to pay the debts of his father except in some cases. Difficult questions on this point have arisen for decision, and a summary of them would form a useful and interesting study. The reader must be referred to larger works for a discussion of the several points that have arisen for decision, and all that is attempted here is a short abstract of the case law on the subject of *debts*.

"The liability of one person to pay debts contracted by another arises from three completely different sources which must be carefully distinguished. These are (1) The *religious* duty of discharging the debtor from the sin of his debts; (2) The *moral* duty of paying a debt contracted by one whose assets have passed into the possession of another; and (3) The *legal* duty of paying a debt contracted by one person as the agent express or implied of

another. Cases may often occur in which more than one of these grounds of liability are found co-existing: but any one is sufficient. All the three occur in the case of a debtor and his sons and grandsons, while the first ground of liability will occur only in their case."

1. *The religious duty: the case of father and son.*—Let us take the case of father and son first. The liability to pay the father's debt arises from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts, a debt being considered by Hindu lawyers as not merely an obligation but a sin. This obligation equally compels the son to carry out what the ancestor has promised for religious purposes. This obligation is not founded on any assumed benefit to himself, or to the estate, arising from the origin of the debt, and is not affected by the nature of the estate which has descended to the son, as being ancestral or self-acquired, for the freedom of the son from the obligation to discharge the father's debt has reference to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.[1] The son is, however, only liable to the extent of the assets he has inherited from his father, and as soon as the property is inherited a liability *protanto* arises, and is not removed by the subsequent loss or destruction of the property, and still less, of course, by the fact that the heir has not chosen to possess himself of it or has alienated it. The creditor is bound to adduce such evidence as would *primâ facie* afford reasonable grounds for an inference that assets had, or ought to have come to the hands of the son, and the word "*assets*" includes, according to the final decision of the Privy Council, the whole property in the hands of the father as representing the joint family. Thus then where the son is sued after his father's death for the payment of his father's debts, it is utterly immaterial whether the debts had been contracted for the benefit of the family, or for the sole use of the father, provided in the latter case, they were not of an immoral

1. I. L. R. VI. M. S., 293: L. R. IX. I. A., 128.

character, and the whole estate is liable in the hands of the heirs for all the debts, which though neither necessary nor beneficial to him were free from any taint of immorality.[1]

The principle of these decisions has recently received a considerable extension by its application to cases where the father has mortgaged or sold the family property to liquidate his private debts, or where it has been sold in execution of decrees against him for such debts. Where such transactions affect a larger share of the property than his own interest in it, the result evidently is that the sons are compelled indirectly to discharge during the father's life an obligation which in strictness only attaches upon them at his death. This was so decided by the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall*.[2] This decision has been followed in numerous cases from all the Presidencies, where sales or mortgages by a father for the purpose of satisfying antecedent debts of his own, which were neither immoral on the one hand, nor beneficial to the family on the other, have been held to bind the son's and grandson's share in the property as well as the father's share.

The principle that a father may bind his son's interest in the joint property by a voluntary alienation, made to discharge his own personal debt, applies *á fortiori* to involuntary sales in execution of a decree of Court pronounced against him in respect of such a debt. But there is a difference between the cases which has an important bearing upon the rights of the son. Where a father has sold or mortgaged the family property for an antecedent debt, not of an immoral or illegal character, it seems now quite settled that a sale under a decree against him enforcing such a transaction will bind his sons, even though they have not been made parties to the suit. The reason for this appears to be that the right of the purchaser or mort-

1. I. L. R., IV. M. S. I. *Ibid* VII., 339 : I. L. R., IX. C. S., 389 L. R., IX. I. A., 128.

2. 1. I. A., 321 : 14 B. L. R., 187.

gagee was complete by means of the transfer made to him by the father, and did not require the decree to give it validity against his sons. But *a mere money* debt contracted by a father for his own personal benefit does not of itself bind the sons nor their interest in the property. It may be enforced against them directly after the father's death, if they have received assets from him, or it may be enforced against them indirectly during his life by a sale of the whole property, including their share. In either case their ultimate liability is contingent, and, as it were suspended, until it is enforced. *Primâ facie*, it would seem reasonable to hold, that if a creditor desires the larger remedy, he should frame his suit in such a way as to give notice to those, who are only sureties for the father, that he intends to enforce his rights against them, as well as against the principal debtor, and consequently, that a decree against the father alone could only be enforced by execution against his share. Upon this point, however, there has been a direct conflict of authorities in India, and each side appeals for support to decisions of the Privy Council. After referring to a number of decided cases Mr. Mayne is of opinion that the decided cases so far as they are reconcilable lay down the following rules,[1] *viz* :—

1. In cases governed by Mitakshara law a father may sell or mortgage not only his own share, but his son's shares in family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are no parties.

2. The mere fact that the father might have transferred his son's interest, affords no presumption that he has done so, and those who assert that he has done so must make out, not only that the words in the conveyance are capable of passing the larger interest, but they are such words as a purchaser, who intended to

1. Mayne's Hindu Law, 4th edition, Para. 296 A.

bargain for such a larger interest, might be reasonably expected to require.

3. A creditor may enforce payment of the personal debt of a father, not being illegal or immoral, by seizure and sale of the entire interest of father and sons in the family property, and it is not absolutely necessary that the sons should be a party either to the suit itself or to the proceedings in execution.

4. It will not be assumed that a creditor intends to exact payment for a personal debt of the father by execution against the interest of the sons, unless such intention appears from the form of the suit, or of the execution proceedings, or from the description of the property put up for sale; and the fact that the sons have not been made parties to the proceedings in execution is a material element in considering whether the creditor aimed at the larger, or was willing to limit himself to the minor remedy.

5. The words "right, title, and interest of the judgment debtor" are ambiguous words, which may either mean the share which he would have obtained on a partition, or the amount which he might have sold to satisfy his debt.

6. It is in each case a mixed question of law and fact to determine what the Court intended to sell at public auction, and what the purchasers expected to buy. The Court cannot sell more than the law allows. If it appears as a fact that the Court intended to sell less than it might have sold, or even less than it ought to have sold, and that this was known to the purchasers, no more will pass than what was in fact offered for sale.

Some recent decisions of the Madras High Court have settled the point we are discussing. In the case of *Kumbali Bhari* v. *Keshava Shambaga*,[1] it was held that the only cases in which the son's interest is not affected by the Court sale are, (1) Where the debt is immoral and, (2) When the purchaser does not bargain and pay for the entire estate. The reason is that in the one case the father has

1. I. L. R. XI. M. S., 64, 76.

no disposing power at all, and in the other that power is exercised only to create a smaller interest than it extends to. In that case the following points were also decided:—viz., (1) that the son cannot set up his vested interest as a co-parcener with his father in respect of ancestral estate for the purpose of denying the father's power to alienate it for an antecedent debt, or against his creditor's remedies for his debt, if such debt has not been contracted for immoral purposes, and that the contention that there was no family necessity for the debt or that it was only the personal debt of the father or that the pious obligation arose on the father's death, and that it could not be referred back to the date of the sale, cannot be upheld.

(2) It is immaterial whether the decree against the father is a money decree, or one founded on mortgage and containing a direction for the sale of the mortgage property, and that as regards the contention that the son was not a party to the suit or decree, the answer is, all that the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale. (*Vide* also the decision of the Privy Council in *Minakshi Nayudu's* case.[1])

In a later case[2] the power of the decree-holder to attach and sell the anscestral property was held to be as extensive as the father's power to sell. In that case their Lordships say: "These decisions[3] show that, if the execution creditor actually brought to sale the entire family estate and bargained and paid for it, the entire estate would pass by the Court sale, unless the son impugning it showed that the debt was immoral or vicious and was therefore one for the payment of which the father had no power to sell it. The principle underlying

1. I. L. R., XII M. S., 142.
2. I. L. R., XII M. S., 309.
3. L. R., XII I. A. 1; S. C. I. L. R., XIII C. S., 21; I. L. R., XI M. S., 75.

the decision is that, if the entire ancestral estate was actually sold in execution of a money decree against the father to which the son was not a party, the interest that passed by the Court sale was one which the father had power to sell with reference to the nature of the decree debt, that if the son showed that it was vicious or immoral, nothing more than the father's interest passed, and that if the debt was a family debt or an antecedent personal debt of the father for the payment of which the father was entitled to sell the son's interest also, the whole estate passed by the sale. Thus the creditor's power to attach and sell depends upon the father's power to sell, which again depends upon the nature of the debt. If the debt was one binding on the joint family as alleged by the defendant, he would be entitled to attach and sell the whole ancestral estate, but if on the other hand the debt was vicious or immoral as alleged by the plaintiffs, their interest would not be liable to be attached and sold. The fact of the sale having either taken place or not taken place before the sons instituted the suit cannot affect the father's power to sell, or, therefore, the execution creditor's power to attach in view to bring the property to sale.

In a still more recent case[1] a distinction has been drawn between a decree against a father and that against any other member of a joint Hindu family, and it has been held "no doubt, under a money decree against a father on foot of a debt which bound the sons, the whole interest and all the shares of the sons could be legally sold and conveyed, although the sons were not parties to the suit. The principle of such decisions is that the father is entitled by his own act, without the assent of his sons, to sell the whole estate for payment of such debts as bind the sons. But that principle has not been extended so far as I know, to the case of any manager of a family except a father. The course of decisions in this Presidency is that, in the case of adult co-parcener, a brother, who is manager, but is not sued

1. I. L. R. XII. M. S., 325.

as such, does not represent in a suit or proceedings affecting the family estate the co-parcener who is not made party to the suit, and that a decree in such suit and execution thereon would not bind him."

A purchaser in Court sale is more favorably treated than a purchaser from the father or other head of the family by private sale; and it has been decided that it is not open to the sons to set up the illegality or immorality of the original debt against an auction-purchaser unless the purchaser had notice that the debts were so contracted: and two propositions might be considered as established by the decided cases, *viz.*:—(1) Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. (2) The purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears in the face of the proceedings.[1]

(2) *The moral duty: the case of other members of a joint family.*—The obligation to pay the debts of the person whose estate a man has taken rests upon the broad equity that he who takes the benefit should take the burthen also. This obligation arises from possession of the estate of the debtor and attaches whether the property devolves upon an heir by operation of law, or whether it was taken by him voluntarily. In some early cases it was held that an heir could not alienate property which had descended to him, while the debts of the deceased were unpaid; but this view has been denounced by recent decisions, and it is now settled that the property of a deceased Hindu is not so hypothecated for his simple debt as to

1. 14 B. L. R., 187: I. L. R. V. C. S., 148.

prevent his heir from disposing of it to a third party, or to allow a creditor to follow it, and take it out of the hands of a third party, who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he have alienated the property, but he cannot follow the property; and the Madras High Court have held that a voluntary transfer of property by way of gift, if made *bonâ fide* and not with the intention of defrauding creditors, is valid against creditors. Here it is necessary to remark that the right of survivorship would defeat the rights of a creditor. Though a creditor who has obtained a judgment against an undivided co-parcener for his separate debt may enforce it during his life by seizure and sale of his undivided interest in the joint property, still if the debtor dies before judgment against him and seizure in satisfaction of it the creditor would not be in a position to enforce his rights against the undivided share of the debtor. If the deceased debtor is an ordinary co-parcener, who has left neither separate or self-acquired property, the creditor who has not attached his share before his death, is absolutely without a remedy in case of simple debts. If he stood in the relation of father to the survivors, his liability can only be enforced by a separate suit against the sons, but if he did not stand on that relation the creditor would be without remedy. The Privy Council have held that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in their father's life-time, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands.[1]

(3) *The legal duty: agency.*—The third ground of liability is that of agency express or implied. Mere relationship however close, creates no obligation. Parents are not bound to pay the debts of their sons, nor a son

1. I. L. R., III M. S. 42. *Ibid* V. 232: V. C. S., 148: VII A. S., 731.

the debt of his mother. A husband is not bound to pay the debts of his wife, nor the wife the debts of her husband. Still less, of course, can any member of a family be bound to pay the debts of a divided member, contracted after partition, for such a state of things wholly negatives the idea of agency. It would be different if he had become the heir of the debtor or taken possession of his assets. On the other hand, all the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorised to contract them. The most common case is that of debts created by the manager of the family. He is *ex officio*, the accredited agent of the family, and authorised to bind them for all proper and necessary purposes, within the scope of his agency. But the liability of the family is not limited to contracts made, or debts incurred by him. The husband is liable for any debts contracted by a wife in a business which he has assigned to her to manage. Persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family property and credit for the ordinary purposes of the business. Debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. Debts contracted by any individual member of a joint family, for his own personal benefit, will not bind the family property. A subsequent promise by one member of a family to pay the individual debt of another member, previously contracted, was held by the Hindu Text writers to bind him, but such a promise would now be held invalid for want of consideration.[1]

5. The following is an epitome of the case law on the subject of debts.

The case law on the subject of debts under the Mahamadan Law.

A decree against one heir of a deceased debtor cannot bind the other heirs.[2] A decree by consent against one

1. Mayne's Hindu Law, para. 308.
2. 11 C. L. R., 268.

heir of a deceased debtor cannot legally bind the other heirs. The estate of an intestate descends entire together with all the debts due from and owing to the deceased. The creditor of an intestate Mahamadan must enforce his claim against the estate in a suit properly framed for the purpose. Such a suit is properly framed if all the persons in possession of that particular portion of the estate which it is intended to charge are made parties to it. The right of a Mahamadan heir claiming the property of his deceased ancestor, who died indebted, is a right of representation only, and except as representative he has no right to the property whatsoever.[1] The creditor of a deceased Mahamadan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice and be affected by the doctrine of *lis pendens*.[2] The debts of a deceased Mahamadan are not a charge upon the estate which gives the creditor a priority over all persons who after his death purchase or take a mortgage of his estate.[3] The creditor of a deceased Mahamadan cannot follow his estate into the hands of a *bonâ fide* purchaser from his heir.[4] Where in execution of a money decree against the heirs of a deceased Mahamadan for a debt incurred by him, A purchased certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance, and where previously to the purchase, the widow had mortgaged the same property to B, who, at the time of the mortgage, knew of the debt for which the decree was obtained, and a suit was brought by B

1. I. L. R. IV. C. S., 142; 2 C. L. R. 223.
2. I. L. R. IV. C. S., 402; L. R. V. I. A., 211.
3. 7 C. L. R., 460.
4. 8 C. L. R., 447.

against A on the mortgage, and it was not shown that there was not assets in the hands of the heirs-at-law to satisfy the debt due to A's vendor, it was held that B was entitled to recover.[1] In another case where after the death of a Mahamadan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter, and in execution of these decrees portions of the property were sold; after which two married sisters of the deceased, who lived with their husbands, apart from the widow and daughter, sued as heirs of the deceased to recover their shares of the property sold, it was held (1) that the property of the deceased having been attached and sold in payment of his debts, the plaintiff's suit must be dismissed, (2) and that when a creditor of a deceased Mahamadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit; and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.[2] Where two widows sold a portion of their deceased husband's real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives and the sale deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians, it was held, that if the plaintiff was in possession, and was not a party to, or properly represented in the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected.[3] In another case where heirs to a deceased Mahamadan divided his estate among themselves accord-

1. I. L. R., VIII. C. S., 20; 10 C. L. R., 225.
2. I. L. R. VIII. C. S., 370; 10 C. L. R., 346.
3. I. L. R. I. A. S., 57.

ing to their shares, a small debt being due from the estate at the time of division and two of the heirs were subsequently sued for the whole of such debt, it was held that, inasmuch as such heirs had not by sharing in the estate rendered themselves liable for the whole of such debt, the Mahamadan law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken.[1] Upon the death of a Mahamadan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon and suspended till payment of such debts. A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Mahamadan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to 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. Accordingly where in execution of a decree for a debt due by a Mahamadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate and one of the heirs, who was out of possession and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property, sold in execution of the decree by right of inheritance, it was held (by the full Bench) that the plaintiff was not entitled to recover from the auction-purchaser, in execution of the decree, possession of his share in the property sold, without such recovery of possession being rendered

1. I. L. R. IV. A. S., 361.

contingent upon payment by him of his proportionate share, of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place.[1]

In another case where the creditor of A., a deceased Mahamadan, under a hypothecation bond, obtained a decree on the 20th December 1876, for recovery of the debt, by enforcement of lien against M., one of A's heirs, who alone was in possession of the estate, and in execution of the decree, the whole estate was sold by auction on the 21st March 1878 and purchased by the decree-holder himself and B., another of A's heirs was not a party to these proceedings, and on B's death, her son and heir C. conveyed to D., the rights and interests inherited by him from his mother, namely, her share in A's estate, and the purchaser of the share thereupon brought a suit against the decree-holder for its recovery, it was held, (1) that immediately upon the death of A, the share of his estate claimed in the suit devolved upon B.; (2) that she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March 1878; (3) that upon her death, that share devolved upon her son, who conveyed his rights to the plaintiff; (4) that the plaintiff was therefore entitled to recover possession of the share which he had purchased, but that he could not do so without payment to the defendant of his proportionate share of the debts of A, which were paid off from the proceeds of auction-sale of 21st March 1878.[2] In another case where A, a Hindu, and a creditor of B, a deceased Mahamadan, sued C, D, E and F his heirs, to recover a sum of money alleged to be due on a roka, alleging that they were in possession of B's estate and praying for a decree against the estate upon that footing, and it was not disputed that the debt would have been barred by limitation but for a part payment made by C, and endorsed by him on the back of the roka, D, E, and F being no parties to such payment, and the

1. I. L. R. VII. A. S., 822.
2. I. L. R. VII A. S., 716.

endorsement was not made with their consent, the first Court considering that collusion existed between A and C and having regard to the fact that C did not dispute his liability, gave A a decree for the full amount of the debt against C, without finding whether the roka was genuine or not, and further held that the shares of D, E, and F in B's estate were not liable for any portion of the debt. A accepted this decision and did not appeal. C appealed on the ground that he could only be held liable for a part of the debt in proportion to the amount of B's estate, which had come into his hands. The lower Appellate Court decided in C's favor and varied the decree by directing that A was only entitled to recover two-fifths of the debt from C that being the amount of C's share, D, E, and F not being made parties to that appeal; A then preferred a second appeal to the High Court, making D, E, and F parties. It was held that, (1) under the circumstances of the case, and having regard to the rule of Mahamadan law, A was not entitled to a decree against C for more than two-fifths of the debt, and (2) applying the principle of justice, equity and good conscience to the case, inasmuch as A was a Hindu, it would not, under the circumstances of the case, be equitable to hold C liable for the whole of the A, a Mahamadan, died, being indebted to B in a s money. B sued the heirs of A for the amoun obtained a decree. Before B obtained his decre heirs of A had mortgaged the estate of A to C property was put up to sale in execution of B's d and B became the purchaser, and now sued to o possession from C. It was held that the mere fact of property having once belonged to the estate of A not entitle B to follow it in the hands of C, so enable him to recover possession without rede The heir of a Mahamadan may, as executor, sell a p of the estate of the deceased, if necessary, for the ment of debts; and such sale will not be set asid the purchaser acted *bonâ fide*.[2] Where M, a Mahamadan

1. I. L. R., XI. C. S., 421.
2. 1 B. L. R., A. C. 172; 10 W. R. 216.

inherited certain property from his father, which, while he was a minor, his mother sold to the defendant, in good faith, for the discharge of a debt adjudged to be due to the defendant by M's father and M, when he became of age, sold the same property to the plaintiff, who sued to obtain possession thereof by avoidance of the sale to the defendant, it was held (1) that the plaintiff, having no better title or other right than M could assert, was not competent to maintain the suit, without tendering payment of the debt, and (2) that, even if the Mahamadan law were applied, and M's mother was not legally competent to sell his property in the assumed character of his guardian, the plaintiff was bound to pay the debt due from M's father to the defendant before he could claim, by avoidance of the sale in question, the possession of the property in suit.[1] Where it is sought to fix a person with liability for the debt of a person deceased, by reason of the receipt of assets, it is incumbent on the creditor to give some evidence of assets having been received.[2]

1. 6 N. W., 268.
2. Marsh, 218; 1 Hay, 559.

MAHAMADAN LAW.

CHAPTER I.

ORIGIN AND SOURCES OF LAW.

Origin.

1. The civil law of Mahamadans is believed to have been derived from direct revelation.

Sources of Law.

2. The sources of Law are four-fold. The *Koran*, the *Sunnat* or *Hadis*, the *Ijmaa*, and the *Kiyas*; some refuse to acknowledge the last authority.

Authorities.

3. The authority of Abu Hanifa and his two disciples Abu Yusuf and Imam Mahamad, is paramount in Hindustan. When master and disciples differ, the judge may adopt either; when disciples differ, whichever agrees with the master must be preferred. In judicial matters Abu Yusuf is preferred.

Schools of Law.

4. There are two great schools of law called the Sunni and the Shiya. Those that supported the cause of Ali are Shiyas, and others Sunnis.

5. The chief authorities and books of references are:—

Law Books.

(i) The *Hidaya*. (ii) the *Sirajya* on inheritance. (iii) the *Sharifiya*, a commentary on Sirajya. (iv) the *principles* and *precedents* of Mahamadan Law by Sir McNaughten. (v) Baillie's *treatise* on the *Law of Inheritance*. (vi.) the Mahamadan Law of *Sale*, by *Baillie*. (vii) the *Futwa Alamgiri*, a collection of opinions. (viii) Elberling's *treatise* on *Inheritance, Gifts, &c.*

CHAPTER II.

MARRIAGE.

Summary of marriage Law.

1. As observed by SIR W. MACNAUGHTEN, the first and most important of domestic relations is that of *Husband* and *Wife*. "Marriage" says MR. BAILLIE, "is merely a civil contract, it confers no rights on either party over the property of the other. Legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing and being sued without husband's consent, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend, and is in no respects under his legal guardianship. On the other hand, husband is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time without assigning any reason. He may also have as many as *four* wives at a time."

Definition.

2. Marriage is defined to be a contract founded on the intention of legalising generation (Mac. Ch. ii. Pri. i.)

Necessity for Marriage.

3. The intercourse of a man with a woman who is neither his wife nor his slave, is unlawful, and prohibited absolutely. When there is neither the reality nor the semblance of either of these relationships between the parties their intercourse is termed *Zina*, and subjects both of them to *hudd*, or (specific punishment) for vindicating the rights of the Almighty God. Knowledge of the illegality of intercourse is a condition essential to the infliction of *hudd* and the offspring of such connection is termed child of Zina, and is necessarily illegitimate.[1]

1. B. D., 143.

Incidents of marriage.

4. The principal incidents of marriage are the *wife's rights* to *dower* and *maintenance*, the *husband's right* to *conjugal intercourse* and *matrimonial restraint*, the *legitimacy* of *children* conceived, not merely born, during the subsistence of the contract, and the *mutual rights* of the *parties* to *share* in the *property* of *each other* at *death*. The last incident belongs exclusively to *valid* marriages.

The object of dower and maintenance.

5. The right to *dower* is opposed to that of conjugal intercourse, and the right of *maintenance* to that of matrimonial restraint. Hence a woman is not obliged to surrender her person until she has received *payment* of so much of her *dower* as is immediately *exigible* by the terms of the contract, and is not entitled to *maintenance* except when she submits herself to personal restraint.

Dower may be due without agreement.

6. Dower though not the consideration of the contract is yet due without any special agreement. Such *dower* is called *the proper dower*, and is usually divided into *prompt and deferred*, the former being payable immediately and the latter not payable till the dissolution of marriage, by death or divorce.[1]

Object of marriage.

7. According to BAILLIE marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life and is one of the prime or original necessities of man. It is therefore lawful to marry even in extreme old age after hope of offspring has ceased, and even in the last or death illness.[2]

Number of wives.

8. A free man may marry four wives at a time, but a slave only two at a time.

1. B. D., Intro. p. 23 to 26.
2. B. D., p. 4.

Essentials.

9. The essentials of marriage are :—

(i) *Declaration* or *Proposal;* (ii) *Acceptance* or *consent.* The first speech, from whichever side it may proceed is *declaration* and the other the *acceptance.*[1]

Time of proposal and acceptance.

10 The proposal and acceptance must both be expressed at one meeting and the acceptance must conform to the declaration or proposal.

Proposals may be made by agency, &c.

11. A declaration or proposal may be made by means of agency or by letter, provided there are witnesses to the receipt of the message or letter, and the consent of the person to whom it is addressed.

Conditions.

12. The Conditions of the marriage are:—(1) *Understanding;* (2) *Puberty;* (3) *Freedom* in the contracting party; (4) *A fitting subject;* (5) *Consent* of the parties, when they are of age or of their guardians when they are minors; (6) *Absence* of legal *impediments;* (7) *Knowledge* of the contract; (8) *Attestation* and the *presence* of *witnesses;* (9) *Proposal* and *acceptance* in one and the same place and meeting; (10) *Equalities* of parties in respect of descent, property, faith; and (11) *Identification* of parties.

After puberty.

13. A woman having attained the age of puberty may contract marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be equal.

Kinds of marriages.

14. There are two kinds of marriages (I) Nikah. (II) Shadee.

Nikah.

15. *Nikah* form of marriage is considered to be the most honorable and religious. *Nikah* depends on three things :—

(i) The consent of the man and woman. (ii) The evidence of two witnesses. (iii) The settling a marriage portion on the wife. When a widow marries, *Nikah* ceremony alone is performed. Under Mahamadan Law a *Nikah* is a legal marriage.

1. B. D., 4.

16. *Shadee* means marriage with festivities. In either of these no religious ceremony seems to be necessary. Shadee.

17. There is no difference between *Nikha* and *Shadee* marriages; as the offspring of both the marriages inherit equally. No difference.

18. Besides the *Nikah* and *Shadee* marriages there are two others known as (i) *A Nikha-i-mootut* meaning a marriage of enjoyment or usufructuary marriage as where a man says to a woman, free from any causes of prohibition, "I will take the enjoyment of you for such a time as for ten days" or give me the enjoyment of your person for ten days. This form of marriage is void and is not susceptible of repudition nor of *Ela* nor *Zihar*. Parties thereto will also be precluded from inheriting to each other. By *Malik*, this form of marriage is deemed lawful as it was once permitted by the *Prophet* and that permission was never abrogated in his opinion. Other kinds of marriage.

(ii) *Moowukput*, or temporary marriage, is also void; the reason assigned to this is that it can be for no other purpose than mere enjoyment, and it makes no difference whether the time be long or short.

19. Marriage is contracted by declaration and acceptance, when they are expressed in words, or by signs (in the case of dumb persons,) when the signs are intelligible. But it is not contracted by mutual surrender, nor by writing between parties who are present: so that if a man should write "I have married *thee*" and the woman should write "I have accepted *thee*" there is no contract.[1] How contracted.

20. Marriages are often contracted by agents on behalf of their principles, who are alone entitled to its rights and obligations.[2] By agents.

1. B. D., 14 & 15.
2. B. D., 75.

Effects of marriage.

21. The legal effects of marriage are:—It legalizes the mutual enjoyment of the parties in a manner permitted by law or according to nature. It subjects the wife to the power of restraint; *i.e.*, it places her in such a condition that she may be prevented from going out and showing herself in public. It imposes on the husband the obligation of *Muher* or *Dower*, and of *maintenance* and *clothing*. It establishes on both sides the *prohibition* of *affinity* and *rights* of *inheritance*. It obliges the husband to be *just* between his wives and to have a due regard to their respective *rights*; while it imposes on the wives the duty of *obedience* when called to his bed and confers on him the power of *correction* when they are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness. And it *forbids* him to associate together either as *wives* or *concubines* two women who are sisters or so connected with each other as to render their association unlawful.[1]

Impediments.

22. The Mahamadan Law recognises six impediments to marriage, *viz.*, (I) *Consanguinity*; (II) *Affinity*; (III) *Fosterage*; (IV) *Religion*; (V) *Slavery*; and (VI) *Previous marriage*.

Prohibition by consanguinity.

23. A man cannot marry with his mother, daughter, sister, aunt (paternal and maternal,) brother's daughter and sister's daughter; and marriage or sexual intercourse with them or even soliciting them to such an intercourse is prohibited for ever, *i. e.*, at all times and under any circumstances.

Affinity.

24. The prohibition of *affinity* is established by a valid marriage, but not by one that is invalid. So that if a man should marry a woman by an invalid contract, her mother does not become prohibited to him by the mere contract, but by sexual intercourse. And the prohibition of *affinity* is also established by

1. B. D., 13.

sexual intercourse, whether it be lawful, or apparently so, or actually illicit. When a man has had sexual intercourse with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grand-father how high soever, and to his son, how low soever.

There is no objection to a man marrying a woman, and his son marrying her daughter or mother.[1]

25. Every woman prohibited by reason of *consanguinity* and *affinity* is prohibited also by *Fosterage.* Fosterage.

[*Fosterage.*—If a child previous to the completion of two years, and a half, drink the milk of another woman, she becomes the *foster-mother*, and her children *foster-brothers* and *sisters* of the child.]

26. Fosterage may be established either by acknowledgment or proof. So it is not lawful for a man to marry his *foster-mother* nor his sister, as prohibited by the sacred *text.* How Fosterages may be established.

27. *Exceptions:—There are two exceptions to this, viz.:—* Exceptions.

(i.) 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 step-daughter, while the latter is neither.

(ii.) It is not lawful for a man to marry the mother of his sister by consanguinity while it is lawful in *fosterage*; for, in the former, she must either be his own mother or step-mother; and, in the latter she is neither.

The sister of one's brother by *fosterage* is lawful in the same way as his sister by descent would be; as, for instance, when a man's half brother, by the father, has a sister by the mother's side, it is lawful for the man to marry her. In fosterage, the mother of one's

1. B. D., 24 to 30.

brother, or of his paternal or maternal uncle or aunt, is lawful to him. And, in like manner, it is lawful for one to marry the mother of his nephew and the grandmother of his child by *fosterage*; but this is not lawful in consanguinity. So, also, it is lawful to marry the aunt of one's child by fosterage, and so the mother of his son's sister, and the daughter of his child's brother; and the daughter of his child's paternal aunt. And in like manner it is lawful for a woman to marry her sister's father, son's brother, niece's father, child's grand-father, or child's maternal uncle by fosterage; though all these are unlawful when the relationship is established by descent.[1]

Women who cannot be lawfully joined together.

28. This prohibition is of two kinds:—One applicable to women who are strangers to each other, and the other to women, who are related to each other.

First.—It is not lawful for any free man to have more than four wives at the same time, and for a slave more than two. It is lawful for a free man to keep and co-habit with as many female slaves as he pleases but it is not permitted to a slave to keep and co-habit with any, even with the permission of his master.

Second.—It is not lawful to co-habit with two sisters, either by marriage or by right of property, whether they be sisters by *consanguinity* or *fosterage*; for it is not lawful to join any two women, who if we suppose either of them to be a male, could not lawfully intermarry, by reason of *consanguinity* or *fosterage*. Hence it is not lawful to join a woman with her paternal or maternal aunt, by *consanguinity* or *fosterage*, but it is lawful to join a woman with her husband's daughter. And in like manner a woman and her female slave may be joined together.

Other relations.

29. The above rules with regard to two sisters apply equally to all other near relations, who cannot

1. B. D., 193 to 195.

be lawfully joined together in contract with a man.[1]

Women prohibited by reason of Polytheism.

30. It is not lawful to marry *fire-worshippers* nor *idolators*; but may lawfully marry a *Kitabi* or all who believe in a heavenly or revealed religion and have a *book* or *Kitab* that has come down to them, such as *Christians, Jews,* and persons of other religions, believing in one *God.*[2]

Women prohibited by reason of marriage.

31. It is not lawful for a man to marry the wife of another. It is lawful for a man to marry a woman pregnant by whoredom, though he must refrain from sexual intercourse with her till her delivery. The marriage of a woman pregnant of a child whose descent or paternity is established, is not lawful according to all opinions; but according to *Abu Haneefa,* if the descent be established from an enemy, as for instance if the woman be a *fugitive* or *captive,* the marriage would be lawful, but the husband should not cohabit with her till her delivery.[3]

Women prohibited by reason of Repudiation.

32. It is not lawful for a man to marry a free woman whom he has repudiated three times, nor a slave (not his own) twice, till another husband has consummated with her and separated from him by death or divorce.[4]

33. Of these 6 classes the first three, or those which are prohibited by reason of *consanguinity, affinity* and *fosterage* are perpetually prohibited to a man, as intercourse with them when under the sanction of marriage would expose the parties to *hudd.* And even these marriages are held to be only invalid according to *Abu Haneefa.*[5]

Invalid Marriage.

34. An invalid marriage is one that is wanting in some of the conditions of validity, as for instance, the

1. B. D., 30 to 32.
2. B. D., 40 and 41.
3. B. D., 37 and 38.
4. B. D., 43 and 44.
5. B. D., 154.

presence of witnesses. In this sense every marriage that is unlawful is *invalid*. Either party may cancel an invalid marriage. Invalid marriages have no legal effect before consummation; but after consummation they are joined to valid marriages as to their effects one of which is the establishment of *nusub* or the child's paternity.[1]

35. When an invalid marriage has taken place, it is the duty of the Judge to separate the parties before consummation; and if the wife be unenjoyed, she has no claim to dower but for a *present*; but if enjoyed she is entitled either to her proper dower or to the dower specific (when any has been named) whichever may be the less; and when none has been named she is entitled to her *proper dower* whatever it may be and it is incumbent on the wife to observe an *iddut* which is to be reckoned from the date of separation.[2]

Minor cannot enter into contract.

36. A male or female not having attained the age of puberty cannot lawfully contract themselves in marriage without the consent of their guardians and the validity of contract entirely depends on such consent. If the match be unequal, the guardians have a right to interfere with a view to set it aside. But in both the preceding cases the guardian should interfere before the birth of issue.

When binding.

37. A contract of marriage entered into by a father or grand-father, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any other guardian, the minors may dissolve the marriage on coming of age provided that such delay does not take place as may be construed into acquiescence.

Who may marry.

38. Where there is no paternal guardian the maternal kindred may dispose of an infant in marriage;

1. B. D., 157.
2. P. C. S. C. P.

and in default of maternal guardians, the Government may supply their place.

39. Promise of marriage whether written or oral, cannot be enforced specifically. Marriage presents or any thing given in consideration must be returned on breach of the contract.[1] Marriage contract cannot be enforced.

40. Marriage will be presumed, in a case of proved continual co-habitation without testimony of witnesses.[2] Presumption of marriage.

CHAPTER III.

DOWER.

1. The necessary concomitant of marriage is *dower*, and is defined to be the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, in exchange for the *usufruct* of his wife; and it is known by several names, as *muhr*, *sudac*, *muhlah*, and *ookr*. The dower which is due by the contract itself is termed the *muhr-i-mithl*, which means literally, dower of the like, or the woman's equals, which is termed the *proper dower*. Definition and its object.

Dower is not the exchange or consideration given by the man to the woman for entering into contract; but an effect of the contract imposed by the law on the *husband* as a token of respect for its subject, the *woman*. The usufruct of the wife being another of its effects, one of these (the dower) is said to be exchanged for the other (the usufruct), and the marriage becomes, in the language of the law, a contract of exchange, though it is only a contract of *union*. What is then the dower.

2. It is usually divided into two parts; one termed *moowjjul* or *prompt* which is immediately exigible, Divisions of dower.

1. Mac. Pri., 58.
2. Mac. Pri., 58.

the other *moowujjul* or *deferred*, which is not exigible till the *dissolution* of marriage by *death* or *divorce*. The payment even of the *exigible* part of the *Dower* is not unfrequently postponed till that event. Now under the decision of the *Privy Council* the time for the limitation of a suit even for the *exigible* part of the dower does not begin to run until the dissolution of the marriage.[1]

Limit of dower.

3. The lowest amount of *dower* is ten dirhams coined or uncoined according to *Sunnis*. Amongst the *Shiahs* the highest or the lowest rate is not fixed. But dower proper is 500 dirhams, a greater sum is not illegal. There is no legal limit to *dower* and *dowers* to a very large amount have been sustained by Courts of Justice in India.[2].

What may be given as dower.

4. Anything that is *mal* (every thing corporeal, except carrion and blood is *mal*) or property, and has value (everything has value except hog and wine) is *fit* to be the subject of *dower*. *Moonafea* or profits, are also good for that purpose, with the exception of the man's own service, when he is a free man.

Dower is a debt.

5. A widow is a creditor of her husband, for, according to Mahamadan Law, *dower* is a necessary *debt* in case of a marriage, insomuch that there can be no contract of marriage without dower and is discharged as such.[3]

Determination of proper dower.

6. The proper *dower* of a woman is to be determined with reference to the family of her father, when on a footing of *equality* with her in respect of *age, beauty, city, understanding, religion, virginity, wealth* and *lineage*.[4]

When dower is

7. *Dower* is confirmed by one of four things:—

1. 4. M. I. A. P., 229; B. D., 92.
2. B. D., 93 and G. P., 243.
3. Mac. Ch. VII S. 20 Pro. 279.
4. B. D. 95 and 2 M. *Jurist*, 239.

viz., (i) *consummation*, (ii) *a valid retirement**, (iii) on *divorce*, (iv) the *death* of either husband or wife: and that, whether, the dower be named, or be the proper dower.[1] confirmed or perfected.

8. A wife cannot claim the *whole* of her dower as *exigible* while her husband is *alive*, where no specific amount has been expressly declared to be exigible. In such case *one-third* of the whole must be considered exigible *moowujjul* and *two-thirds* not exigible *moowujjul*, such two-thirds being only claimable on the death of the husband.[2] When whole cannot be claimed.

9. Dower not exigible is not recoverable until the *death* of the husband, or the *dissolution* of the marriage by *divorce*, unless the contrary be specified; *dower* must be considered as immediately demandable, and until paid co-habitation cannot be enforced.[3] When can be claimed

Though dower should be payable on demand, the wife is not bound to sue for it immediately.[4] Not bound to sue.

The whole dower is demandable on *divorce*, but if *divorce*, should take place before the dower is *perfected* or before *consummation* she is entitled only to *half* of the specified dower if any or *half* of the proper dower if none has been specified or to a *mootut* or *present*. When whole is demandable.

10. When dower has once been perfected, it does not drop, though a separation should afterwards take place for a cause proceeding from the *wife*, but before dower is perfected, the whole falls by reason of any separation proceeding from the *wife*. If either of the parties should die a natural death before consum- After its perfection it does not drop.

1. B. D., 96.
2. S. D. A. N. W. P., 185.
3. 5 S. D. A. Ben., 76.
4. 6 M. I. A., 229.

* [Retirement is valid or complete when the parties meet together in a place where there is nothing indecency, law or health, to prevent their matrimonial intercourse.]

mation of marriage in which dower has been assigned, the right to it is perfected, without any difference of opinion, so also in a case where there was no assignment of dower the right to the proper dower is perfected whether the woman be *free* or slave.[1]

Addition.

11. An addition to the *dower* is valid during the subsistence of the marriage; and if a man should make an addition to his wife's dower after the contract, the addition is binding on him if she has accepted the addition; the addition may be made by the husband or his guardian: the addition is not a gift; but an alteration of the terms of the contract in a non-essential matter within the power of the parties and it becomes incorporated with the original dower. It nevertheless falls to the ground when the woman is repudiated before consummation. The addition to the dower is perfected in the same way as the original, by consummation, valid retirement, or the death of one of the parties; but if a separation should take place before the occurrence of one or the other of these three causes, the *addition* is void, and it is only the original dower that is halved.

Abatement.

12. If a woman should allow an abatement from her dower, the abatement is valid.

Gift of dower.

13. A woman may make a gift to her husband of whatever *dower* she is entitled to, whether consummation has taken place or not, and none of her guardians, not even father has any right to object. When the gift is to her deceased husband the gift is lawful, but if she should give it while in the pangs of labor and should then die, it would be valid to the extent of only *one-third*. If the gift be to the heirs of her husband it is valid. If the gift be made conditionally it becomes valid after the fulfilment of the condition, otherwise it reverts to its former state.[2]

1. B. D., 101 & 102.
2. B., 119 and 120.

What constitutes dower now.

14. Dower in modern times, is usually a sum of money, and is not unfrequently left, in whole or part as a debt on the responsibility of the husband. The debt is termed *Deyn-mukr* or *dower-debt*; and, like any other debt, it may be made the consideration for a transfer of property by the husband to the wife. Transfers of this kind are of common occurrence in India.[1]

When a wife may refuse.

15. A woman may refuse herself to her husband, as a means of obtaining payment of so much of her dower as is *moowjjul*, or prompt, and, when a husband has paid his wife's dower he may remove her wherever he pleases; but not before the payment without her consent.[2]

Prompt and deferred dower's division.

16. When the parties have agreed as to how much of the dower is to be prompt, that part is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned are to be taken into consideration for the determination of how much of such a dower should properly be prompt according to the custom; if whole is agreed to be prompt the whole to be paid immediately or on demand. When the dower is deferred to a known or definite period and the time has arrived the wife cannot deny herself for the purpose obtaining payment of it. Where part of the dower is prompt and part of it deferred, and the woman has obtained the prompt or when, after the contract she has allowed it to be deferred to a definite time, she has no right to deny herself, but she would be entitled to demand it on arrival of the time for payment. If a husband should say half of it *prompt* and half of it *deferred* and should mention a time for the payment of the deferred half, there is a difference among the learned on the point; some

1. B. D., 122.
2. B. D., 124 & 125.

saying that the postponement is unlawful, and that the whole of the dower is payable immediately, while others say that the postponement is lawful and is to be construed as having reference to the time when a separation shall take place between the parties, either by death or repudiation. Some, however, say that the postponement is still valid; and this opinion is correct, for in fact, the period is sufficiently known, that, being death or repudiation. Even a revocable repudiation would hasten the payment of a *deferred dower*, that is, make it *prompt*; and though the wife should be actually re-called by her husband, it would not again become *deferred*.[1]

Who may take possession.

17. Guardians such as father, grand-father and other guardians who can dispose a girl in marriage or Judge may take possession of an infant's *dower* but not that of an adult without her consent.[2]

Mootut.

18. There are three kinds of *mootut* or *presents*.

(I). *Incumbent*, which is due to every woman repudiated *before* consummation, for whom no dower has been assigned; (II). *Laudable*, which is conferred on any woman repudiated *after* consummation; (III). What is neither *incumbent* nor *laudable*, which is applicable to women repudiated *before* consummation to whom dower has been regularly assigned, so that it is laudable to confer a *mootut* on all repudiated women except the last.[3]

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1. B. D., 127 & 128.
2. B. D., 129 & 130.
3. B. D., 97.

CHAPTER IV.

PARENTAGE.

1. Next to the relation of *husband* and *wife* is the relation of *parent* and *child*. This may be founded both on the relation of *husband* and *wife* as well as on that of *master* and *slave*.

Law scrupulous.

2. The Mahamadan Law is very scrupulous in basterdizing the issue of any connection, in which it can be shown by presumption, that there has been co-habitation and acknowledgment of paternity; continual co-habitation and acknowledgment of paternity is presumptive evidence of marriage and legitimacy.[1]

Definition.

3. Acknowledgment is defined to be "the giving of information respecting a right in favor of another against one-self."[2]

Maternity and Paternity.

4. *Maternity* admits of positive proof, because the separation of a child from its mother can be seen. *Paternity* does not admit of positive proof, because the connection of a child with its *father* is secret. But it may be established by the father by his acknowledgment or by a subsisting *firash*, *i. e.*, a legally constituted relation between him and the mother of the child, or other circumstances.

Degrees of paternity.

5. There are three degrees in the establishment of paternity. The first is a valid marriage, or an invalid one that comes within the meaning of one that is valid. Second an invalid marriage that has been consummated.

Effect.

The effect of the *first* is to establish parentage without claim, and to prevent its rejection by a mere denial, though it may be done by *lian* or *imprication*. The right of rejection continues until he has expressly

1. 3 M. I. A., 295.
2. B D., 403

or impliedly acknowledged the paternity. Of the *second* is the child's mother being an *oom-i-wulud* to her master, and the *third* the child's mother being a mere slave. In the *second* and the *third* cases paternity would not be established without a claim on the part of the father.[1]

Period of gestation.

6. The shortest period of gestation in human species is six months, and the longest is two years. According to the *Prophet's* saying that "a child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel." Hence a child born six months after marriage is considered to all intents and purposes the offspring of the father; so also a child born within two years after the *death* or *divorce* of the husband.[2]

Acknowledgment.

7. If a man acknowledge another to be his son, and there is nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.[3]

Effect of Acknowledgment.

8. The acknowledgment and recognition of children by a Mahamadan as *his*, is giving them a *status* capable of inheriting as being of legitimate birth, and may without proof of his express acknowledgment, be inferred from his treatment of such children, provided there is nothing to negative it.[4]

Whose acknowledgment is valid.

9. The acknowledgment of a *man* is valid with regard to four persons:—*viz.*, his *father, mother, child* and *wife*; but not of other relations such as *brother*, &c; that of a *woman*, is valid with regard to *father, mother* and *husband*; but not with regard to a *child*, unless assented to by her husband, as it is burdening him with paternity.

1. B. D., 389—392.
2. B. D., 393.
3. Mac. Ch. VII. Pri., 33.
4. I. L. R., VIII Cal. 422; and II M. I. A. P., 94.

When acknowledgment of a child is valid.

10. The acknowledgment by a man of a *child* is valid only, (i.) when the ages of parties admit of the party acknowledged being born to the acknowledger; (ii.) when the descent of the person acknowledged is not already established to be from another; (iii.) when he confirms the acknowledger in his acknowledgment if he can give an account of himself.

Legitimate and Illegitimate.

11. A child born out of *wed-lock* is illegitimate; but if acknowledged, he acquires the *status* of legitimacy. The child of marriage is legitimate as soon as born; and that of a concubine may become legitimate by acknowledgment and treatment[1].

Presumption of legitimacy.

12. The legitimacy of a child may properly be presumed or inferred from circumstances, without proof or at least without any direct proof either of marriage, or any formal act of legitimation.[2]

Acknowledgment of parents.

13. The acknowledgment by a man of his *parents* is valid, when the acknowledger might be born to the person of the same age, and has no established descent from another, and the person acknowledged confirms the acknowledger in his statement when in a condition to do so.

Acknowledgment of wife.

14. The acknowledgment of a man of a woman as his *wife* is valid, when confirmed by her, and she is not married to another nor in *iddut*, and the acknowledger has not already her *sister* or *four other wives*.

When made.

15. Acknowledgment of above persons is valid, whether it is made in health or in sickness, because it is of a matter binding on the acknowledger himself and the burden of descent is not cast on any other; and it is obligatory (when valid) not only on the acknowledger and the acknowledged but on other persons also.

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1. 11 M. I. A., 9.
2. 8 M. I. A., 136 and 14 M. I. A., 346

What it comprehends.

16. The acknowledgment comprehends two things (i) descent, (ii.) and a right to acknowledger's property after his death. When the acknowledger is a *man* he must be twelve years and a half older than the child; if *woman* nine years and a half older than the child.

Descent.

17. Descent when once established cannot be dissolved or cancelled, neither can it be transferred from one person to another.[1]

Slave's child.

18. The first born child of a man's female slave is considered his offspring, provided he claim the parentage but not otherwise; but if after having claimed the parentage of one the same woman bear another child to him the parentage will be established without any claim.[2]

Inheritance.

19. Children by slave girls inherit equally with the children of free married woman.[3]

Illegitimate children.

20. Illegitimate children can inherit only from their mothers and mothers' kindred but not from their fathers.[4]

CHAPTER V.

DIVORCE.

Definition.

1. *Repudiation* or *Tulak* is a release from the marriage tie, either immediately or eventually by the use of special words. It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils. But it is not demandable as a right by the wife even on payment of consideration.[5]

1. B. D., 404 to 408.
2. Mac., 61.
3. Mac., 85.
4. El. 42 Mac. Pri., p. 91.
5. B. D., 205.

How effected.

2. The words by which repudiation may be effected are of two kinds; (i) *Sareek* or plain; (ii) *Kinayat* or ambiguous; the former are sufficient of themselves, the latter require intention. Express repudiation is effected by express words, such as "thou art repudiated" or "I have repudiated thee."

Time.

3. Repudiation may be either of the present time or be referred to the future; and it may be pronounced either before or after consummation. But cannot be referred back to an antecedent period, it must take effect from the date on which it is declared.[1]

Special conditions.

4. (i) There must be an actual tie on the woman either of *marriage* or *iddut*; (ii) She must still be legally capable of being the subject of the marriage. Hence, if a woman should become unlawful to her husband by means of supervenient affinity after consummation, and it should in consequence become incumbent on her to separate from him, and to observe *iddut*, and he should then repudiate her while in *iddut*, the repudiation would not take effect.[2]

Classes of Repudiation.

5. Repudiation is either revocable (*Rujaee*) or irrevocable (*Bain*); and its effect is a total separation or *divorce* between the parties, on the completion of the *iddut* when it is revocable, and without such completion when it is irrevocable. Further when repudiation amounts to three, they present an obstacle to the marriage of the parties with each other.[3]

No cause necessary.

6. Under Mahamadan Law a wife may be *divorced* without any misbehaviour on her part or without assigning any reason whatever; but before the *divorce* becomes irreversible according to the more approved doctrine, it must be repeated three times, and between each time the period of one month must have

1. B. D., 212. Mac. Pre., 296.
2. B. D., 205.
3. B. D., 205.

intervened, and in the interval he may take her back either in an express or implied manner.[1]

Different kinds.

7. There are thirteen kinds of *firkut*, or separation of married parties, of which *seven* require a judicial decree, and *six* do not. The former are separations for *jub* and *impotence*, and separations under the option of *puberty*, or for *inequality*, or *insufficient dower*, or a *husband's refusal of Islam*, or by reason of *Lian* or *imprication*. The latter are separations under the option of *emancipation* or for *Eela*, *apostasy*, or difference of *dar*, or by reason of *property* (*i. e.*, one of the parties becoming the owner of the other) or a marriage being invalid. In the first seven cases husband's presence is necessary, as a decree cannot be passed against an absent person.[2]

Cancellation and Tulak.

8. Every separation of a wife from her husband for a cause not originating in him such as the *option* of *puberty*, &c., is a *cancellation* of the marriage contract; and every separation for a cause originating in him such as *Eela*, *jub*, *impotence*, &c., is a *Tulak* (or release from the marriage tie.) Separation from a husband for *apostasy* appears to be an exception, for it is a cancellation and it merely nullifies the husband's right, and with it the legality of conjugal intercourse. Cancellation differs from divorce in so far that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower, whereas, though a divorce should take place before consummation she is entitled to a half of the specified dower or a present if none has been specified.[3]

Who may repudiate.

9. Repudiation by any husband who is *sane* and *adult* is effective. This is founded on a saying of the

1. Mac. Ch. VII. Pri., 24.
2. B. D., 203.
3. B. D., 203 and 96.

Prophet that "every *Tulak* is lawful, except that of a boy or a lunatic," whether he be free or a slave, willing or acting under compulsion, and even though it were uttered in sport or jest or by a mere slip of tongue, instead of another word. Thus when a man says to his wife; "thou art repudiated" without knowing the meaning of the words, still the words are effective, and the woman is repudiated judicially, though, in a religious point of view, there is no repudiation.[1]

By a dumb man.

10. Repudiation by a dumb man by signs is effective, when the dumbness has been long continued, and his signs have become well understood. Repudiation by dumb man in writing is also lawful.

By reason of property.

11. If a man or woman buy their wife or husband and then repudiate, it is not effective unless repudiation takes place after emancipation. The wife of a slave cannot be repudiated by his master.

Number.

12. In the case of a slave or a free woman, the full number of repudiations is *two* and *three* respectively, whether the husband be a *slave* or a *free man*.[2]

By agents.

13. As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party.[3]

Other forms.

14. (I) Another mode of repudiation is, by the husband's making oath accompanied by an imprication as to his wife's infidelity, and if in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardized.[4]

(II) A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible *divorce*.[5]

1. B. D., 206 to 208.
2. B. D., 210 and 211.
3. B. D., 206.
4. Mac. Ch. VII. Pri., 60.
5. Mac. Ch. VII. Pri., 27.

(III) There is another species of irreversible *divorce*, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expitiated by emancipating a slave, by alms or by fasting. This is called *Zihar*.[1]

Khoola.

15. There is another form of separation of the marriage couple termed *Khoola* (a mutual release) or *divorce* by *consent*, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage *tie*. In such cases the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration give up any of her rights, or make any other arrangement for the benefit of the husband. When the disagreement or aversion is on the part of the husband, it is not lawful for him to take anything from her in exchange for the *Khoola*; and if he should take anything, it is legally valid. And when the aversion is on her part, it is not fair for him to take more than what he gave her as *dower*.[2]

Moobarat.

16. This is another form of Khoola or repudiation for an exchange. This differs from Khoola, the former (Moobarat) is founded on the mutual aversion of the husband and wife while the latter (Khoola) on the aversion of the wife alone.[3]

Effects of divorce by Tulak and Khoola.

17. A divorce by *Tulak* is not complete and irrevocable by a single declaration of the husband; but a divorce by *Khoola* is at once complete and irrevocable from the moment when the husband repudiates the wife, and separation takes effect. In these particulars the two modes of *divorce* differ. But there is one condition which attends every *divorce* in whichever way it takes place, namely, that the wife is to

1. B. D., 321.
2. B. D., 303 and 304
3. B. I. P., 136.

remain in seclusion for a period of some months after the *divorce*, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her *iddut* for her maintenance, during this period.[1]

Iddut.

18. *Iddut* is the waiting for a definite period, which is incumbent on a woman after the dissolution of a rightful or semblance of marriage that has been confirmed by consummation, or by death.[2]

Who are not subject to.

19. Four women are not liable to *iddut*, *viz.*, (i) a woman who has been repudiated before consummation, (ii) an alien, who has come for protection leaving her husband, (iii) two sisters married by one contract which has been cancelled, (iv) more than four women connected together in one contract which has been dissolved.[3]

Duration of iddut.

20. The *iddut* of pregnant woman continues till her delivery; that of a free woman for the death of her husband is four months and ten days; of slave two months and five days.[4]

Must avoid luxury.

21. A woman during *iddut* must avoid the use of ornaments and everything intended to adorn or beautify the person. This is not incumbent on a little girl.[5]

Time for re-taking.

22. A man may retake his wife. While she is still in her *iddut*, whether she is willing or not either by speech or deed, and a right, to retake a wife, expires on the full completion of her *iddut*.[6]

When may remarry.

23. A *free woman* repudiated *three* times, or a *slave twice*, cannot be re-married until married and enjoined by another husband and separated from him,

1. 8 M. I. A., p 879.
2. B. D., 350.
3. B. D., 135.
4. B. D., 353.
5. B. D., 357.
6. B. D.

either by *death* or *divorce*. A man may re-marry his *thrice* repudiated wife on her own assertion that "she has been married again, and enjoined by her husband and he has repudiated her and her *iddut* is passed."[1]

Effects on inheritance.

24. A revocable repudiation has no effect on the inheritable rights of husband or wife, when death occurs during the *iddut*, nor an irrevocable repudiation on the rights of the wife, when it is given during the husband's *death illness* unless it were given at her own request.[2]

CHAPTER VI.

OF MAINTENANCE.

Liability.

1. The liability to maintain the wife arises from *marriage*, which is one of the subjects to which Mahamadan law applies; and that of infant children arises from natural *equity*.

What it includes.

2. Maintenance comprehends food, raiment and lodging, though in common parlance it is limited to the first. There are two causes for which it is incumbent on one person to maintain another:—*marriage* and *relationship*.

Of wife's.

3. It is incumbent on a husband to maintain his wife, whether she be *mooslim* or *zimmee*, *poor* or *rich*, *enjoyed* or *unenjoyed*, *young* or *old*, if not too young for matrimonial intercourse.

Where a wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she be living in his house or not.[3]

A husband is bound to give proper maintenance to his wife or wives, provided she or they have not

1. B. D., 90 and 91.
2. B. D., 227.
3. B. D, 437.

become refractory or rebellious, but have surrendered herself or themselves, to the custody of their husbands.[1]

If a woman refused to surrender herself on account of her *dower*, her maintenance does not drop, but it is incumbent upon the husband, although she be not yet within his custody. The maintenance of a wife is incumbent upon her husband, notwithstanding he be of a different religion.[2]

A woman, separated from her husband for any cause than her own fault, is entitled for maintenance during *iddut*. So a wife is entitled to maintenance during an investigation relating to an irrevocable repudiation if the marriage was consummated.[3]

Of children.

4. A father is bound to support his infant children only where they possess no independent property. The maintenance of an infant child is incumbent upon the father, although he be of a different religion.[4]

A father must maintain his female children absolutely, until they are married, when they have no property of their own.[5]

Of son's wife.

5. It is incumbent on a father to maintain his son's wife, when the son is young, poor or infirm.[6]

Of relations.

6. The Mahamadan law enjoins the maintenance of male children disabled by infirmity or disease, of parents, of grand-fathers and grand-mothers, of all infant male relations within the prohibited degrees if in poverty, and also of all adult male relations within the same prohibited degrees, who are *poor*, *disabled* or *blind* but not of step-mother.[7]

1. 1. Sircar, 447.
2. Sircar, 448, 459.
3. B. D., 450 & 454.
4. 1 Sircar, 457 & 459.
5. 1 Sircar, 461.
6. 1 Sircar, 462.
7. 1 Sircar, 464 to 472.

CHAPTER VII.

OF GUARDIANS.

Period of Minority.

1. Minority ceases on the 16th year, unless symptoms of puberty appear earlier. This is virtually cancelled by the Indian Majority Act (IX of 1875) which limits the minority to the completion of eighteen in the case of ordinary minors and twenty-one in the case of minors whose guardians are appointed by a court of wards or by a court of justice. But the act is not to affect any person in respect of *marriage, dower, divorce,* &c. For the purpose of registration personal law is applicable.[1]

Kinds of Guardians.

2. Guardians are either *natural* or *testamentary*; they are also called *near* and *remote*. Of the former description are, father, grand-father (paternal) and their executors and the executors of such executors. Of the latter description are the more distant paternal kindreds, and their guardianship extends only to matters connected with the education and marriage of their wards.[2]

Maternal relations.

3. Maternal relations are the lowest species of guardians as their right of guardianship for the purpose of education and marriage takes effect only where there may be no paternal kindred nor mother.[3]

Mothers.

4. Mothers have the right to the custody of their sons until they attain the age of seven, and of their daughters until they attain puberty. The mother's right is forfeited by her marrying a stranger, but reverts on her again becoming a widow.[4]

Paternal relations.

5. The paternal relations succeed to the right of guardianship, for the purpose of education and

1. Mac. Ch. viii. Pri. 4.
2. Mac. Ch. viii. Pri. 5.
3. Mac. Ch. viii. Pri. 7.
4. Mac. Ch. viii. Pri. 8 and 9.

marriage, in proportion to the proximity of their claims to inherit the estate of the *minor*.[1]

Debts.

6. Necessary debts contracted by the guardian for the support of the minor and for his education must be discharged by the minor on his coming of age.[2]

Minor's power.

7. A minor is not competent to contract a *marriage*, to pass a *divorce* or to engage in any other transaction of a nature not manifestly for his benefit without the consent of his guardian. But he may receive a gift or do any other act which is manifestly for his benefit.[3]

Power of the guardians.

8. A guardian is not at liberty to sell the immoveable property of his ward except for the following purposes:—

(i) Where he can obtain double its value; (ii) where it is absolutely necessary for the minor's maintenance; (iii) to discharge family debts; (iv) where there are some general provisions in the will which cannot be carried into effect without such sale; (v) where the produce of the property is not sufficient to defray the expense of keeping it; (vi) when the property may be in danger of being destroyed; (vii) where it has been usurped, and the guardian has reason to fear that there is no chance of its restitution.[4]

When binding.

9. Every contract entered into by a near guardian for the benefit of the minor, and every contract entered into by a minor with the consent of guardian, with regard to personal property, is binding on the minor, provided there is no fraud on the face of it.[5]

1. Mac. Ch. viii. Pri. 10.
2. Mac. Ch. viii. Pri. 11.
3. Mac. Ch. viii. Pri. 12 and 13.
4. Mac. Ch. viii. Pri. 14.
5. Mac. Ch. viii. Pri 14 and 15.

Responsibility. Minors are civilly responsible for any intentional injury done by them to the property or interest of other; though not liable in criminal matters.[1]

CHAPTER VIII.

INHERITANCE.

According to the Sunni School.

Right of Inheritance. 1. Under the Mahamadan Law, the right of inheritance is not a natural right but a right established by positive laws. A son has no greater right to take the property which belonged to his deceased father or mother, than any other individual, and much less has the eldest son any right to take the property in preference to his other brothers, or the *sons* in general in preference to their *sisters* or their *mothers*, &c.[2]

What are necessary. 2. To inherit it is necessary, (1st) that the person, whose property is to be acquired by inheritance is dead (naturally or civilly) or long absence unheard of leading to a presumption of death; (2ndly) that the person who is to acquire the property:—the heir:—is alive; (3rdly) that the heir is really connected with the deceased in the manner stated by him and required by Law. For instance, when an heir claims as a son, that he is the progeny of the deceased, and not of another person, &c.[3]

Order of succession. 3. The order of succession is different according to the doctrines of the *Sunni* and *Shiah* schools, though both have the *same basis, viz.*, the following passage in the *Qoran*.[4]

1. Mac. Ch. viii. Pri. 16.
2. Elb, 38.
3. Elb., 39 and 40.
4. Elb., 40.

"God hath thus commanded you concerning your children.

A male shall have as much as the share of 2 females; but if they be females only, above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall have, if he have a child, but if he have no child and his parents be his heirs, then his mother shall have a sixth part after the legacies, which he shall bequeath, and his debts be paid. Moreover, *ye* may claim *half* of what your wives shall leave, if they have no issue; but if they have issue then *ye* shall have the *fourth* part of what they shall leave, after the legacies which they shall bequeath, and their debts be paid; they also shall have the *fourth* part of what *ye* shall leave in case *ye* have no issue, but if you have issue, then they shall have the eighth part of what *ye* shall leave, after the legacies which *ye* shall bequeath, and your debts be paid. And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them shall have a sixth part of the estate; but if there be more than this number, they shall have equal shares in the *third* part, after payment of the legacies which shall be bequeathed, and the debts, without prejudice to the heirs."

"They will consult *thee* for thy decision in certain cases, say unto them, God giveth you these determinations concerning the more remote degress of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave, and ye shall be heir to her, in case she shall have no issue; but if there be two sisters, they shall have between them two-third parts of what ye shall leave, and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."[1]

No distinction of property.

4. There is no distinction between *real* and *personal* or between *ancestral* and *self-acquired* property as to inheritance.

Mahamad says: "that if a person leave either property, or rights appertaining thereto, they will go to his or her heirs (male or female); and *Sharif adds*, that an heir (male or female) succeeds to his or her ancestor's property with an absolute right of ownership, right of possession, and power of alienation."[2]

Right of representation.

5. The estate of a person vests on his or her death in his or her surviving heirs, who are entitled to succeed to it immediately. But there is no right of

1. Sale on Qoran.
2. G. I., 2.

representation, *i.e.*, the son of a deceased person shall not represent such person, if he died before his father. He shall not stand in the same place as the deceased would have stood, had he been living, but shall be excluded from the inheritance, if he had one or more paternal uncles. Thus if A dies leaving behind him three sons and a grandson by a fourth deceased during A's life-time, the grandson is excluded by the surving sons of A; because A's property could not vest in his deceased son during A's life-time. But if any of his sons die subsequent to its vesting, though before its actual distribution, his descendants succeed by representation to the shares he would have obtained had distribution taken place during his life-time[1].

The reason, assigned for denying the right of representation by Mahamadan Doctors is, that a person has not even an inchoate right to the property of his ancestor until the death of such ancestor, and that consequently, there can be no claim through a deceased person, in whom no right could by any possibility have vested[2].

No specific share to sons.

6. Sons, grandsons, and their descendants, in how low a degree, have no specific shares assigned to them; the general rule is that they take after the legal shares are satisfied, unless there are only daughters, in which case, each daughter takes a share equal to half of what is taken by each son. For instance, where there are a father, a mother, a husband, a wife, and a daughter, then there will be very little left as the portion of the son; but where there are no legal sharers, nor daughters, the son takes the whole property[3].

Females.

7. Females are not excluded from inheriting property. The widow, daughter, mother and sister are

1. Mac. Ch. i. Pri. 9 and 96.
2. Mac. Ch. Pre. ru. ix.
3. Mac. Ch. i. Pri. 10.

very near heirs to the deceased. It is a general rule that the share of a female is half of that of a male of parallel grade when they inherit together; the exceptions, to this rule, are the cases of father and mother and of half-brothers and sisters by the same mother but by different father. Females take the property with the same full proprietory right as the males; so that their property devolves on their heirs after their death[1].

Preferable heirs.

8. Among the heirs of the same grade, those of the full blood are preferred to those of the half. Half-brothers and sisters on the mother's side are exceptions to this rule.[2]

Disinheritance.

9. Neither a child nor any other heir can be disinherited, nor can one heir be favored to the prejudice of the other; but as a man is at liberty to dispose of his property as he pleases during his life-time, he can under the common rules of gift, make such disposal of his property as will virtually amount to a disinheritance, or a disposal in favour of one of his heirs to the exclusion of another.[3]

Plurality of heirs.

10. To the estate of the deceased person a plurality of heirs, having different relations to the deceased, may succeed simultaneously according to their allotted shares; and the inheritance may partly *ascend* and partly *descend* at the same time.[4]

Surrender.

11. Any one of the heirs may surrender his portion for a consideration, *i. e.*, for a sum of money or a specific chattel. According to MacNaughten, the remainder of the share will go to the residuaries; but according to *Sirajiya*, all the other heirs divide the remaining property among them in the ratio of their respective shares. The person must still be included

1. Mac. Ch. i. Pri. 85: Elb. P. 42.
2. Mac. Ch. i. Pri. 5.
3. Elb., 42: Mac. Prec., 83.
4. Mac. Ch. i. Pri. 8.

in the division, as the portions of the other sharers will otherwise be affected. Thus where the heirs are the husband, the mother, and a paternal uncle, and distribution of the estate among them would respectively be $\frac{1}{2}$, $\frac{1}{3}$ and $\frac{1}{6}$. Now suppose the estate to amount to 600 Rs., and the husband to content himself with 200 Rs., still as far as it affects the mother, the division must be made as if he were a party; otherwise she would get only $\frac{1}{3}$ of 400 Rs. instead of $\frac{1}{3}$ of 600 Rs. as her share, the residue going to the uncle as residuary.[1]

Renunciation.

12. There may be a renunciation of one's right of inheritance. Such renunciation during the lifetime of the ancestor is null and void; as in point of fact, it is giving up that which has no existence; as property vests in the heir only after the death of the ancestor.

NOTE.—Renunciation means, the yielding up a right already vested or the ceasing or desisting from prosecuting a claim maintainable against another.[2]

Posthumous children.

13. A posthumous son has a legal right to inherit. It is not necessary that the heir should be actually born. It is sufficient for legal purposes that he had been begotten before the death of the person from whom he claims and was afterwards born with vitality. When born with vitality it is of no consequence how soon after, the child may expire; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child.[3]

Primogeniture.

14. Primogeniture confers no superior rights. This right is to a certain extent recognized by the *Shiah School*.[4]

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1. Mac. Ch. i. Pri.
2. Mac. Ch. i, Pri. 85.
3. Elb., 40: 9 W. R, 257.
4. Mac. Ch. i. Pri. 2. Ch. ii & Pri. 33.

15. Illegitimate children can inherit only from their mother's and mother's kindred, but not from their fathers; nor can father inherit from them.[1] Illegitimate.

16. Mental derangements or any description of insanity, blindness, and unchastity in females, are no impediments to succession.[2] Insanity.

17. Mahamadan law does not recognise adoption. So the English law.[3] Adoption.

18. The law lays down four causes of impediments to succession, *viz.*—(i) *Homicide;* (ii) *Slavery;* (iii) *Difference of religion;* (iv) *Difference of allegiance.* To operate as a bar, homicide may be intentional or unintentional; with the *Sunnis;* but with the *Shiahs* it must be intentional, mere suspicion will not do; even when intentional, the *slayer* alone is precluded from inheriting the property of the *slain.* The other impediments have been removed; Slavery by Act V. of 1843. Difference of religion by Act XXI of 1850. Difference of allegiance by the subversion of the Mahamadan Government.[4] Impediments.

19. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications such as slavery, &c., or by the intervention of an heir, in default of whom the claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance. Of exclusion.

20. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs Entire exclusion.

1. Mac. Prec., 91 : Elb., 42.
2. Mac. Prec., 89.
3. Mac. Prec. 96.
4. Mac. Ch. i Pri. 6 : Elb. 50.

either entirely or partially; but those who are excluded by reason of some intervening heir, do, in some instances, partially exclude others. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only be entitled to a sixth share, although the sisters, who partially excluded her, are themselves entirely excluded by reason of the intervention of the father.[1]

Persons never excluded.

21. The father, son, husband, mother, daughter and wife are never excluded under any circumstances.[2]

Table showing of Total and partial exclusion among the legal Sharers.

1st Class.	Father.	Mother.	Daughter.		Husband.	Wife.
2nd Class.	True grandfather.	True grandmother.	Daughter of a son how low so ever.		...	...
3rd Class.	...	...	Full sister.	Half-brother and sister by the same mother only.	...	...
4th Class.	...	...	Half-sister by the same mother only.	...	...	...

N. B.—These sharers are excluded by the one above him or her in the same column. The father ont only excludes the true grandfather but also the paternal true grand-mother. The father or true grand-father excludes also the sharers of the 3rd and 4th classes.

Missing persons.

22. When one of the heirs is missing, *i. e.*, when he is absent, and there is no certain intelligence whether he is alive, or not, he is considered as living with respect to his own estate, and defunct with

1. Mac. Ch. ii. Pri. 84 to 86.
2. B. D., 705; Mac. Ch. i. Pri. ii.

respect to the estate of others, until such a time has elapsed, that it is inconceivable that he should be still alive, or until his contemporaries are dead.[1]

Period of absence.

23. *Abu Haneefa* allowed 120 years from birth; *Mahamad* 110; *Abu Yusaf* 105; and the *Hedaya* 90 years, which is the generally received period, (Sirajiya). But *Baillie*, in his treatise on Inheritance, P. 167, suggests that the Judges might perhaps consider themselves at liberty to exercise their own discretion, a latitude which some of the followers of *Abu Haneefa* appear to have advocated; and this suggestion obtains additional strength in consequence of the facilities now-a-days of locomotion.

MACNAUGHTEN says, the property of a missing person must be kept in abeyance for ninety years, from the date of his birth, after which his estate may be divided among his heirs.[2]

After sixty five years' disappearance of a person, the courts must presume his death, unless proof to the contrary be adduced.[3]

If he be a co-heir.

24. If the missing person be a co-heir, the estate may be distributed, as far as the other co-heirs are concerned, provided they are not excluded by the existence of such missing person, or they would take at all events, whether such person were living, or dead. Thus, in the case of a person dying, leaving two daughters, a missing son and a son, and daughter of such missing son; in this case the daughters will take half the estate immediately, being their share at all events; but the grand-children will not take any thing, as they are precluded on the supposition of their father being alive.[4]

1. Mac., Pri., 92. Elb. 63. B. D., 703.
2. Mac. Ch. i. Pri., 101.
3. 4 S. D. A Ben., 231.
4. Mac. Ch. i. Pri., 120.

Contemporaneous death.

25. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed, according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor, had never existed. The following case may be cited as an example of this rule. A, B and C are grand-father, father and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognised *no right* by *representation*, and sons exclude grand-sons. *Mr. Christian*, in a note to *Blackstone's* Commentaries (Vol. II., p. 516), notices a curious question that was agitated some time ago, where it was contended that when a parent and child perish together, and the priority of their deaths is unknown, it was a rule of the *Civil law* to presume that the child survived the parent. He proceeds, however, to say: "But I should be inclined to think that our Courts might require something more than presumptive evidence to support a claim of this nature." Some curious cases of *contemporaneous death* may be seen in *causes celebres*, Vol, III., 412 in one of which 'where a father and son were slain together in a battle, and on the same day, the daughter became a professed *Nun*, it was determined that her *civil* deaths was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father.'[1]

1. Mac. Pri. 106 Bl. Com. v. ii, p. 516.

Special rules.

26. It has been held by the Privy Council that when a sect has its own rule, that rule should be followed with respect to litigants of that sect.[1]

(a.) The regulations which prescribe that the Mahamadan Law shall be applied to the Mahamadans, must be understood to refer to the Mahamadans not by *birth* merely but by *religion* also.[2]

(b.) The law allows a person the right to *cease* to be a *Mahamadan* in the fullest sense of the word and to *become* a *Christian* or any other and to claim for himself and his descendants all the rights and obligations of that sect.

(c.) A Mahamadan family may adopt the *customs* of Hindus subject to any modifications which they may consider desirable.[3]

Application of the deceased's estate.

27. The estate of a deceased person is applicable to *four* different *purposes, viz.*, his *funerals*, his *debts*, his *legacies*, and the *claims* of his *heirs*. The *funeral* comprises the washing, shrouding, and interring of his body; all of which are to be performed in a suitable manner to his condition; and for the necessary expenses incurred thereby all his property is liable, except the property which is subject to some special charge, as a pledge to which the pledger has a preferable right.[4]

Debts.

28. *Debts* are next to be paid. The debts may be wholly of health or wholly of sickness, or partly of health and partly of sickness. If they are wholly debts of health, or wholly debts of sickness, they are all alike, and none is entitled to any preference. If they are partly debts of health, and partly debts of sickness, the former are preferred, if the latter can be established *only* by the acknowledgment of the deceased. But when the debts of sickness can be established by proof to have been openly incurred for known causes, such as the purchase of property, or the proper dower of a wife, then they are on the

1. 2 M. I. A., 441.
2. 9 M. I. A., 195.
3. 3 I. L. B. C., 964.
4. B. D., 683.

same footing as those of health. Debts not actually due at the time of debtor's death, become payable immediately on the occurrence of that event, because the privilege of postponement being a personal right, dies with the deceased. The death of the creditor has not the same effect, because the person to whom the right of delay belongs is still alive.[1]

Legacies.

29. *Legacies* are next to be paid out of, a *third* of, what remains after payment of funeral expenses and debts, unless the heirs allow them beyond a third. Then the *residue* is to be divided among the heirs, according to their shares in the *inheritance*. This, or the preference of a legatee to an heir, is only when the legacy is of something specific; for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference. Nay, the legatee in that kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator's estate.[2]

Increase.

30. Until a division has legally been made, estate is considered to belong to the deceased; so that any increase accruing after his death is held to be part of the estate.[3]

Addition.

31. Additions made to the joint estate by the managing member of a Mahamadan family, will be presumed, in the absence of proof otherwise, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share.[4]

Right of inheritance.

32. The right of inheritance is founded, on two different qualities (i) *nusub* or kindred; (ii) *special cause*, which is a valid marriage, for there are no

1. B. D., 684.
2. B. D., 684.
3. Elb., 59.
4. 2 M. H., 414.

mutual rights of inheritance by a marriage that is invalid or void according to Law.[1]

Order of succession.

33. There are seven classes of heirs entitled to succeed to the property of the deceased, *viz.*, (i) *Legal Sharers;* (ii) *Residuaries;* (iii) *Distant Kindred;* (iv) *Successor* by *contract;* (v) *Acknowledged Kindred;* (vi) *Universal Legatee;* (vii) The *Government* or *Crown.*

(1.) *Legal sharers* are certain relations of the deceased to whom the law has allotted certain specific shares to be satisfied in the first instance, after the payment of the charges upon inheritance. These shares are however liable to be withheld, increased, or diminished according to the number and classes of persons entitled to them and to the residue.[2]

(2.) *Residuaries* are those other relations of the deceased, who are entitled to succeed to the residue left after the claims of the *legal sharers* are satisfied. The residue varies with the number and classes of persons entitled to *legal sharers.* If no sharers, the residuaries take the whole property.[3]

(3.) *Distant kindred* are all the relatives of the deceased who are neither *sharers* nor *residuaries.*[4]

(4.) *Successor by contract,* that is, a stranger appointed as an heir by the owner of the estate, such appointment being accepted by the person so named.[5]

(5.) *Acknowledged kindred,* that is a stranger, whom the deceased acknowledged as his Kinsman, such acknowledgment never having been retracted.[6]

(6.) *Universal Legatee* is a person to whom the deceased bequeathed the whole of his estate, which, it may be observed, he could not do, if there were any surviving relation.[7]

(7.) On failure of all the persons above enumerated, and in the absence of a *will,* the property escheats to the *Crown.*[8]

The Sharers.

34. The *sharers* are twelve in number of whom the rights of *ten* are founded on *nusub* or kindred, and *two*

1. B. D., 684.
2. Elb., 43.
3. Elb., 43. Siraj., 58.
4. Elb., 52.
5. Elb., 43 & 44.
6. Elb., 44.
7. Elb., 44.
8. Mac. Ch. i.; Pri., 56. Elb., 44.

on *special cause.* Of those claiming on the ground of kindred, there are *three males* and *seven females, viz*:—

(a) MALES.—(i) *Father*; (ii) *True grand-father*; (iii) *Half-brother by the same mother only.*

(b) FEMALES.—(i) *Daughter*; (ii) *Son's Daughter*; (iii) *Mother*; (iv) *True grand-mother*; (v) *Full Sisters*; (vi) *Half-Sisters by the same father*; (vii) *Half-Sisters by the same mother only.*

(c) BY SPECIAL CAUSE ARE.—(i) *Husband*; (ii) *Wife.*

35. The persons above named do not all succeed simultaneously nor are their shares constantly the same.[1]

Portions of legal sharers can be stated definitely.

36. The portions of those who are legal sharers *only*, can be stated definitely, but of those who are *both* sharers and residuaries cannot be stated generally, but must be adjusted with reference to each particular case. Thus in the case of a husband and wife, who are sharers only, their portion of inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and others residuaries, and in the case of father and grand-father who are under some circumstances legal sharers only, and others residuaries also, the next of their portions depends entirely upon the degree of relation of other heirs and their number. Daughters without sons are legal sharers, and so are sisters without brothers; but with them, they are residuaries. Grand-father and father with sons, son's sons, &c., are legal sharers but with the daughters only, they are residuaries as well as legal sharers.[2]

The Shares.

37. The *shares* appointed or ordained by the sacred text are six in number:—*half*, a *fourth*, an *eighth*, and *two-thirds*, *one-third* and a *sixth.*

(1) *A half* is appointed to *five* different persons, *viz.*, (i) husband, when the deceased has left neither a child nor a child of a son; (ii) one daughter of his loins; (iii) son's daughter when there is no daughter of loins; (iv) full sister; and (v) half-sister on the father's sides, when there is no full sister.

1. Elb., 45.
2. Elb., 43.; Mac. Pri., 13.

(2) *A fourth* is the share of *two* persons, (i) husband, when the deceased has left a child or a child of a son; (ii) wife or wives, when he has left neither a child nor a child of a son.

(3) *An eighth* is the share of one or more wives, when the deceased has left a child or a child of a son.

(4) *Two-thirds* are the shares of *four* persons, (i) two or more daughters; (ii) two or more daughters of a son, when there are no daughters; (iii) two or more full sisters; (iv) two or more half-sisters by the fathers, when there is no full sister.

(5) *A third* is the share of *two* persons, (i) mother, when the deceased has left neither a child nor a child of a son, nor two brothers nor sisters; (ii) two or more children of a mother, whether they may be males or females.

(6) *A sixth* is the share of *six* persons, (i) father, when the deceased has left a child, or child of a son; (ii) grand-father, when there is no father; (iii) mother, when the deceased has left a child or child of a son, or two brothers and sisters; (iv) one grand-father and several grand-mothers, when there are more at the time of inheriting, son's daughter with a daughter of the loins, to make up two-third; (v) one child of the mother, whether, male or female.[1]

38. Primary Rules of Distribution are :—

(*a*) Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by *four*; as in the case of a husband and an only daughter, the property is made into four parts of which the former takes one and the latter two. The remaining fourth will revert to the daughter as *return*.

(*b*) Where there are two claimants, the share of one of whom is half, and of the other an eighth, the division must be made by eight; as in the case of a wife and a daughter, the property is made into eight parts, of which the daughter takes four and the wife one. The surplus three shares revert to the daughter as *return*.

(*c*) No case can occur of two claimants, the one entitled to a fourth and the other to an eighth; nor of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth.

(*d*) Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third; as in the case of a mother and father being the only claimants, the property is made into *six* parts of which the mother takes two and the father one as legal sharers. The surplus three shares revert to the father as *return*.

(*e*) Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds; as in the case of a father and two daughters being the only claimants, the property is made

1. G. I. P., 35 and 36.

into six parts, of which the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father as a *return*.

(*f*) Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds; as in the case of a mother and two sisters, the property is made into *three* parts, of which the mother takes one and the sisters two.

(*g*) No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds.

(*h*) Where a husband inherits from his childless wife, (his share in this case being one-half), and there are other claimants entitled to a sixth, a third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six.

(*i*) Where a husband inherits from his wife who leaves children or a wife from her childless husband (the shares of these persons respectively in these cases being one-fourth), and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twelve.

(*j*) Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twenty-four.

(*k*) Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine, or ten.

(*l*) Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen.

(*m*) Where twenty-four is the number, and it does dot suit, it may be increased to twenty-seven.[1]

Of male sharers who are entitled by Nusab.

Father.

39. *Father.*—He has three characters:—

(i) *Mere sharer.*—First where he takes merely as a sharer, in which case he is entitled to *one-sixth, i. e*, when the deceased has left a son or son's son how low soever.

(ii) *Mere residuary.*—When there is no successor but himself, he takes the whole property as *Residuary*; or when there is only a sharer with him, who is not a child, nor child of a son, how low soever, as a *husband, mother* or a *grand-mother*, the sharers take their shares; and the father takes the remainder as a *Residuary*.

(iii) *Sharer and residuary.*—When there are with him a daughter and son's daughter, but no son, nor son's son, he gets *one-sixth* as

1. Mac. Pri., 57 to 69.

sharer, the *daughter one-half* or *two-third* (when there are two or more), the *son's daughter one-sixth*; and he succeeds to the remainder as *Residuary*.[1]

40. *True grandfather.*—He is entirely excluded by the father; but in default of *father*, he comes into the place of the father, and where there is a son or son's son how low soever of the deceased, he takes *one-sixth*. The true grand-father, however, does not, like the father, reduce a mother's share to one-third of the residue, nor entirely excludes a paternal grand-mother. But he excludes, however, all the brothers and sisters of the deceased, according to *Abu haneefa*, with whom *futwa* concurs.[2] True grand-father.

Note.—A true grand-father is a male ancestor into whose line of relationship to the deceased no female—*i. e.*, no mother—enters; as the father's father, and so forth.

Note.—A false grand-father is one into whose line of relationship to the deceased a female—*i. e.*, a mother—enters; as the father of the father's mother.[3]

41. *Half-brothers.*—These are called *uterine brothers*. When there is but one, he is entitled to *one-sixth*, in the absence of children or children of a son how low soever, father and true grand-father; when there are two or more of them *one-third*, which is to be divided equally among them.[4] Half-brothers by the same mother only.

Of females who are entitled by Nusab.

42. *Daughter.*—She gets *half* when she is alone; and two or more together *two-thirds*. When there are both sons and daughters, the sons make the daughters residuaries, the share of each son being equal to that of two daughters.[5] The Daughter.

Note.—A step-daughter, *i. e.*, daughter of a co-wife, cannot participate in her inheritance.[6]

1. Elb., 47; B. D., 686.
2. Mac. Pri., 35 and 36: B. D., 687.
3. B. D., 687; Elb., 47.
4. Mac. Pri., 31; B. D., 687; Elb., 49.
5. Mac. Pri., 16 and 17; B. D., 687
6. Mac. Pri., 99.

Son's daughters.

43. *Son's Daughters.*—When there is no child of the loins the son's daughters take as daughters. When there is a son, the children of a son take nothing. When there is one daughter, she takes *one-half*, and the son's daughters take *one-sixth*; if there are two daughters, they take *two-thirds* and there is nothing for the son's daughters, *i. e.*, when there is no male amongst the children of a son. But if there is a male he makes the females (whether his sisters or cousins) residuaries with him. So that if there were two or more daughters of the lions, they take two-thirds between them, and the remainder would go to the children of the son in the proportion of two parts to the males and one part to the females. Though the male were in a grade below them he would make them residuary with him, so that the remainder would be between him and them in the same proportion as above. Thus, if there were two daughters, a son's daughter, the daughter of a son's son, the daughter would take two-thirds, and the remainder would go between the son's daughter, and all below her, in the proportion of two parts to a male and one to a female. The principle being that a son's daughter becomes a residuary with a son's son, whether he is in the same, or a lower grade with herself, when she is not a sharer.[1]

Mother.

44. *Mother.*—Like the father, has three characters.

(i.) *Sharer.*—When there is with her a child or child of a son, how low soever, or when there are two or more brothers, or sisters, whether of the whole or half blood, and on whatever side they may be, the *mother* takes *one-sixth*.

(ii.) *Residuary.*—Where there are none of these, she takes *one-third*.

(iii.) *Sharer and Residuary.*—When the deceased has left a *husband*, or *wife* and both parents, she takes *one-third* of the remainder, after deducting the shares of the husband or wife, and

1. Elb., 46. Mac. Pri., 18 and 19; B. D., 687.

the remainder goes to the father. But if, in the place of the father there was a grand-father, the mother would have one-third of the whole property. Mother excludes both the maternal and paternal grand-mothers.[1]

Note.—Mother does not include step-mother.[2]

True grand-mother.

45. *True grand-mother.*—The share of a true grand-mother on the father's or mother's side, in the absence of the mother, is *one-sixth* whether there be one or more, all partaking of it equally, who are in the same degree. The mother excludes both the paternal and maternal grand-mothers, but the father excludes only the former. When there are two grand-mothers, one of whom is related to the deceased on both sides, and the other only on one side, the one-sixth is to be divided amongst them equally.[3]

Note.—A *true grand-mother* is a female ancestor, into whose line of relationship to the deceased, a *false grand-father* does not enter. *Mother's mother*, how high soever, and father's mother, how high soever are *true grand-mothers*.

Every one into whose line of relationship to the deceased a mother enters between two fathers is a false grand-mother.[4]

Full-sisters.

46. *Full-sister.*—In the absence of children, or children of a son, how low soever, and father and true grand-father, and full-brother, full-sisters take as daughters. If there were a full-brother with them, the male takes the share of two females.

If there are daughters, or daughters of a son, how low soever but neither sons, nor son's sons, nor father, nor true grand-father, nor brothers, the *sisters*, as *residuaries*, take what remains after daughters, or son's daughters have taken their shares: such residue being *one-half*, when there is one daughter, or son's daughter; or *one-third* where there are two or more.

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1. Mac. Pri., 33; B. D., 688.
2. Mac. Prec., 99.
3. Mac. Pri., 6. 37 to 40; B. D., 688.
4. B. D., 688.

But full-sisters cannot affect the shares of husband, or wife, mother, or true grand-mother.[1]

Half-sisters by the same father.

47. *Half-sisters by the same father.*—These take like the full-sisters when there are none, one takes *half* and two or more *two-thirds*. With one full-sister, however, they take *one-sixth, i. e.*, the complements between *two-thirds* and *one-half;* but with two full-sisters they have no partition in the inheritance unless there happens to be with them a half-brother by the same father, in which case they become *residuaries*. In that case the full-sisters take their two-thirds, and the children of the father only have the *residue* between them, in the proportion of two parts to a male and one to a female.[2]

Half-sister by the mother.

48. *Half-sister by the mother.*—In the absence of children, or children of a son, how low soever, and father, and true grand-father, if there is but one, she takes one-sixth; if two or more two-thirds between them. All *brothers* and *sisters* are excluded by a son, or son's son how low soever, or a father, or true grand-father. And children of the father, *i. e.*, half-brothers and sisters on his side, are excluded not only by these, but also by a full-brother; and children of the mother, *i. e.*, half-brothers and sisters on her side are excluded by a child, though a daughter and by a child of a son, a father and true grand-father.[3]

Husband and wife.

49. The sharers who are entitled for special cause are husband and wife:—

(1) *Husband.*—He must in all cases get a share, whatever may be the number or degrees of the other heirs. The husband takes *one-fourth* of his wife's estate, where there are children or son's children, how low soever and a *moiety* when there are none. On the failure of other *sharers*, and *residuaries*, and *dis-*

1. Mac. Pri., 21, 23, 25, and 3. B. I., 67 & 68.
2. Mac. Pri., 27 and 28; B. D., 689.
3. Mac. Pri., 31; B. D., 689.

tant kindreds, the husband takes the whole of the wife's property.[1]

(2) *Wife.*—The wife takes *one-eighth* of her husband's property where there are children, or son's children, how low soever, and *fourth* where there are none. In law there is no distinction between a wife married as a *virgin* and that married after *widowed* or *divorced;* the *fourth* or *eighth,* as the case may be, being equally divisible among all when there are more than one. Wife.

According to the *Shiahs,* the widow does not get a share of the land or the like, left by her husband, unless he left a child by her; she is however entitled to her share of any other property left by her husband.[2]

According to the Sunnis, in default of other sharers, residuaries, and the distant kindreds, the widow is entitled to the *return.*[3]

But among *Shiahs,* the remainder never returns to the *widow,* but goes to any other heir that may happen to exist at the time.

Further where a wife dies, leaving no other heir, her whole property vests in her husband; and when a husband dies, leaving no other heir but his wife, she is only entitled to *one-fourth* and the remainder would go to the *Crown.*[4]

49. According to Mahamadan law, where a man dies leaving no children, a sister's son can claim his inheritance after the widow has obtained her *one-fourth* share. The widow under no circumstances can be entitled to more than *one-fourth* of her husband's property, in addition to her dower the rest Sister's son.

1. Mac. Pri., 15; Elb., 45.
2. 2 Sircar P., 185; 20. W. R., 297.
3. 3 C., 702.
4. Mac. P., 37.

going to his sister's sons, and to various other distant members after the widow's share has been satisfied.[1]

50. Sadagopacharloo in his Manual arranges the sharers under four classes:—

(i) Father, mother, daughter, husband and wife.

(ii) True grand-father, true grand-mother, and son's daughter, how low soever.

(iii) Full sisters and half-brother and sister by the same mother only.

(iv) Half-sister by the same father only.

Of these the first class is always entitled to some share or other. The other three classes are liable to exclusion during the life-time of one who is more nearly related to the deceased than themselves, except in the case of half-brothers and sisters by the same mother only, who are not excluded by her.[2]

51. The accompanying tables 1 and 2 will illustrate at a glance the respective shares of the sharers, and their different characters, *i. e.*, when they are *sharers*, when *residuaries* and when both *sharers* and *residuaries*.

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1. Mac. Pri., s. 3 and Prec. case., 15 and 95.
2. Elb., 45.

Table showing the characters of the sharers, the circumstances under which they inherit and the extent of the **shares** *they take.*

	Name of the sharers.	Circumstances under which they inherit.	Extent of shares assigned.	Remarks.
1.	Father	If there are children, or children of sons how low soever.	$\frac{1}{6}$	(i) The father is both a *sharer* and *residuary*. He is simply a *sharer* when there are sons or son's sons how low soever. (*Siraj* 4, *Elb.* 47. & *B. D.* 686.) (ii) He is simply a *residuary* when there are neither children nor children of sons how low soever. (iii) But when there are only daughters or son's daughters, but no sons nor son's, sons he is both a *sharer* and *residuary*. (*Elb.* 47.)
2.	True grand-father ...	On failure of the father and under similar circumstances, takes the father's share.	$\frac{1}{6}$	(*Mac. Pri.* 35, 136. *B. D.* 687.)
3.	Half-brothers of the same mother only.	In the absence of children or children of a son how low soever, and father and grand-father, they get if one.	$\frac{1}{6}$	In this class of sharers the male shares equally with the females, without distinction of sex. (*Mac. Pri.* 31.)
		If two or more.	$\frac{1}{3}$	
4.	Daughters	In the absence of sons one takes... ...	$\frac{1}{2}$	With sons they become residuaries. (*Mac.* 3 note.)
		Two or more together	$\frac{2}{3}$	A step-daughter, *i. e.*, the daughter by the co-wife of woman's husband cannot participate in her inheritance. (*Mac. Pri. B. D.* 99.)

Table showing the characters of the sharers, the circumstances under which they inherit and the extent of the **shares** *they take.*—(continued.)

	Name of the sharers.	Circumstances under which they inherit.	Extent of shares assigned.	Remarks.
5.	Son's daughters ...	In the absence of daughters and son's sons, son's daughters take as daughters, *i. e.*, one gets.	½	With son's sons they become residuaries (*Elb.* 46, *B. D.*, 687.)
		Two or more get	⅔	
		If there are neither sons nor son's sons but only one daughter the son's daughters get the difference between ⅔ and ½, *i. e.*,	⅙	If there are more than one daughter, the son's daughters get nothing.
6.	Mother	If there is a child or child of a son how low soever, or two or more brothers and sisters whether of the whole or half blood.	⅙	Except where the deceased left a husband or wife and both parents, when the mother takes ⅓ of the remainder, after the shares of the husband or wife are given. (*Elb.* 48.)
		In all other cases.	⅓	A step-mother is not in law considered mother. (*Mac. Pri.* 99.)
7.	True grand-mother.	In the absence of mother...	⅙	The mother excludes both the paternal and maternal grand-mothers; but the father excludes only the former. (*Elb.* 48.)
8.	Full-sisters	In the absence of children or children of a son how low soever, and father or true grand-father and full-brother, full-sisters take as daughters, *i. e.*, one.	½	With full-brothers they become residuaries. (*Elb.* 49.) If there are daughters or daughters of a son how low soever, but neither sons, nor son's sons nor

		Two or more together.	⅔	father, nor true grand-father, nor brothers, the sisters, as residuaries, take what remains after daughters or son's daughters have taken their shares; such residue being ½ or ⅓ according as there are one or more daughters or son's daughters. But full-sisters cannot affect the shares of husband or wife, mother or true grand-mother. (*Mac. Pri.* 5.)
9.	Half-sister by the same father only.	In the absence of full-sisters and under similar circumstances they get the share of the full-sisters, *i. e.*, one.	½	With half-brothers of the same degree they become residuaries. (*Mac. Pri.* 4.)
		Two or more together.	⅔	
		With one full-sister however they take the complement between ⅔ and ½, *i. e.*,	⅙	
10.	Do. by the same mother only.	In the absence of children or children of a son how low soever and father and true grand-father, they get if one.	⅙	In this class of sharers, the male shares equally with the female without distinction of sex. (*Mac.*)
		Two or more.	⅓	
11.	Husband	If there are children or children of sons how low soever.	¼	
		If there are none.	½	
12.	Wife	If there are children or children of son's how low soever.	⅛	If there are more wives than one they must divide the allotted share equally among them. (*Elb.* 46.)
		If there are none.	¼	

SECTION II.

Asubat and Residuaries.

Definition.

1. *Residuaries* are all persons for whom no shares have been appointed, and who take the residue after the sharers have been satisfied, or the whole where there are no sharers.

Kinds.

2. There are two kinds of residuaries:—(i) *Residuaries* by *nusub* or *kindred* or by *consanguinity*, (ii) *Residuaries* for *special cause*.

Classes.

3. The *Residuaries* by *consanguinity* are divided into three classes. (I) *Residuaries in their own right;* (II) *Residuaries in another's right;* (III) *Residuaries together with another.*[1]

Rules of Succession.

4. The general *rule*, in the succession of residuaries of this description, is that he who has *two* relations is preferable to him who has but *one* relation, whether *male* or *female*: Thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the same father only; and the son of a brother by the same father and mother is preferred to the son of a brother by the same father only; and the rule is the same with regard to the paternal uncles of the deceased, and after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grand-father.[2]

Residuaries in their own right.

5. *Residuaries in their own right.*—Are every male in whose line of relation to the deceased no female enters.

The *residue* is divided *equally* among residuaries in the same *degree* and of the same *sex*; but if they *differ* in *sex* each male takes *twice* as much as each female.

1. G. I. P., 38 and 39.
2. Siraji., p. 18.

6. These are again sub-divided into three classes: Sub-division.

(*a*) *Descendants;* (*b*) *Ascendants;* (*c*) *Collaterals.*

(I.) The *descendants* are entitled to the residue in preference to *all* other classes of residuaries. They are the direct lineal male offspring of the deceased. Hence the nearest of the residuaries is the *son*; then the *grandson*, or son's son, the *great-grandson*, how low soever, the nearer always excluding the more remote.[1] Descendants.

(II.) *The ascendants* are entitled to succeed in default of all the descendants. They are the paternal lineal ancestors of the deceased, *viz.*, the *father*, then the *true grand-father*, then the *great-grand-father*, how high soever, nearer excluding the more remote. Ascendants.

(III.) Next in succession are the *collaterals*, of whom the offsprings of the father come first, *viz.*, sons of the father, *i. e.*, the full-brother of the deceased; then the half-brother by the father; then the son of the full-brother; then the son of the half-brother by the father; then their sons, how low soever, in the same manner, the *full* being preferred to the *half-blood* at each stage of descent,[2] then the offspring of the true grand-father, *viz.*, the full paternal uncle of the deceased; then the half paternal uncle by the father; then the son of the full paternal uncle, then the son of the half paternal uncle by the father; then their sons, how low soever, in the same order. Then come the offsprings of the great grand-father, *viz.*, the full paternal uncle of the father, then the half paternal uncle of the father on the father's side; then the son of the father's full paternal uncle; then the son of the father's half paternal uncle on the father's side; then the paternal uncle of the grand-father; then his son, how low soever. Collaterals.

1. Elb., 51; Siraj., 30; B. I., 73.
2. Siraj., 10, 48, 49.

Preference.

7. From the above it is clear, that the nearest in degree is preferred to the more remote; and of those in the same degree, those of the whole blood are preferred to those of the half. Thus, a son's son can never participate in the inheritance with a son, nor the father, with either, as residuary, though he cannot be excluded from his *one-sixth*, as sharer.[1]

Mr. Baillie says: "In the right line, whether of descent or ascent, it is universally agreed that there is no limit to the persons who may be called to the succession, provided they are males, and connected with the deceased through males; I am disposed to think that with this qualification the succession of *residuaries*, in the *collateral* line, is equally unlimited."[2]

The Madras High Court have held, that descendants, in the male line of paternal grand-father of an intestate, are within the class of 'residuary heirs, and are entitled to take, to the exclusion of the children of the testator's sisters of the whole blood.[3] And by the High Court of Calcutta it has been held, that descendants of a paternal grand-father's brothers are entitled to rank as residuaries and as such are preferable heirs to grand-daughters.[4]

Division.

8. When there are several residuaries in the same degree, the property is divided amongst them *per capita*, and not *per stirpes*; *i. e.*, when there is one son of one brother and ten sons of another, the property is to be divided into eleven parts, of which each takes one.[5]

Residuaries in an another.

9. *Residuaries in another.*—They comprise every female who becomes, or is made, a residuary by a male who is parallel to her; in other words, they are certain females who, though entitled to legal shares in the absence of males of the same degree, become residuaries with them. They are four in number, *e. g.*:—

1. A daughter, who is made residuary by a son.

1. B. I., 73; Elb., 51.
2. B. I., 76.
3. 1. M. H., 92.
4. W. R. Rul., 39; G. I., 44.
5. B. D., 692.

2. A daughter of a son, who is made residuary by a son of a son.
3. A full-sister, who is made residuary by her brother.
4. A half-sister by the father, who is made residuary by her brother[1]

The remaining residuaries, *i. e.*, all besides these—take the residue alone; *i. e.*, the males take it without any participation of the females. These are four in number, *viz.* :—

1. The paternal uncle.
2. His son.
3. The son of a brother.
4. The son of an emancipator.[2]

Residuaries together with another.

10. *Residuaries together with another.*—They comprise every female who becomes a residuary with another female, as full-sisters, or half-sisters by the father, who become residuaries with daughters, or the sons of daughters.

Nearest is preferred.

11. When there are several residuaries of different kinds, as in the three classes referred to, preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in his own right, is the first. Thus, when a man has died leaving a daughter, a full-sister and a son of a half-brother by the father, a half of the inheritance goes to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than her brother's son. So, also when there is, with the brother's son, a paternal uncle, the uncle takes nothing; and, in like manner, when in the place of the brother's son, there is a half-brother by the father there is nothing for the half-brother.[3]

Residuaries by special cause.

12. *A Residuary by special cause.*—A residuary by special cause is the emancipator, or emancipatrix of

1. Elb., 51.
2. B. D., 693.
3. B. D., 694.

a freed man dying without residuary male heirs; the legal sharers as well as females, being in this case specially excluded from inheritance.[1] This provision is, however, inoperative inasmuch as slavery has been abolished by Act V. of 1843.

Table showing the character of Residuaries, &c.

Character of Residuaries.

(I.) *Father, as sharer and Residuary.*—Where there are daughters or daughters of a son, how low soever, and no sons, the father takes the residue after their shares are satisfied, in addition to his one-sixth share as sharer.

As Residuary.—On failure of children or son's children, or other low descendants he takes the whole.

(II.) *True grand-father.*—Takes the father's share assuming there is no intermediate true grand-father, both as residuary, and sharer. But the grand-father is excluded by the father if he be living, since the father is the man of consanguinity, between the grand-father and the deceased[2].

(III.) *Daughter.*—When there are sons, as well as daughters, the daughters take as residuaries, and each daughter takes half of a son. Thus where there are two sons and two daughters, each daughter will take one-sixth of the residue, instead of two-thirds between them.

(IV.) *Son's daughter.*—If there be two daughters of the deceased, they take two-thirds and there is none left for the son's daughters, unless there be in an equal, or in a lower degree with them, a boy who makes them residuaries; thus, two daughters, one son's daughter, and one son's son; the two daughters taking two-thirds, there is none left for the son's daughter; but she will take a third of the residue, and the son's son will take two-thirds. If however, there were no son's sons, the son's daughter would take nothing, and the daughters would take the residue as the *Return*.

When there is a son's daughter, and a son's son's daughter, but no daughter, the son's daughter takes one-half, and the son's son's daughter one-sixth.

(V.) *Sister.*—Brothers make the sisters residuaries, and each take half of a male. If there are daughters, and son's daughters, and no brothers, the sister takes the residue after the payment of daughter's or son's daughter's shares.[3]

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1. Elb., 52.
2. Siraj. 4.
3. Mac. Pri. 25.

(VI.) *Sisters.—By the same father only*, take nothing where there are two or more full-sisters; but if there be also brothers and sisters by the same father only, the latter become residuaries and each take half of her brother's by the same father only. Daughters of son's daughters make them residuaries like sisters.[1]

Distant kindred.

Definition.

13. *Distant kindred* are those relatives of the deceased, who are neither sharers, nor residuaries, and they resemble residuaries in this, that where there is only one of them, he takes the whole property.

Absence not sufficient.

14. The mere absence of residuaries would not of itself be sufficient to cause the admission of distant kindred; for, even if the property had not been exhausted by the sharers, the residue, by the doctrine of the *return*, would be divided amongst them, exclusive of the husband and wife, if any; so that the distant kindred in that case would really have nothing left for him.

Order of succession.

15. If the distant kindred succeed in consequence of the absence of sharers, and residuaries, they come in, according to the order of their classes; unless, indeed, in case of the maternal grand-father, who comes after the third class, though nominally of a higher class.[2] Thus the distant kindred of the second class cannot claim, so long as there are any of the first class. This rule is rigidly observed, so much so, that one of the third class cannot inherit, even where he is nearer to the deceased, in the actual number of steps, than those of the first, and second class who may be living. Some writers, however, maintain that the second class are in the highest position.[3]

Division.

16. Of the *distant kindred* there are four classes, viz.:—

1. *The first class* includes those descended from the deceased, and they are the

1. G. I. p. 47 and 48.
2. Siraj., 30.
3. See Siraj. 29; B. D., 705.

children of daughters, and children of son's daughters, how low soever, and whether male or female.[1]

2. *The second class* are those from whom the deceased is descended, *i. e.*, the excluded, or false grand-fathers, how high soever, as the mother of the maternal grand-father, and his father, and the excluded, or false grand-mothers, how high soever, as the mother of the maternal grand-father, and the mother of the maternal grand-father's mother.[2]

3. *The third class* includes, those descended from the parents of the deceased, *i. e.*, the children of full, and half-sisters on the father's side, and daughters of full and half-brothers, how low soever, and sons of half-brothers by the same mother only, how low soever.[3] In the *Siraj*. p. 29, they are stated to be the sisters' children, and the brother's daughters, and the sons of brothers by the same mothers only. *Mr. Baillie*, enumerates them thus: Daughters of full-brothers, and of half-brothers by the father, the children of half-brothers by the mother, and the children of all sisters.

4. *The fourth class* includes those descended from the two grand-fathers, and two grand-mothers of the deceased, *i. e.*, father's sisters, or paternal aunts of full, or half blood, and uncles by the same

1. Siraj., 29. Elb., 52.
2. Siraj. 29; Mac. Pri. 44; Elb. 52.
3. Mac. Prin. 45; Elb. 52.

mother, (*i. e.*, half-brothers of the father on the mother's side,) and maternal uncles, and aunts, and their children.[1] In the *Siraj* 29, they are enumerated thus: Paternal aunts, and uncles by the same mother only, and maternal uncles, and aunts. These, and all who are related to the deceased through them are his distant kindred.[2] Other authorities enumerate them thus: Paternal aunts, uterine paternal uncles, maternal uncles, and aunts, and (consanguine,) and uterine paternal aunt, and maternal uncles, and aunts, how distant soever their degree.

Rules of preference.

17. The rules by which preference is given to the individuals of each of these classes are thus shortly stated:—

First class.

(I.) *First class.*—The rule for the succession of the individuals of the first class of distant kindred is, that they take according to proximity of degree, and when equal, those who claim through an heir, have a preference to those who claim through one who is not an heir. For instance, the daughter of a son's daughter, and the son of a daughter's daughter are equi-distant in degree from the ancestor; but the former shall be preferred by reason of the son's daughter being an heir, which the daughter's daughter is not. If there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage of ascent, the distribution will be made with reference to such difference of sex, regard being had to the stage at which the difference first appeared; for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.[3] So in the case of a daughter's son, and a daughter's daughter, the male

1. Mac. Pri. 46; B. I. 128.
2. Sirj. 29, Mac. Pri. 47.
3. Mac. Prin. 49; Siraj. 30, 31.

will have a double share, for there is no difference of sex in the intermediate ancestors. But in the case of a daughter of a daughter's son, and the son of a daughter's daughter, the female will get the double portion, by reason of her father's sex.[1]

The opinion of *Abu Yusaf* is, that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants, and not to the sexes of their ancestors; but this, although the most simple, is not the most approved rule.[2]

Second class.

(II.) *For the succession of the Second Class.*—The succession with regard to the second class of distant kindred is also regulated nearly in the same manner by proximity and by the condition, and sex of the person through whom the succession is claimed, when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one-third to the maternal side, without regard to the sex of the claimants.[3]

The rule may be thus exemplified: The claimants being a paternal and a maternal grand-father, the former, being more proximate, excludes the latter; but suppose them to be the father of a maternal grand-father, and the mother of a maternal grand-father; here the claimants are equal in point of proximity; the side of their relation is the same, and they are equal with respect to the sex of the person through whom they claim; in this case the only method of making the distribution is, by having regard to the sexes of the claimants, and by giving a double share to the male.[4]

Third class.

(III.) *For the succession of the Third Class.*—The same rules apply with regard to the third as to the first class of distant kindred. A person descended from a residuary is preferred to one not so descended; for instance, the brother's son's daughter, and the sister's daughter's son are equi-distant in degree from the ancestor, but the former shall be preferred by reason of the brother's son being a residuary heir; and where they are equal in this respect, the rule laid down for the first class is applicable to this.[5]

Fourth class.

(IV.) *For the succession of the Fourth Class.*—With regard to the fourth class, all that need be said is, that (the sides of the relation being equal) uncles, and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only, are preferred to those by the same mother only whether they may be males, or females. Where the strength of

1. Siraj, 31.
2. Mac. Pri., 49, Note.
3. Mac. Pri., 50; Siraj. 35.
4. Mac. Pri. 50, Note.
5. Mac. Pri.

relation is also equal—as, for instance, where the claimants are a maternal uncle, and a maternal aunt of the whole blood—then the rule is, that the male shall have a share double that of the female. Where one claimant is related through the father only, and the other is related through the mother only the claimant related through the father shall exclude the other, if the sides of their relation are the same: for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only; but if the sides of their relation differ—for instance, if one of the claimants be a paternal aunt by the same father and mother and the other be a maternal aunt by the same father only—no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.[1]

Each of these classes excludes the next lower. The rules are so intricate and puzzling, it can hardly be expected that the student will understand them without some trouble and care.

The following rules, which may be deduced from them, will help the memory and tend to their elucidation.

18. In the *first, second,* and *third classes* the nearer in degree to the deceased is preferred to the more remote. Rules.

(I.) If several of an equal degree are entitled to succeed, the property is divided equally amongst them, if they are of the same sex. If of different sexes, in general, each male will take a double share. But where the persons through whom they are related to the deceased are of different sexes in the first, second, and third classes, regard must be had to the sexes of the intermediate relatives, and not to those of the actual claimants. Thus, where the deceased leaves a daughter's son, and a daughter's daughter, the male will take a double share, there being no difference of sex in the intermediate ancestors. But where the deceased leaves a daughter of a daughter's son, and a son of a daughter's daughter the female will get the double portion on account of her father's sex.

(II.) In classes *one* and *two*, a person descended from an heir is preferred to one not so descended. So in class *three* a person descended from a residuary is preferred to one not so descended.

(III.) *In the second class*, two-thirds go to the paternal side and one-third to the maternal, if there are sets of claimants on both sides.

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1. Mac. Pri., 52; Siraj 39 and 40.

(IV.) *In the fourth class* the whole blood is preferred; and those who are connected by the father only, are preferred to those connected by the mother only, without regard to sex.

(V.) The rule as to whole blood does not apply when the claimants are on different sides, *i. e.*, a maternal aunt, of the whole blood, will not exclude an uterine paternal aunt, but, on the contrary, she will take a double share on account of her relationship through the father.

Upon *third class Mr. Baillie* says: "If the claimants are equal in proximity to the deceased, and there is no child of an heir amongst them, the property is to be equally divided amongst them, if they are all males, or all females; and if there is a mixture of males and females then in the proportion of *two* parts to a male and *one* to a female. This is without any difference of opinion when the sex of ancestors, whether male or female is the same. But when the ancestors are of different sexes, though, according to *Abu Yusaf*, the division is to be made in the same way, yet according to *Mahamad*, it is only the number that is to be taken from the individual claimants, and the equality of the sex is to be taken from the generation in which the difference of sex *first* appears. Thus if one should leave the son of a daughter, and a daughter of a daughter, the property is to be divided amongst them in the proportion of *two* shares to the male and *one* to the female, because, here the sex of the ancestors is the same; but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided amongst them in halves, according to *Abu Yusaf*, regard being had merely to the number of the individuals; while according to *Mahamad* it would be divided amongst them in *thirds—two-thirds* to the daughter of the son of a daughter, and *one-third* to the daughter of the daughter's daughter."[1]

Upon the *fourth Mr. Baillie* says: "If one of the claimants is connected with the deceased, in two, or more ways, he will inherit by each way, regard being had to the branches, according to *Abu Yusaf*, and to the roots according to *Mahamad*, except to grandmother, who according to *Abu Yusaf*, can inherit only in one way. Thus suppose a man to have left two daughters who have died, one leaving a son and the other a daughter, and suppose this son and daughter to intermarry, and to have a son, after which the daughter marries another man, to whom she bears a daughter. Her first child is thus the son of a daughter's son and also the son of a daughter's daughter, while her *second* child is only the daughter of a daughter's daughter. Now, suppose the husband and wife, and the grand-mother to be dead, and the question to relate

1. B. D., 706.

to the estate of the grand-father; according to *Abu Yusaf*, the son would take *four-fifths*, and the daughter *one-fifth*, *i. e.*, a double share as a male and that doubled by reason of his being connected in two ways; whilst, according to *Mahamad*, the son would take *five-sixths* and the daughter only *one-sixth*—*i. e.*, *Mahamad* would make the division according to the sexes in the second generation, where the distinction *first* appears, giving *two-thirds* or *four-sixths* to the grandson, which would pass wholly to his son, and leaving the remaining *third*, or *two-sixths* for the grand-daughter, which would be equally divided between her son by the first marriage and her daughter by the second.[1]

Mr. *MacNaughten* says: "In considering the *doctrine* of *succession* of *distant kindred*, attention must be paid to the following points:—1*st*.—Their relative distance in degree of relation from the deceased; whether a greater or less number of degrees removed. 2*nd*.—It must be ascertained whether any of the claimants are the children of heirs. If so, preference must be shown to such children. 3*rd*.—Their strength of relation, whether they are of the half or whole blood. 4*th*.—Their sides of relation, whether connected by the father's or mother's side. 5*th*.—The sexes of the persons through whom they claim, whether male or female. With respect to this latter point, however, a difference of opinion exists, it being maintained by some authorities that *cæteris paribus*, no regard should be had to the mere sex of the person through whom the claim is made, but that the adjustment should be made according to the sex of the claimants themselves. But the contrary is the more approved doctrine. It should be recollected, too, that whenever the sides of relation differ, those connected through the father, are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants."[2]

For the succession of their children.

19. After fourth class, their children, or descendants come in, *i. e.*, the cousins. Their succession is regulated by the following rules:—Propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before claimant through one who is not an heir, without respect to the sex of the claimants; for instance, the daughter of a paternal uncle succeeds in preference, to the son of a paternal aunt, unless, the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where

1. B. D., 707.
2. I. B. note.

the son of a paternal aunt by the same father, and mother, and the son of a maternal aunt by the same father, and mother, or by the same father only, claim together, the latter will not be excluded by the former. The only difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the maternal side. Should there be no difference between the strength of relation, the sides, or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves.[1]

For the succession of the descendants of their children.

20. In the distribution amongst the descendants of this class, the same rule is applicable as to the descendants of the first class. For instance, the two daughters of the daughter of a paternal uncle's own son, will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same; and in the case of equality in all other respects, regard must be had, as above, to the sexes of the claimants.[2]

Those who succeed in default of distant kindred.

21. *Acknowledged Kindred.*—In default of *distant kindred and successor by contract* he has a right to succeed whom the deceased ancestor acknowledged, conditionally or unconditionally, as his *kinsman* provided the acknowledgment was never retracted and provided it cannot be established that the person in whose favor the acknowledgment was made, belongs to a different family.[3]

The crown.

22. *Escheat.*—In default of all the above, there being no will, property escheat to the *Crown;* but this only where no individual has the slightest claim.[4]

The accompanying tables A, B, & C. will show the order of succession under each law.

1. Mac. Pri. 53, Saraj., 30.
2. Mac. Pri., 54.
3. Mac. Pri., 55.
4. Mac. Pri., 56.

A

TABLE OF SUCCESSION ACCORDING TO THE SUNNI SCHOOL.

I. Sharers.

I. Father.
II. True grand-father.
III. Half-brothers.
IV. Daughters.
V. Son's daughters.
VI. Mother.
VII. True grand-mother.
VIII. Full-sister.
IX. Half-sisters by same.
X. Half by the same mother.
XI. Husband.
XII. Wife.

Corollary.—All brothers and sisters are excluded by son, son's son, how low soever, father or true grand-father. Half-brothers and sisters, on father's side, are excluded by these and also by full-brother. Half-brothers and sisters on mother's side are excluded by *any* child or son's child, by father and true grand-father.

II. Residuaries.

A.—Residuaries in their own Right, being *males* into whose line of relationship to the deceased no *female* enters.

(*a*) *Descendants.*

1. Son.
2. Son's son.
3. Son's son's son.
4. Son of No. 3.

4 A. Son of No. 4.

4 B. And so on, how low soever.

(*b*) *Ascendants.*

5. Father.
6. Father's father.
7. Father of No. 6.
8. Father of No. 7.

8 A. Father of No. 8.

8 B. And so on, how high soever.

(*c*) *Collaterals.*

9. Full-brother.
10. Half-brother by father.
11. Son of No. 9.
12. Son of No. 10.

12 A. Son of No. 11.

12 B. Son of No. 12.

12 C. Son of No. 12 A.

12 D. Son of No. 12 B.
And so on, how low soever.

13. Full paternal uncle by father.
14. Half paternal uncle by father.
15. Son of No. 13.
16. Son of No. 14.
16 A. Son of No. 15.
16 B. Son of No. 16.
And so on, how low soever.
17. Father's full paternal uncle by father's side.
18. Father's half paternal uncle by father's side.
19. Son of No. 17.
20. Son of No. 18.
20 A. Son of No. 19.
20 B. Son of No. 20.
And so on, how low soever.
21. Grand-father's full paternal uncle by father's side.
22. Grand-father's half paternal uncle by father's side.
23. Son of No. 21.
24. Son of No. 22.
24 A. Son of No. 23.
24 B. Son of No. 24.
And so on, how low soever.

N. B.—(*a*) A nearer residuary in the above Table is preferred to and excludes a more remote.

(*b*) Where several residuaries are in the same degree, they take *per capita*, not *per stirpes*, *i. e.*, they share equally.

(*c*) The whole blood is preferred to and excludes the half blood at each stage.

B.—Residuaries in another's right, being certain females, who are made residuaries by males parallel to them; but who, in the absence of such males, are only entitled to legal shares. These female residuaries take each half as much as the parallel male who makes them residuaries.

1. Daughter made residuary by son.
2. Son's daughter made residuary by son's son.
3. Full-sister made residuary by full-brother.
4. Half-sister by father made residuary by *her* brother.

C.—Residuaries with another, being certain females who become residuaries with other females.

1. Full-sisters with daughters or daughter's sons.
2. Half-sisters by father.

N. B.—When there are several residuaries of different kinds or classes, *e. g.*, residuaries in their own right and residuaries with another, propinquity to the deceased gives a preference: so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.

If there be residuaries and no sharers, the residuaries take all the property.

If there be sharers, and no residuaries, the sharers take all the property by the doctrine of the "*Return.*" Seven persons are entitled to the Return. 1st mother; 2nd grand-mother; 3rd daughter; 4th son's daughter; 5th full-sister; 6th half-sister by the father; 7th half-brother or sister by mother.

A posthumous child inherits. There is no presumption as to commorients, who are supposed to die at the same time, unless there be proof otherwise.

If there be neither sharers nor residuaries, the property will go to the following class (Distant Kindred.)

III Distant Kindred.

Comprising all relatives, who are neither sharers nor residuaries.

CLASS I.

Descendants; children of daughters and son's daughters.

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter of No. 1.
5. Son of No. 2.
6. Daughter of No. 2, and so on, how low soever, and whether male or female.
7. Son's daughter's son.
8. Son's daughter's daughter.
9. Son of No. 7.
10. Daughter of No. 7.
11. Son of No. 8.
12. Daughter of No. 8, and so on, how low soever, whether male or female.

N. B.—*(a) Distant Kindred* of the first class take according to proximity of degree; but, when equal in this respect, those who claim through an heir, *i. e.*, sharer or residuary, have a preference over those who claim through one not an heir.

(*b*) When the sexes of their ancestors differ, distribution is made having regard to such difference of sex, *e.g.*, daughter of daughter's son gets a portion double that of son of daughter's daughter, and when the claimants are equal in degree, but different in sex, males take twice as much as females.

CLASS II.

Ascendants; false grand-fathers and false grand-mothers.

13. Maternal grand-father.
14. Father of No. 13, father of No. 14, and so on, how high soever, (*i. e.*, all false grand-fathers.)
15. Maternal grand-father's mother.
16. Mother of No. 15, and so on, how soever (*i. e.*, all false grand-mothers.)

N. B.—Rules (*a*) and (*b*), applicable to class I, apply also to class II. *Further* (*c*) when the side of relation differ, the claimant by the *paternal* side gets twice as much as the claimant by the *maternal* side.

CLASS III.

Parents' Descendants.

17. Full-brother's daughter and her descendants.
18. Full-sister's son.
19. „ „ daughters and their descendants, how low soever.
20. Daughter of half-brother by father, and her descendants.
21. Son of half-sister by father.
22. Daughter of half-sister by father, and their descendants, how low soever.

N. B.—Rules (*a*) and (*b*) applicable to class I, apply also to class III. *Further*, (*c*) when two claimants are equal in respect of proximity, one who claims through a residuary is preferred to one who cannot so claim.

CLASS IV.

Descendants of the two grand-fathers and the two grand-mothers.

23. Full paternal aunt and her descendants.*
24. Half paternal aunt and her descendants.*
25. Father's half-brother by mother and his descendants.*
26. Father's half-sister by mother and her descendants.*
27. Maternal uncle and his descendants.*
28. Maternal aunt and her descendants.*

N. B.—(*a*) The *sides* of relation being equal, uncles and aunts of the whole blood are preferred to those of the half, and those connec-

* Male or female, and how low soever.

ted by the same father only, whether males or females, are preferred to those connected by the same mother only. (*b*) Where sides of relation differ, the claimant by paternal relation gets twice as much as the claimant by maternal relation. (*c*) Where sides and strength of relation are equal, the male gets twice as much as the female.

General rule.—Each of these classes excludes the next following class.

IV.—*Successor by contract or Mutual Friendship.* V.—*Successor of Acknowledged Kindred.* VI.—*Universal Legates.* VII.—*Public Treasury.*

SECTION III.

Increase.

Definition.

1. Where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found on a distribution of the shares into which it is necessary to divide the estate, that there is not a sufficient number of shares to satisfy the just demands of all the claimants, the processes of increasing the number of shares is applied, this is technically called "the *Increase.*"[1]

This is the natural consequence of a system which requires the division of unity, into a number of fractional parts to satisfy several claimants simultaneously; the fractions, when added together, being sometimes found to be greater, sometimes less, than the whole. The doctrine of "the *increase*" therefore provides for the former classes of cases, and the doctrine of "the *return*" for the latter, when there are no residuaries.

What is increase.

The *increase,* then is the division of the estate into a larger number of parts than that indicated by the least common denominators of the fractional shares.

Elberling says: "When the sum of the shares to which persons are entitled exceeds the whole estate, each of the sharers must

1. Mac. Pri., 88.

suffer a proportionate reduction, or, in other words, the number of the shares must be increased"[1]

The shares of the sharers may be *equal*, or *less* or *more* than the shares of the property, into which it is divided, *i. e.*, the sum of the fractions representing the number of shares may be *equal* to, or *less*, or *more* than the *integer*.

(I) *Equal.*—In the first case they are said to be *ádil*, or just; as when the deceased has left two full-sisters and two half-sisters by the mother, and the former takes two-thirds, and the latter one-third; or when the shares of the sharers are less than the number of shares into which the property is divided, the residuary takes the remaining shares.

(II) *Less.*—In the second case the shares are said to be *kasir or deficient*, as when they are less than the shares of the property and there is no residuary; for instance, where the deceased has left two full-sisters, and a mother, the sisters take *two-thirds* and the mother *one-sixth* and the remaining *one-sixth*, goes to them as their portion of *return*, as there are no residuaries.

(III.) *More.*—In the third case, which is termed *ail*, or excessive, the shares of the sharers exceed the number of shares into which the property is divided, by their being, for instance, two-thirds and a half, as in the case of a husband with two full-sisters and a mother or two halves and a third as in the case of a husband with one full-sister and a mother. To this case the rule of *increase* is applicable and it consists in raising the number of the shares of the property, to the number of the shares of the sharers, by which means the deficiency is distributed over all the sharers in proportion to their shares. Thus, in the two above cases where the shares amount to *seven-sixths* and *eight-sixths* respectively, the denominators should be raised to seven and eight respectively, the sharers, instead of getting so many sixths of the property, get only so many sevenths in one, and eighths in the other.[2]

Cases in which the increase occurs.

2. The *increase* is said to occur only in three cases, *viz.*, where the estate has to be divided into six, or twelve, or twenty-four shares respectively.

In the first instance the *six* may be increased into seven, eight, nine or ten.

(I.) *It may be increased to seven.*—Where the estate is to be divided into one-sixth, half, one-third, and one-sixth, as in the case of a grand-mother, one full-sister, two half-sisters by the mother, and one half-sister by the father, the shares of these being $\frac{1}{6}$, $\frac{1}{2}$, or

1. Elb, 58.
2. B. D., 713 & 714.

$\frac{3}{6}$, $\frac{1}{3}$ or $\frac{2}{6}$ and $\frac{1}{6}$ respectively or $\frac{1}{6}$ on the whole, the denominator 6 may be raised to 7, *i. e.*, multiply each of the fractions by $\frac{7}{7}$ or by a fraction which would give the required denominator to enable all the heirs to obtain their respective shares, and each of the sharers would get so many *sevenths* instead of so many *sixths*.

(II.) *It may be increased to eight.*—Where the estate is to be divided into a *half*, *two-third* and a *sixth*; as in the case of a husband, two full-sisters, and a mother, the shares of these being $\frac{1}{2}$ or $\frac{3}{6}$, $\frac{1}{3}$ or $\frac{2}{6}$, $\frac{1}{6}$ or $\frac{1}{6}$ respectively or $\frac{8}{6}$ on the whole; or when the estate is to be divided into two moieties and a third, as in the case of a husband, a full-sister, and two half-sisters, by the mother, their shares being $\frac{1}{2}$ or $\frac{3}{6}$, $\frac{1}{4}$ or $\frac{2}{6}$, $\frac{1}{4}$ or $\frac{2}{6}$ respectively or $\frac{8}{6}$ on the whole; the common denominator 6 may be raised to 8 to enable all the heirs to get their respective shares, and each of them would get so many *eighths* instead of so many *sixths*.

(III.) *It may be increased to nine.*—Where the estate is to be divided into a *half*, *two-thirds* and a *third*; as in the case of a husband, two full-sisters and two half-sisters, by the mother their shares being $\frac{1}{2}$ or $\frac{3}{6}$, $\frac{2}{3}$ or $\frac{4}{6}$ and $\frac{1}{3}$ or $\frac{2}{6}$ respectively or $\frac{9}{6}$ on the whole; or into two moieties, a third and a sixth, as in the case of a husband, a full-sister, two half-sisters by the mother, and a mother, their shares being $\frac{1}{2}$ or $\frac{3}{6}$, $\frac{1}{4}$ or $\frac{2}{6}$, $\frac{1}{4}$ or $\frac{2}{6}$ and $\frac{1}{6}$ respectively or $\frac{9}{6}$ on the whole, the common denominator 6 may be raised to 9, to enable all the sharers to get their respective shares, and each of them would get so many *ninths* instead of so many *sixths*.

(IV.) *It may be increased to ten.*—Where the estate is to be divided into *a half*, *two-thirds*, *one-third and a sixth*, as in the case of a husband, two full-sisters, two half-sisters by the mother and a mother, their shares being $\frac{1}{2}$ or $\frac{3}{6}$, $\frac{2}{3}$ or $\frac{4}{6}$, $\frac{1}{3}$ or $\frac{2}{6}$ and $\frac{1}{6}$ respectively or $\frac{10}{6}$ on the whole, the common denominator 6 may be raised to 10 to enable all the sharers to get their respective shares, and each of them would get so many *tenths* instead of so many *sixths*.

3 In the second instance the *twelve* may be increased to *thirteen*, *fifteen* or *seventeen*.[1]

(I.) *It may be increased to thirteen.*—Where the estate is to be divided into a *fourth*, *two-thirds*, and *a sixth*, as in the case of a widow, two full-sisters and a half-sister by the mother, their shares being $\frac{1}{4}$ or $\frac{3}{12}$, $\frac{2}{3}$ or $\frac{8}{12}$, $\frac{1}{6}$ or $\frac{2}{12}$ respectively or $\frac{13}{12}$ on the whole, the common denominator 12 may be increased to 13 to enable all the sharers to have their respective shares and each of them would get so many *thirteenths* instead of so many *twelfths*.

(II.) *It may be increased to fifteen.*—Where the estate is to be divided into a *fourth*, *two-thirds*, and *one-third*, as in the case of a

1. Mac. Pri., 68.

wife, two full-sisters, or two half-sisters by the mother, their shares being $\frac{1}{4}$ or $\frac{3}{12}$, $\frac{2}{3}$ or $\frac{8}{12}$, $\frac{1}{3}$ or $\frac{4}{12}$ respectively or $\frac{13}{12}$ on the whole; or where the estate is to be divided into *a fourth, two-thirds,* and *two-sixths,* as in the case of a widow, two full-sisters, two half-sisters by the mother, their shares being $\frac{1}{4}$ or $\frac{3}{12}$, $\frac{2}{3}$ or $\frac{8}{12}$, $\frac{1}{6}$ or $\frac{2}{12}$ respectively or $\frac{13}{12}$ on the whole; the common denominator 12 may be raised to 15 and each of the sharers would get so many *fifteenths* instead of so many *twelfths.*

(III.) *It may be increased to seventeen.*—Where the estate is to be divided into *a fourth, two-thirds, one-third,* and a *sixth,* as in the case of a wife, two full-sisters, two half-sisters by the mother and a mother, their shares being $\frac{1}{4}$ or $\frac{3}{12}$, $\frac{2}{3}$ or $\frac{8}{12}$, $\frac{1}{3}$ or $\frac{4}{12}$, $\frac{1}{6}$ or $\frac{2}{12}$ respectively or $\frac{17}{12}$ on the whole; the common denominator 12 may be raised to 17, and each of them would get so many *seventeenths* instead of so many *twelfths.*

(IV.) In the third instance *twenty-four* may be raised to *twenty-seven.* Where the property is to be divided into *one-eighth, two-thirds,* and *two-sixths,* as in the case of a widow, two daughters and both the parents, their shares being $\frac{1}{8}$ or $\frac{3}{24}$, $\frac{2}{3}$ or $\frac{16}{24}$, $\frac{2}{6}$ or $\frac{8}{24}$ respectively or $\frac{27}{24}$ on the whole, the common denominator 24 may be raised to 27 and each of the sharers would get so many *twenty-sevenths* instead of so many *twenty-fourths.*

SECTION IV.

Return.

Definition.

1. The *return* is the apportionment of the *surplus* amongst the sharers, where there are no residuaries.

The *return* is the converse of the *increase,* and it takes place in what remains above the shares of those entitled to them, when there are no claimants to it, *i. e., residuaries.* This surplus reverts to the sharers according to their respective shares except the *husband* and *wife*

Operation.

2. The operation, employed in ascertaining the *increase,* is to *raise* the common denominator of the fractions in which the shares are represented, while the numerators remain unchanged, so the *return* being the converse of the *increase,* the operation must be

reversed, and that is done by *reducing* the common denominators of the fractions representing the shares, leaving the numerators unchanged. In both the cases the new denominators whether increased or reduced would represent the number of the shares into which the property should be divided.

The operations of *increasing* or *reducing* the denominators may not be easily understood by the students; so the simplest method appears to be, to follow the definition of the term "*return*" that is to divide the *surplus* among the sharers entitled to the *return* according to their respective shares. Thus when a deceased has left a husband and two sisters, whose legal shares being $\frac{1}{2}$ and $\frac{2}{3}$ respectively, the sum, of which being $\frac{7}{6}$ is more than the integer, here we have to *increase*, the number of the shares, in order to satisfy all the sharers; this can be done only by raising the denominators of fractions from 6 to 7, applying the doctrine of *increase*. But in a case where the deceased has left a mother and a daughter as sole heirs, whose legal shares being $\frac{1}{6}$ and $\frac{1}{2}$ respectively, which leaves a remainder of $\frac{2}{6}$ as surplus; this surplus, want of residuaries, must return to the sharers, according to their respective shares, *i. e.*, $\frac{2}{6}$ must be divided between the mother and daughter, the former getting $\frac{1}{6}$ of the $\frac{2}{6}$ and the latter $\frac{3}{6}$ of the $\frac{2}{6}$; here the doctrine of the "*Return*" applies.

Who are entitled.

3. There are seven persons entitled to the *return* namely, (1) mother, (2) grand-mother, (3) daughter, (4) son's daughter, (5) full-sister, (6) half-sister by the father, and (7) half-brother and sister by the mother.

Who are not.

4. The widow and the widower get no share of the *return*, so long as there are heirs by blood alive,

on failure of such heirs, however, the widower or widow takes the whole estate.[1]

When occurs.

5. The exclusion of the husband and wife has given rise to the four-fold division of cases in which the *return* occurs.

First case.—When there is only one class of sharers unassociated with those not entitled to claim the *return*, as in the case of 2 daughters or 2 sisters, whose legal shares being $\frac{2}{3}$, the surplus $\frac{1}{3}$ (there being no residuaries), reverts to them as the portion of their *return*; or in other words the whole goes to the daughters or sisters in equal shares.

Second case.—Where there are two or more classes of sharers, unassociated with those not entitled to claim the *return* as in the case of a mother and 2 daughters, whose legal shares being $\frac{1}{6}$ and $\frac{2}{3}$ respectively; the surplus $\frac{1}{2}$ would go to the mother and daughters in proportion to their respective shares.

Third case.—Where there is only one class of sharers associated with those not entitled to claim the *return*, as in the case of 3 daughters, and a husband, whose legal shares being $\frac{2}{3}$ and $\frac{1}{4}$ respectively. In this case the husband not being entitled to the *return*, both these get their legal shares first; and the daughters in addition to their legal shares, which is $\frac{2}{3}$ in this case get the surplus $\frac{1}{12}$ as the portion of their *return*.

Fourth case.—When there are two more classes of sharers associated with those not entitled to claim the *return*, as in the case of a widow, four paternal grand-mothers, and six sisters by the same mother only, whose legal shares are $\frac{1}{4}$, $\frac{1}{6}$, and $\frac{1}{3}$ respectively. In this case the widow not being entitled to a share in the *return*, gets only her legal share which is $\frac{1}{4}$ in this case and the paternal grand-mothers, and six sisters by the same mother only, in addition to their legal shares which being $\frac{1}{6}$ and $\frac{1}{3}$ respectively also get the surplus which is $\frac{1}{4}$ in this case in proportion to their shares as the portion of their *return*.[2]

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1. 1. S. D. A., 346.
2. Mac. Ch. 1. Pri., 62 to 95.

SECTION V.

Inheritance.

According to the Shiah or Imamia School.

Preliminary.

1. *Shiahs* are called the Imamia sect as they recognize *Imam* as their head or chief, in religious matters, whether he be the head of all Mahamadans, as the *Khalif,* or the *priest* of a mosque, or the *leader* in the prayers of a congregation. The *Shiahs* recognize *twelve Imams* or heads of the faith in *Allie* or his successors of whom the last *Imam, Mahadi,* is believed to be still alive. The word *Shiah,* which signifies *sectaries* or adherents, in general, was used to designate the followers of *Allie* as early as fourth century *Hijirah.*

The rules of inheritance among the *Shiahs* and *Sunnis* are the same with a few exception. The legal *shares* allotted to the several heirs among the *Shiahs* are the same as those prescribed for the *Sunnis,* both having the precepts of the *Qoran* as their guide. The rules of distribution and ascertainment of the relative shares of different claimants are also *(Mutatis Mutandis)* the same with very slight variations. These two sects differ in the following points, *viz.* :—

(1) *Sunnis* regard the presence of witnesses is essential to a valid contract of marriage, the *Shiahs* do not. (2) The *Sunnis* make distinctions with regard to *valid* and *void* marriages, *Shiahs* do not. (3) With regard to marriages of slaves, according to the *Sunnis* the right must be permanent, as the woman being the actual property of the man; according to the *Shiahs,* the right may be temporary. (4) As to repudiation, the *Sunnis* recognise two forms, the *Sunni* and *Budaee,* whereas the *Shiahs* recognise only one *sunni* or *regular.* (5) The *Sunnis* do not require intention when express words are used, while, according to the *Shiahs,* both the intention and the presence of two witnesses in all cases are essential. (6) With regard to parentage, maternity is established according to the *Sunnis* by birth alone, without regard to the connection of the parents being lawful; according to the *Shiahs,* it

must in all cases be lawful. (7) As to "*descent*":—According to the *Sunnis* it is enough if the information be received from two just men, or a just man and two just women, while the *Shiahs* require such testimony from a considerable number of persons in succession. (8) As to pre-emption according to the *Sunnis*, the right may be claimed (i) by a partner in the thing, (ii) by a partner in its rights of way and water, (iii) by a neighbour; the *Shiahs* reject the claim of the *third*; and say that the right belongs only to the first of these, with some slight exceptions in favor of the second. (9) As to gifts the gift of an undivided share of a thing is lawful with *Shiahs* but not with *Sunnis*. (10) As to inheritance according to the *Sunnis* the impediments are (*a*) slavery, (*b*) homicide, (*c*) difference of religion, (*d*) and difference of *dar* or country: the *Shiahs* recognise (*a*) and also (*b*) with some modification, *i. e.*, the homicide must be intentional, for (*c*) they substitute infidelity and (*d*) they reject entirely. The *Sunnis* prefer agnate kinsmen; the *Shiahs* prefer the nearest kin without reference to sex. According to the *Shiahs* in default of heirs the husband takes the whole property of his wife, but the wife only her legal share of her husband's property; the wife is not entitled to a share in the *return* as in the *Sunnis*, and the doctrine of *increase* is not recognised among the *Shiahs*, further the right of primogeniture is allowed to a certain extent. (11) In wills a bequest in favour of an heir is illegal according to *Sunnis* but legal according to *Shiahs*.[1]

Sources of succession.

2. According to the tenets of this sect, the right of inheritance proceeds from three different sources. *First*, it accrues by virtue of *consanguinity*. *Secondly*, by virtue of *marriage*. *Thirdly*, by virtue of *Wilda*.

By consanguinity.

3. There are three degrees of heirs who succeed by virtue of consanguinity, and so long as there is any one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit.[2]

The first degree.

4. The first degree comprises the parents, and the children, and grand-children, how low in descent soever, the nearer of whom exclude the more distant. Both parents or one of them inherit together with a child, a grand-child, or a great grand-child; but a

1. B. I., 1.
2. Mac. Pri., 2.

grand-child does not inherit together with a child, nor a great grand-child with a grand-child.

Sub-division of.

5. This degree is divided into two classes; First the roots of the deceased which is limited in number, and the branches of the deceased which is unlimited. The former are the parents who are not represented by their parents; the latter are the children who are represented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

Of co-heirs with children.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife.

Offspring of sons, &c.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent.

Second degree.

8. The second degree comprises the grand-father, and grand-mother, of the deceased how high soever and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. Thus great grand-father cannot inherit together with a grand-father or a grand-mother; and the son of a brother cannot inherit with a brother or a sister, and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister.

Sub-division.

9. This degree again is divided into two classes; the grand-parents and other ancestors, and the brothers and sister and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line may be extended to *ad infinitum*. An individual of one class does not exclude an individual of the other, though the relation to the deceased be more proximate; but the

individuals of either class exclude each other in proportion to their proximity.

Third degree.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a paternal uncle cannot inherit with a paternal uncle or a paternal aunt, nor the son of a maternal uncle with a maternal uncle or a maternal aunt.

Additional rules.

11. This degree is unlimited in the ascending and descending line, and their representatives may be extended to *ad infinitum;* but so long as there is a single aunt or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Other heirs.

12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed, and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all these heirs, the paternal and maternal uncles and aunts of the grand-parents and great grand-parents inherit according to their degree of proximity to the deceased.*

* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law taking out letters of administration: "In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grand-fathers, uncles or nephews (and the females of each class respectively), and lastly cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the Intestate."—*Blackstone's Com.* Vol. ii, P. 504.

13. It is a general rule that the individuals of the whole blood exclude those of the half-blood who are of the same rank: but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half-blood: a son of the brother of the whole blood, however, does not exclude a brother of the half-blood, because they belong to different ranks: but he would exclude a son of the half-brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half-blood, though he does an uncle of the half-blood. Half and whole blood.

14. The principle of the whole blood, excluding the half-blood, is confined also to the same rank, among *collaterals*: for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half-blood; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half-blood by the same father only, the latter of whom is excluded by the former. Additional rules.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased; for instance, a paternal uncle or aunt of the whole blood does not exclude a maternal uncle or aunt of the half-blood; but a paternal uncle or aunt of the whole blood excludes a paternal uncle or aunt of the half-blood, and so likewise a maternal uncle or aunt of the whole blood excludes a maternal uncle or aunt of the half-blood. Where sides differ.

If a man leave a paternal uncle of the half-blood, and a maternal aunt of the whole blood, the former will take two-thirds in virtue of his claiming through the father, and the latter one-third in virtue of her claiming through the mother; as the property would have been divided between the parents in that pro-

portion, had they been the claimants instead of the uncle and aunt.

Exclusion of the half-blood.

16. The general rule, that those related by same father and mother exclude those who are related by the same mother only, does not operate in the case of individuals to whom a legal share has been assigned.

Half-sisters.

17. If a man leave a whole sister and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole sister, and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

Double relation.

18. Where there are two heirs, one of whom stands in a double relation; for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle,* the former will take one-third and the latter two-thirds, and he will be further entitled to take one-half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth.

By marriage.

19. *Secondly*, those who succeed in virtue of marriage are the *husband* and *wife*, who can never be excluded in any possible case; and their shares are half for the husband and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.

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* The relation of paternal and maternal uncles may exist in the same person in the following manner: A having a son C by another wife, marries B having a daughter D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half-brother by the same father, and a half-sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

20. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury. Of husband and wife.

21. If a sick man marry and die of that sickness without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him, under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness. Not consummated.

22. If a man on his death-bed *divorce* his wife, she shall inherit, provided he die of that sickness within one year from the period of *divorce*; but not if he lived for upwards of a year. Death-bed divorce.

23. In case of a reversible *divorce*, if the husband die within the period of his wife's probation, or if she die within that period, they have a mutual right to inherit each other's property. Reversible divorce.

24. The wife by an usufructuary, or temporary marriage, has no title to inherit.* Irregular marriage.

25. *Thirdly*, those who succeed by virtue of *Willa*; but they never can inherit so long as there is any claimant by *consanguinity* or *marriage*. By Willa.

26. *Willa* is of two descriptions; that which is derived from *manumission*, where the emancipator, by such act, derives a right of inheritance; and that which depends on mutual compact, where two persons reciprocally engage, each to be heir of the other. Descriptions of.

* This species of contract is reprobated by the orthodox sect, and they are both considered wholly illegal. See Hamilton's Hedaya, Vol. i., pp. 71 and 72.

Preference.

27. Claimants under the latter title are excluded by claimants under the former.

Of exclusion.

28. The general rules of exclusion according to this sect, are similar to those contained in the *orthodox doctrine*; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son and a maternal uncle excludes a paternal grand-uncle; whereas according to the *orthodox doctrine* in such cases, the daughter would get only half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

Exclusion.

29. Difference of allegiance is no bar to inheritance, and *homicide* whether justifiable or accidental, does not operate to exclude from the inheritance. The *homicide*, to disquality, must have been of *malice prepense*.

Increase.

30. The legal number of shares into which it is necessary to divide the property, cannot be *increased*, if found insufficient to satisfy all the heirs without a fraction. In such cases a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter and parents. Here the property must be divided into twelve, of which the husband is entitled to three, or a fourth; the parents to two-sixth, or four and the daughter to half; but there remain only five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the *orthodox doctrine*, the property would have been made into thirteen parts to give the daughter her six shares; but according to the *Imamiya* tenets, the daughter must be content with the five shares that remain, because in certain cases her right as a legal sharer is liable to extinction; for instance, had there

been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

Return.

31. Where the assets exceed the number of shares due to the different sharers the *surplus* reverts to the legal sharers (if no residuaries). The *husband* is entitled to a share in the *return;* but *not* the *wife.* The *mother* also is not entitled to a share in the *return,* if there are *brethren:* and where there is any individual possessing a double relation, the *surplus* reverts exclusively to such individual.[1]

Primogeniture.

32. On a distribution of the estate, the *eldest son,* if he be worthy, is entitled to his father's *sword,* his *Qoran,* his *wearing apparel,* and his *ring.*[2]

SECTION VI.

Of Partition.

When may be.

1. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also where one heir claims it, provided the property admit of separation without detriment to its utility.

With consent.

2. But where the property cannot be separated without detriment to its several parts, the consent of all the co-heirs is requisite; so also where the estate consists of articles of different species.

Mode of distribution.

3. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the co-heirs; each share should

1. B. D. J. P., 323 to 403.
2. Mac. Chapter 11. Pri. 1 to 33.

be appraised, and then recourse should be had to drawing of lots.

By usufruct.

4. Another common mode of *partition* is by usufruct, where each *heir* enjoys the use or the profits of the property by rotation; but this method is subordinate to actual partition, and where one co-heir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases.

CHAPTER IX.

OF WILLS.

Definition.

1. *A Vassiyat* or *Will* is an assignment of property to take effect *after* the *testator's death*. The thing so given is called, "*a legacy*," the person to whom it is given, "*the legatee*," the person giving, "*the testator*," and the person to whom the trust is confided is called, the *executor*."[1]

Who can and cannot.

2. An owner has a perfect right to dispose of his property during his life-time, but this right ceases on his death, and his property devolves upon his heirs.[2]

Any person who is a *sane, free*, and *adult*, whether *man* or a *woman*, is competent to make a bequest by a *will*.[3]

A minor cannot make a will, but a bequest made by a minor however becomes effective by his confirming or ratifying the same after attaining majority.

A married woman can make a will of her *own* property without the consent of her husband.[4]

Under the Hindu law in Bengal a father may will away all his property, and a co-sharer as regards his

1. Mac. Ch. vi Pri. 1.
2. Elb., 139.
3. B. D., 617.
4. Elb. 140.

share, may dispose of it by will as he likes, whatever may be its nature.

Written and Oral.

3. A will may be made either *verbally* (nuncupative) or in *writing*; when satisfactorily proved both have the same effect. But when the testator does not die soon after making the will, a *verbal* one will be *inoperative* as he might have subsequently altered his intention.

The disposition must be made by words spoken or written, with the intention of bequeathing, but not in a loose discourse.[1]

As a *will* cannot take effect till the *death* of the testator, all the dispositions must be construed as if the will had been executed immediately before the death of the testator; the intention of the testator must be followed, as far as it is in conformity with law, or at least is not contrary to law; and if one part be invalid, or illegal, the whole will not be affected; but that part which is legal may be carried into effect.[2]

Conditions.

4. The conditions of a valid bequest are:—(i) that the testator is competent to *make* a transfer of the property; (ii) the legatee, competent to *receive* it; (iii) the subject of the bequest susceptible of being transferred after the testator's death; (iv) and the acceptance of the legatee expressly or impliedly.

Distinction.

5. There is this difference between the property; which is the subject of inheritance and that which is the subject of legacy. The former, becomes the property of the heir by the mere operation of law; the latter does not become the property of the legatee, until his consent shall have been given either expressly or impliedly after the death of testator.[3]

1. Elb., 142.
2. Elb., 146.
3. B. D., 914.

Effects.

6. The legal effects of a bequest are to confer on the legatee a new right of property, in the same way as in the case of a gift, and the bequest becomes vested in him by acceptance and his heirs succeed to it after him.[1]

To whom.

7. Legacies are to be made only to strangers, *i. e.*, those who are not heirs.[2]

What extent.

8. Legacies can be made only to the extent of one-third of the clear surplus of the estate after the payment of funeral expenses and debts, when the testator has any heir, and the whole, when he has no heirs, except the *crown*.

Not to heirs.

9. No bequest in favor of a person who is an heir is valid, without the assent of other heirs, as each is entitled for a specific share under the law.[4]

Order.

10. The payment of the legacies to a legal amount precedes the satisfaction of the claim of inheritance; and all the debts of the *testator* must have been liquidated before the legacies could be claimed.[5]

What may be given.

11. Any thing that is property may be the subject of bequest; The testator may not only bequeath things actually in his possession, but also things not in possession and even not belonging to him, in which case it is the duty of the executor to obtain the thing, if he can, and deliver it to the legatee, as far as it comes within the disposal part of the estate; or to pay its value. The testator may also bequeath a thing held in partnership with others, or he may give one thing to several individuals, without separating or defining the portion of each. When the testator bequeaths a thing not in his possession, he must of

1. B. D., 614.
2. Elb., 146.
3. Elb. 146 and 147. Mac.
4. Elb., 146.
5. Mac. Pri. 5 & 6.

course state, that the thing is to be acquired and given, otherwise the bequest is null.[1]

Who can and who cannot.

12. A person not being an heir at the time of the execution of the will, but becoming one previous to the death of the testator, cannot take the legacy under the will. For example, suppose the testator, has a son as his only heir when making a will in favor of his son's son, but the son dies before the testator, the son's son cannot take under the will as on the death of his father he becomes the heir of his grandfather, the testator.[2] But a person being an heir at the time of the execution of the *will*, and becoming excluded previously to the testator's death, can take the legacy under the *will*. Thus, the testator's sole heir and legatee was his son's son who however becomes afterwards excluded by the birth of a son to the testator before his death, such legatee can take under the *will*.

When annulled.

13. If a man bequeaths property to one person and subsequently make a bequest of the same to another, the first bequest is annulled; so also if he sells or gives away to another; even though it may have reverted to his possession before his death, as the above acts amount to retraction of the legacy.[3]

Abatement.

14. Where a testator bequeaths more than he legally can to one or more legatees, and the heirs refuse to confirm the same, a proportionate abatement must be made in all the legacies.[4]

Where a legacy is left to an individual and subsequently a large legacy to the same, the large legacy will take effect; in other words the latter bequest will always take effect.[5]

1. Elb., 147.
2. Mac. ch. vi. Pri., 10.
3. Mac. ch. vi. Pri., 11.
4. Mac. ch. vi. Pri., 12.
5. Mac. ch. vi. Pri., 13.

Joint legacy.

15. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining half will go to the heirs; so also in the case of an heir and a stranger being left joint legatees and of a sole legatee dying during the testator's life time, the bequest is void.[1]

Existence of Property.

16. It is not essential to the validity of a will that the property bequeathed should exist at the time of making the will (as in the case of a gift), it is sufficient that it exists in the possession of the testator at the time of his death.[2]

Prevention.

17. To prevent the testator from disposing more than a third, by making the bequest under another form, all contracts, gifts, sales, acknowledgment of debts, of dower, &c., made on his death-bed are considered in the light of bequest and would take effect only to the extent of one-third. And acknowledgment of debt in favor of an heir takes effect only with the consent of the other heirs.

The legally contracted dower and debt must of course be paid to the extent of the whole property, but if there is no other proof than the acknowledgment of the deceased and the heirs object, the acknowledgment will only give validity to the extent of one-third.[3]

Unaccepted legacy.

18. A bequest to a person without any clause that the bequest shall go to his heirs, in case he should die before the testator, becomes void, when that event happens, because the legacy was not yet become the property of the legatee, as the testator has not willed, that it should go to his heir's; but if the legatee survives the testator, for however short a period, the

1. Mac. ch. vi. Pri., 14.
2. Mac. ch. vi. Pri., 8.
3. Elb., 147.

legacy will go to the estate of the legatee, though he had not expressly accepted it before his death as his acceptance is implied from his not having rejected it.[1]

19. Bequest for pious purposes have no preference over other bequests. If the bequests are made for the performance of several religious duties, those made for the performance of duties, absolutely incumbent, are to be first executed whether the testator has mentioned them first or not, but with regard those of which the object is not incumbent, the arrangement of the testator must be followed.[2] For pious purpose

20. A *will* in its nature being revocable instrument, may be revoked either expressly or impliedly. It is said to be express, when it is destroyed or superceded by a codicil; and implied when the testator increases or diminishes the legacy or alienates it subsequently.[3] Revocation.

NOTE.—A codicil is a supplement to a will annexed to it by the testator, and to be taken as part of the same, either for the purpose of explaining or altering, or of adding to, or subtracting from his former disposition.[4]

21. When there is no executor appointed, the father or the grand-father may act as executor, or in their default their executors. Executors having once accepted the *trust* cannot subsequently decline it. Who may be executors.

22. When there are two executors, it is not competent to one of them to act singly, except in cases of emergency or for the benefit of the *trust*. Joint.

A Mahamadan should not appoint a person of a different persuasion to be his executor, as such appointment is liable to be annulled by the ruling power. But this restriction no longer exists and a

1. Elb., 148.
2. Elb., 148.
3. Elb., 145.
4. Elb., 139.

Hindu or Christian may legally be the executor of a Mahamadan and *vice versa*.[1]

Though a disposition by a *will* is foreign to the Hindu law yet it has *now* become a matter of daily occurrence and recognised by all the courts.

The English, the Hindu and the Mahamadan laws agree with each other in great many points as to the disposition under a will with slight variances, strictly speaking, both the Hindus and Mahamadans more follow the rules of the English law than their own laws under the legislative provision of Hindu Wills Act (XXI of 1870) and the Indian Succession Act (X of 1865).

CHAPTER X.

OF PRE-EMPTION.

Definition.

1. Shufa or the right of pre-emption is the right to purchase property which has been sold to another by paying a price equal to that settled or paid by the purchaser.

This right is constantly asserted by the *Hindus* as well as *Mahamadans* and has been recognised by the Courts of Justice, as part of the *customary* law of the country.[2]

Object

2. The principle, on which the right is established is the prevention of disagreement arising from having a bad neighbour or from partnership, it is generally applicable, and even more so, among the Hindus on account of division of caste, than among Mahamadans. The right of *pre-emption*, therefore, does not apply to moveable, but only to immoveable property, and can be exercised when the latter is transferred in any shape for consideration.[3]

1. Elb., 29.
2. B. D.
3. Elb., 205.

3. The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale but not with regard to property the possession of which has been transferred by *gift*, or by *will*, or by *inheritance*; unless the gift was made for a consideration, and it was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated. When.

4. The right of *pre-emption* takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveables, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned. Of what property.

5. The right of pre-emption may be claimed by all descriptions of people; no distinction is made on account of difference of religion.[1] By whom.

6. All the rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption. Rights &c.

7. The right of pre-emption belongs in the *first* place, to a partner or co-sharer in the property sold; *secondly*, to a sharer or participator in its appendages or appurtenances; and *thirdly*, to a neighbour. Who has.

8. It is necessary that the person claiming this right should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witnesses, of such his intention, either in the presence of the seller, or the purchaser or on the premises. It is not material in what words the claim is preferred; it being sufficient that they imply a claim. Must declare.

9. The right of pre-emption is rendered void expressly, when the pre-emptor relinquishes his claims When void.

1. Elb. 205.

in plain terms, and it is rendered void by implication when any thing is found on the part of the pre-emptor, that indicates his acquiescence in the sale. The right of pre-emption is rendered void necessarily when the pre-emptor has died after the two demands, and before taking the thing under the pre-emption.[1]

May be resumed.

10. The right of pre-emption may be resumed, if the claimant had relinquished it upon misinformation of the amount or the kind of price, or of the purchaser, or of the property sold.

Part.

11. When a pre-emptor wishes to take one part of a purchased property without another, and the part is not distinct or separate, he cannot do so.

When cannot.

12. When one man purchases from one by a single bargain several houses in a street in which there is no thoroughfare, and the pre-emptor desires to take one of them, it has been said, that if his 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 the right be based on neighbourhood, and he is neighbour only to the houses which he wishes to take, he may lawfully take it alone.[2]

First purchaser.

13. The first purchaser has a right to retain the property until he has received the purchase money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made.

Where an intermediate purchaser has made any improvements to the property the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, the claimant may insist on a proportional abatement

1. Sircar 534.
2. 1 Sircar 536 to 539.

of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.

But a claimant by pre-emption having obtained possession of, and made improvements to property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will in this case, recover the price from the seller or from the intermediate purchaser (if possession had been given, and he is at liberty to remove his improvements.)

The claimant is not obliged to deposit the price in the court on preferring his claim. It is sufficient that he pays it upon his taking possession.

There are many legal devices by which the right of pre-emption may be defeated. For instance, where man fears that his neighbour may advance such a claim, he can sell all his property with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when, if a claimant by pre-emption appear, he must pay the price first stipulated without reference to the subsequent commutation.

CHAPTER XI.

GIFT.

1. (I) *Hibut* or *Heba* or gift is the conferring of a right of property in something specific without an exchange. This may be done either by actual transfer or by extinction of donor's right in the property. It

Definition.

constitutes in the declaration of the donor, "I have given,"[2] for, that constitutes the gift, and it is completed by the act of the owner alone, acceptance being required only for the purpose of establishing the property in the donee.

Conditions.

2. A gift must not be dependent on any thing contingent, nor be referred to a future time. It cannot be implied and must be express and unequivocal and the intention of the donor must be demonstrated by his entire relinquishment of the thing given. The giver must be *free, sane, adult,* and the *owner* of the thing given. The thing itself must be in existence at the time of the gift and must possess a legal value; and possession must be taken of it to establish in it the right of the donee; and if in its nature divisible, it must be actually divided from the things not given.

Effects.

3. The legal effects of gift are (i) that it establishes a right of property in the donee, without being obligatory in the donor, (so that the gift may be validly resumed or cancelled); (ii) that it cannot be subject to an option of stipulation; (iii) that it is not cancelled by vitiating conditions.[1]

Kinds.

4. Gifts are of three kinds (i) *Hibut* or gift without consideration or exchange; (ii) *Hiba-bil-i wa*s. mutual gift or gift for consideration; (iii) *Hiba-bashartul* gift on stipulation or on promise of consideration, the latter two non-resumable sales.[2]

Seizin.

5. The Seizin or possession must be immediate; yet if temporary possession had, that is enough to make the gift valid. The seizin may be at a subsequent period, if at the desire of the donor; gift of property not in donor's possession during his life time is invalid and void.[3]

1. B. D., 507 and 508.
2. Mac., Pri. 14.
3. Elb., 120, Sada. 41.

6. Gift of one's whole property to an heir is valid if the donor be in health, or, if sick at the time, afterwards recovers from his sickness. A gift made on death-bed is viewed as a legacy.[1] To the heir.

Gift of one's whole property to the exclusion of his heirs however sinful, is nevertheless valid as the consent of the heirs is not requisite to a gift.[2]

7. Every person able to contract is generally competent to make a gift. Persons afflicted with mortal diseases such as, lame, the paralytic, the consumptive, and a person having a withered or paralyzed hand, when the malady is of long-standing and there is no immediate apprehension of death, may make gifts of the whole of their property, if the donor at the time of making the gift was of sound mind. A married woman can make a gift of her whole property.[3] Who can give.

But when a woman has been seized with the pains of labor, her acts in that state are valid only to a third of her property, unless she recovers, when they become lawful to the whole extent. If she should give her dower to her husband, while in labor and should die during *nifs* (period of purification after child birth) the gift would not be valid.

8. A woman gives her dower to her husband during her death illness, and he dies before her, she has no claim against him, as the release is valid till she dies. But if she should die of the same sickness, her heirs may claim the dower. The gift of a dower to a dead husband is valid. Dower.

9. Sudukah or charity differs from the gift in two ways, *viz.*, gift requires possession actual or constructive and may be revoked under certain circumstances; Sudukah.

1. Sada., 61.
2. Sada., 41.
3. Elb., 122.

but the *Sudukah* requires no possession and it cannot be revoked under any circumstances.[1]

Who can receive.

10. Every person who is of sound mind can receive a gift, whether he be of age, or minor, if he is only able to declare his acceptance thereof; and the contract being a beneficial one to the donee, the father or mother can accept a gift for their child; or guardians for their wards, if they are unable to give their assent.[2]

What property.

11. Whatever property can be the subject matter of contracts in general, can also be the subject of gift, not only the thing itself, but the use and possession thereof may be given. No one of course can give away what does not belong to him, nor more than that which belongs to him, nor what is merely a personal right, such as a pension, office, &c. Things not in the possession of the donor, though belongs to him cannot be the subject of the gift, such as *right of redemption*, &c., as the donor cannot deliver the thing to the donee, not having actual possession; or in other words property which cannot be delivered to the donee cannot be the subject matter of the gift. But according to *Shiahs*, gift, of immoveable property, not deliverable, is valid, as the proprietory right, according to their *doctors*, arise from the abandonment by the donor, and not as with movable and deliverable things from delivery and transfer. As gifts are gratuitous contracts the donor is not bound to grant warranty.[3] The gift of a debt to the debtor is valid and is complete without his acceptance, but in the case of security it is not complete without his acceptance.[4]

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1. B. D., 543.
2. Elb., 126.
3. Elb. 127 to 130, 138.
4. B. D. 522 and 523.

12. The law does not prescribe any particular form for a gift. It may be made either orally or in writing. If written it should be on stamp paper and must also be registered.[1] No form, &c.

13. All conditional gifts are invalid. If however, seizin has taken place, the gift is to be upheld, but the condition becomes inoperative. If the condition has been performed by the donee, the gift is viewed to be a sale or transfer for consideration, and as such it will be upheld.[2] Conditional gifts.

14. In the case of a gift made to two or more persons, the interest of each must be defined either at the time of making the gift or on delivery.[3] To two persons.

15. The gift, of an undivided part of a property which admits of partition must be divided before delivery, otherwise the gift will be invalid. But the gift of such property is lawful to a stranger, partner, or to two paupers.[4] Undivided property.

16. Any indefiniteness as to the subject matter of the gift, such as when one's undivided share out of common property is given, would invalidate the gift.[5] Indefiniteness.

17. All gifts may be revoked, before delivery to the donee, whether he was present or absent at the time of gift, and whether he were permitted to take possession or not. But after delivery the donor has no right of revocation, when the gift is to a relation within the prohibited degrees. When the gift is to others, he cannot do without a decree or the consent of the *donee*. The revocation should be in express terms; such as I revoked the gift.[6] Revocation.

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1. Elb, 135.
2. Elb., 120.
3. Mac. Pri., 7.
4. Mac. Pri., 6.
5. Sada., 43.
6. B. D., 52 b.

When cannot.

18. The causes that prevent revocation are of various kinds, *viz.*, (i) the loss of the thing given; (ii) the passing of it from the donor's hand by sale, gift or otherwise or by his death to his heirs; (iii) the death of the donor; (iv) an increase of the thing given of such a nature as to be united to it; (v) an exchange received for the gift; (vi) a change in the subject of it, as grinding when it is grain; (vii) the marriage relation between the donor and donee; (viii) relation within the prohibited degree, either by consanguinity or affinity.

When a man gives away a debt due to him to his debtor he cannot revoke it.

According to Shiah School, gift of an aliquot part of an undivided whole is valid, so an undefined gft.[1]

CHAPTER XII.

WUKF OR ENDOWMENT.

Definition.

1. An Endowment is the appropriation of propery to the service of God or charity.[2]

Conditions.

2. To constitute a valid "*wukf*" it must be absolute and unconditional, and possession must be given of the thing granted. The thing granted must be, at the time, the property of the appropriators.[3]

Nature.

3. When the grant clearly appears to have been intended for charitable purposes, the property is to be considered *wukf* notwithstanding the use of words such as "*Inam*" or "*altamgha.*"[4]

Ingredients.

4. To constitute a valid, *wukf*, it is not sufficient that the word *wukf* be used in the instrument of

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1. 5 S. D. A., 213.
2. Mac. ch. x., Pri. 1.
3. 1 S. D. A. Beg. Rep., 17.
5. 6 W. R., 3; 20 W. R., 85; 25 W. R., 557.

endowment, there must be a dedication of the property to the worship of *God* or to *religious* or *charitable* purposes. A Mahamadan cannot, therefore, by using the terms *wukf*, effect a settlement of property inalienable by himself and his descendants for ever.[1]

5. A valid *wukf* cannot be affected by revocation or by the bad conduct of those responsible for carrying out the grantor's *bequest*, nor can it be alienated.[2] Mismanagement.

6. An endowment is not a fit subject for *sale*, *gift* or *inheritance*; and if the grant be made *in extremis* it takes effect only to the extent of a third of the property. It may, however, be sold by the judicial authority for indispensable purposes, such as the execution of necessary repairs of buildings, forming part of the *endowment*, where the object cannot be obtained by temporary alienations, as preservation of the buildings in all cases of endowment being a matter of indispensable necessity.[3] Inalienable.

An heritable estate burdened with a trust, (as keeping up a saint's tomb) may be alienated subject to the trust.[4]

A property wholly dedicated to religious purposes cannot be alienated; but when a portion only of its profits is set apart, the property may be sold subject to the trust.[5]

7. Undefined property is a fit subject for endowment.[6] What property.

8. In the case of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified should be in existence at the Existence of grantee.

1. 10. B. H., 7.
2. 16. W. R., 116.
3. Mac. ch. x. Pri., 3 and Prec., 328; 6 S. D. A., Beg Re. 32.
4. 10 W. R., 299.
5 13 W. R., 200; 20 W. R., 267.
6. Mac. ch. x. Pri., 2.

time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant would nevertheless be valid, and the *profits* of the endowment will be distributed among the poor.[1]

When removable.

9. The ruling power cannot remove the superintendent of an *endowment* appointed by the grantor, unless on proof of misconduct; nor can the grantor himself remove such person, unless he has reserved himself such power at the time of the grant.[2]

Succession.

10. When the property has been devoted exclusively to religious or charitable purposes, the determination of the question of succession, depends upon the rules which the founder of the endowment may have framed at the time of making the grant.[3]

Within the class.

11. When the grantor specifies a class from amongst whom the manager is to be selected, he cannot afterwards name a person as manager not answering the proper description. After the death of the founder, the right to nominate a manager, vests in the founder's Vakils, or Executors, or the survivor of them for the time being.[4]

Reversion.

12. Where the *Mutwalle* of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property.[5]

Not to hereditary.

13. The rule of the Mahamadan law that the superintendent is removable for mismanagement, does not apply to the case of a trustee who has a hereditary proprietary right vested in him.[6]

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1. Mac. ch. x. Pri., 4.
2. Mac. ch. x. Pri., 7.
3. 8. H. M., 83.
4. 9. B. H., 19.
5. 13. W. R., 396.
6. 4. M. H., 44.

Who may.

14. Mismanagement is a good ground for the interference of the Court, and although *wukf* property is not deemed a subject of inheritance, yet persons who are of the founder's *kin* would be entitled to sue a manager who was wasting the property, and, if qualified, themselves might have a claim to succeed the disqualified person in the management, and to manage the trust in conformity with the intention of the founder.

Not inheritable.

15. Lands granted, for the endowment of a *khitabe* (office of preacher) or other religious office, cannot be claimed by right of inheritance, and grantor's heirs cannot claim the income derivable from such lands after the grantor's death. The right to the income of such lands is inseparable from the office, for the support of which the lands were granted.[1]

Of succession to.

16. Where the grantor has not made any express provision as to the successor to the office of the superintendent on the death of his nominee, nor has left an executor, such superintendent may on his death-bed, appoint his own successor, subject to the confirmation of the ruling power.[2]

Rules as to management.

17. The specific property endowed cannot be exchanged for other property, unless a stipulation to that effect may have been made by the grantor or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage derivable from the exchange; nor should the endowed lands be farmed out on terms interior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.[3]

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1. 2. M. H., 19.
2. Mac. ch. x., Pri., 6.
3. Mac. ch. x., Pri., 7.

When may be contravened.

18. The injunction of the grantor should be observed except in the following cases. If he stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removeable by them on proof of misconduct. If he stipulate that the lands shall not be let out for a longer period than one year, and it be difficult to obtain tenant for so short a period, or by making a longer lease, the endowment be profitted, the ruling authorities may do so, without the consent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the *mosque*, it may nevertheless be distributed in other places. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear deserving of it, and the endowed property may be exchanged, when it may seem advantageous by order of such authorities, even though the grantor may have expressly stipulated against an exchange.[1]

Of two persons.

19. Where the grantor appoints two persons as joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of superintendence, associating another individual, he is at liberty to act singly and upon his own authority in his self-created capacity of joint superintendent.[2]

Public and private.

20. Where a grant has been made by the ruling power, from the funds of the public treasury for public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private

1. Mac. ch. x., Pri., 8.
2. Mac. ch. x., Pri., 10.

grants, with the exception above named the injunctions of the founder should be fulfilled.[1]

21. Grants are of two kinds. *Altumgha* and *Wukf;* the former is *personal* and as such divisible, the latter *religious* and as such not divisible. Profits of the former are divisible equally without the distinction of sex, so of the latter out of the surplus.[2] Classification.

A female can manage the temporal affairs of a *mosque but* not the spiritual affairs.[3]

Though the Hindu Law has its own rules of endowment, yet they are virtually now made a dead letter by the legislative provisions such as Religious Endowment and Trusts Acts, &c.

1. Mac. ch. x. Pri., 10.
2. Mac. Prec., 329.
3. 4 M. H., p. 23, and 5 M. J., p. 173

THE END.

APPENDIX—A.

GLOSSARY.

Abatement.—Diminution.

Acknowledged-kindred.—A stranger, whom the deceased acknowledged as his kinsman, such acknowledgment never having been retracted.

Affinity.—Relationship by marriage in contradistinction to consanguinity or relationship by blood.

Ahsun.—A form of Divorce, when a man gives to his wife one revocable repudiation in a toohr, during which he has had no sexual intercourse with her, and then leaves her for the completion of her iddut or the birth of her child, if she then happens to be pregnant.

Aimah.—Learned or religious men. Allowances to religious and other persons of the Mahamadan persuasion: charity lands.

Altamgha.—A royal grant in perpetuity. Perpetual tenure.

Apostasy.—An abandonment of what one has voluntarily professed. A total desertion or departure from one's faith.

Asbah.—Kindred relation, agnate relations.

Ascendant.—An ancestor, or one who precedes in genealogy or pedigree of kindred; opposed to descendants, or the paternal lineal ancestors of the deceased.

Bain.—Irrevocable repudiation.

Bay-bil-wafa.—A mortgage. A conditional sale.

Bay-Makasa.—Barter. A deed of sale in satisfaction of dower.

Benami.—A sale or purchase made in the name of some one other than the actual vendor or purchaser.

Bequest.—In law the conferring of a right of property in a specific thing or in a profit, or advantage, in the manner of gratuity, postponed till after the death of the testator.

Bidaut.—New and heritical form of repudiation; this is void according to *Shiahs* and valid according to *Sunnis.*

Budaee.—New or irregular form of repudiation or Divorce.

Butwara.—Shares. A formal division of property into parts.

Chila.—A slave brought up in the house; a favorite slave; a pupil.

Collateral.—Descending from the same stock or ancestor, but not one from the other—opposed to lineal.

Consanguinity.—Relationship of persons by blood in contradistinction to affinity or relation by marriage.

Consummation.—Completion of marriage by sexual intercourse.

Descendants—The direct lineal male offsprings of the deceased.

Deyn-Muhr.—Unpaid dower.

Dirhm.—Coined money of ancient Arabs.

Divorce.—All separations of a wife from her husband for causes originating in him.

Distant-kindred.—All the relation of the deceased who are neither sharers nor residuaries.

Dower.—The property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself in exchange for the usufruct of the wife.

Eela.—Is a husband's prohibition of himself from approaching his wife carnally for four months if he is a free man, and two months when he is a slave.

Endowment.—A bequest for religious or charitable purposes; an appropriation of property by will or gift to the service of God in such a way that it may be beneficial to men, the donor or the testator having the power of designating the person to be benefited.

Exigible.—Demandable, capable of being exacted.

Exclusion.—Deprivation of right to inherit.

False-grand-father.—Is one into whose line of relationship to the deceased a female, *i. e.*, mother:—enters; as father of the father's mother.

False-grand-mother.—Is one into whose line of relationship to the deceased a mother enters between two fathers.

Fakir.—A poor man. A Mendicant. A Musulman beggar.

Farikh Khatt.—A written release.

Fasly or Fusli.—What relates to the season. The harvest year.

Fosterage.—If a child previous to the completion of two years and a half drinks the milk of another woman, she becomes the *foster-mother* and her children *foster-brothers* and *sisters.*

Futwa.—A judicial decree, sentence, or judgment, particularly when delivered by a Mufti.

Gift.—The conferring of a right of property in some thing specific, without an exchange or consideration.

Ghuleez.—The aggravated form of irrevocable repudiation which prevents marriage.

Hadis.—The *Prophet's* sayings or the narrations of what was said or done by him or was in silence upheld by him.

Hakk dar.—One who possesses a right.

Hiba or Hibut.—Gift without an exchange or consideration.

Hiba-bil-Iwuz.—Gift for exchange.

Hibch-ba-shart-ul-iwuz.—A gift on stipulation or promise of a consideration. It is said to resemble a sale in the first stage only; that is before the consideration for which the gift is made has been received and the seizure of donor and donee is therefore a requisite condition.

Hibah Nameh.—A deed of gift.

Hidad.—Abstaining from the use of ornaments and every thing intended to beautify the person.

Hudd.—A specific punishment for vindicating the rights of the Almighty.

Hussun.—A form of divorce, *i. e.*, when a husband gives one repudiation in a toohr in which he has had no sexual intercourse with her, and then gives her another repudiation in the next toohr and a third in the toohr after. The third being irrevocable completes the divorce without *iddut* or delivery if pregnant.

Iddut.—Term of probation after death or divorce to ascertain if she be pregnant; or is the waiting for a definite period which is incumbent on a woman after the dissolution of marriage that has been confirmed by consummation or death.

Ijab.—A verbal offer.

Ijmaa.—The decisions and determinations of the Prophet's companions and their disciples and other learned men.

Ikrar Nameh.—A written acknowledgment.

Imam.—A Head or Chief in religious matters, whether he be the head of all Muhamadans as the *Calif* or the priest of a mosque or the leader in the prayers of a congregation.

Inaam.—Present, gratuity. Inaams are grants of land free of rent or assignments of the Government share of the produce of a portion of land for the support of religious establishments and priests, and for charitable purposes. Also to revenue officers and the public servants of a village.

Increase.—When there are certain number of legal sharers, each of whom is entitled to a specific share, and it is found on a distribution of the sharers into which it is necessary to divide the estate, that there is not a sufficient number of shares to satisfy the just demands of all the claimants the processes of increasing the number of shares is technically called *the increase.*

Jagir.—An assignment of the Government revenue on a tract of land to families, individuals or public officers.

Juhaz or *jehaz.*—Parephernalia or a portion given to a daughter or whatever a bride brings with her to her husband's house.

Kabuliyat.—An engagement or agreement in writing the counter part of a revenue lease.

Kazi.—A Judge, Civil or Criminal and ecclesiastical among the Mahomadans.

Kiyas.—Analogical deductions derived from a comparison of the Qoran the *Hadis* and *Ijmaa.*

Khoolah.—The laying down by a husband of his rights and authority over his wife for an exchange.

Keetabi.—All who believe in a heavenly or revealed religion and have a *Kittab* or book that has come down to them.

Ladani.—A deed of relinquishment. A release or acquittance.

Legal Sharers.—Certain relations of the deceased to whom the law has allotted certain specific shares to be satisfied in the first instance after the payment of the charges upon inheritance.

Legacy.—A gift by will of personal property.

Lian.—Reciprocal cursing.

Mal.—Every thing coporeal, except carrion and blood.

Malik.—Master, proprietor, owner.

Mauza.—A place, a village.

Milkiyat.—Property. Proprietory right.

Mooberat.—Is another form of repudiation for an exchange. This differs from Khoola. Mooberat is founded on the mutual aversion of the husband and wife, while Khoola is founded on the aversion of the wife alone.

Moonafee.—Profits.

Moonlluk.—Dependent marriage, such as depending on some event that had passed or that is to happen.

Mootut.—Present.

Moonjjul.—Dower which is immediately exigible.

Moowujjul.—Deferred dower which is not exigible till dissolution of the marriage by death or divorce.

Moonjjul.—Prompt Dower or Dower payable immediately.

Moowukkut.—Temporary marriage.

Moozaf.—Marriage future, such as 'I have married thee to her, to-morrow.'

Mdharam.—The name of the first month of the Mahamadan year. The mourning festival observed in that month by the Musalmans of India in rememberance of *Husan* and *Husain*, the grand-sons of the Prophet.

Muhr.—Dower.

Muhrimithil.—Proper dower.

Mukhtarnamah.—A power of attorney.

Mutawalli.—The Superintendent or Treasurer of a religious or charitable foundation.

Mutta Marriage.—Marriage for enjoyment.

Nikah.—Is defined to be the legal union of the sexes and implies a particular contract for the purpose of legalizing generation; and

the bare use of the word *Nikah* is sufficient to constitute a contract of marriage.

Nikah-i-Mootut.—Marriage for enjoyment or usufructuary.

Nusb.—The term is commonly restricted to the descent of a child from its father, but it is sometime applied to descent from the mother and occasionally employed in a larger sense to embrace other relationships or relationship by consanguinity.

Okar.—A woman's dower or the money paid as her portion; also means a sum of money paid by a man to a woman with whom he had illicit intercourse.

Option.—Power of cancellation.

Pishkash.—A present, particularly to Government in consideration of an appointment or as an acknowledgment for any tenure, tribute, fine, quit-rent, advance on the stipulated revenues. The first prints of an appointment or grant of land.

Pre-emption or *Shufa.*—Any possession coveted. In law it is the right to purchase property by a partner, co-parcener or neighbour, which has been sold to another.

Qoran.—The scriptures of the Mahamadans containing the professed revelation of *Mahamad*, their Prophet and the founder of their religion.

Renunciation.—Yielding up a right already vested or ceasing, or desisting from prosecuting a claim maintainable against another.

Representation.—The estate of a person vests on his or her death in his or her surviving heirs, who are entitled to succeed to it immediately; or an heir representing the deceased.

Return.—Is the apportionment of the surplus amongst the sharers, where there are no residuaries.

Revocation.—The act by which one having the right calls back or annuls an act done or gift made.

Retirement.—When the parties meet together in a place where there is nothing in decency, law, or health to prevent matrimonial intercourse. Consummation.

Repudiation.—Is a release from marriage tie, either immediately or eventually by the use of special words by the husband.

Residuaries.—Are those other relations of the deceased who are entitled to succeed to the residue left after the claim of the legal sharers are satisfied.

Rujat.—Maintaining of a marriage in its former condition, while the wife is still under *iddut.*

Rujaee.—Reversible divorce.

Rusum.—Customs, customary commissions, gratuities, fees or perquisites.

Sajjadeh Nishin.—Sitting on a praying carpet. The supervision of a religious endowment.

Sanad-i-Milkiyat-i-Istimrar.—A written authority for the permanent possession of lands or office.

Shufa.—See pre-emption.

Shugher.—When one man gives his daughter or sister in marriage to another, on condition that the other will give him his daughter or sister in return, the right to the person of each woman being the dower of the other.

Shadee.—Means marriage with festivities.

Sunnat or *Sunnah.*—Whatever the *Prophet* had done, said or tacitly allowed.

Summee or *Soonnee.*—A form of repudiation which is agreeable to the sunnat, or traditions.

Successor-by-contract.—A stranger appointed as an heir by the owner of the estate, such appointment being accepted by the person so nominated.

True-grand-father.—Is a male ancestor into whose line of relationship to the deceased no female, *i. e.*, mother enters as father's father.

True-grand-mother.—Is a female ancestor into whose line of relationship to the deceased a false grand-father does not enter as mother's mother.

Toohr.—Period of purity, *i. e.*, between two occurrences of the courses.

Tafarick.—A judicial divorce; one pronounced by *Kazi* as distinguished from one given by the husband on his own authority.

Tulub.—Demand.

Tulub-Moowasabut.—Immediate demand.

Tulub-Tukreer.—Confirmatory demand.

Tulub-Ishad.—Demand with invocation.

Tulub-Tumluk.—Demand of possession.

Tulub-Rhusoomut.—Demand by litigation.

Tufuz.—Authorising a wife or a third person to repudiate a wife

Tulg-Tulak, Talak.—Is the taking off of the marriage tie by the use of appropriate words.

Universal-legatee.—A person to whom the deceased bequeathed the whole of his property, which it may be observed he could not do if there were any surviving relations.

Usubat.—Residuaries.

Wasiyat namah.—A last will.

Watan.—Hereditary property. Village offices which descend according to the laws of succession.

Wukf.—See endowment.

Yemen.—An oath; a vow, an adjuration by the name of God, or by such of the divine attributes or other terms ordinarily employed for the purpose.

Zihar.—A formula of divorce, such as saying to a wife "you are my mother," *i. e.*, our marriage is within the prohibited degree and is therefore dissolved.

Zina.—Any illicit intercourse of the sexes, whether parties be single or married.

APPENDIX—B.

SOLUTIONS OF
PROBLEMS ON MAHAMADAN LAW
OF
INHERITANCE.

Where there are different sets of heirs, and several individuals in each set, entitled to partition, the process of distribution may be effected as follows:—

First ascertain the respective shares of each individual and find out the least common multiple of the several fractions (representing the share of each) which will show the number of parts into which the whole estate is to be divided.

1. Q.—A man dies leaving two widows, a mother, a daughter, three brothers and a sister.

In this case, the widow, the mother and daughter are legal sharers; and brothers and sister residuaries. The deceased having left a child, the joint share of widows is $\frac{1}{8}$. The daughter (having no brother nor sister of her own) her share is $\frac{1}{2}$; and the mother's share is $\frac{1}{6}$. This leaves a residue of $1-(\frac{1}{8}+\frac{1}{2}+\frac{1}{6})$ or $\frac{5}{24}$ which goes to brothers and sister as residuaries. The share of sister being $\frac{1}{7}$ of $\frac{5}{24}$ or $\frac{5}{168}$ and that of each brother $2\times\frac{1}{7}$ of $\frac{5}{24}$ or $\frac{10}{168}$. If the fractions of all the claimants be reduced to a common denominator which will be 336, widows' share will be $\frac{21}{336}$, mother's $\frac{56}{336}$, daughter's $\frac{168}{336}$, each brother's $\frac{20}{336}$, and that of the sister $\frac{10}{336}$. Therefore the estate should be divided into 336 parts of which each widow gets 21, mother 56, the daughter 168, the brother 20, and sister 10.

2. Q.—A man dies, leaving three widows, six sons and six daughters.

Here the widows are legal sharers and the sons and daughters, residuaries. The joint share of widows being $\frac{1}{8}$, the share of each widow is

$\frac{1}{3}$ of $\frac{1}{8}$ or $\frac{1}{24}$. This leaves a residue of $1-\frac{1}{8}$ or $\frac{7}{8}$. This must go to daughters and sons. The son's share being double of the daughter the share of each son is $2\times\frac{1}{18}$ of $\frac{7}{8}$ or $\frac{14}{144}$ and that of each daughter is $\frac{1}{18}$ of $\frac{7}{8}$ or $\frac{7}{144}$. Therefore the property must be divided into 144 parts of which each widow gets 6, each son 14 and daughter 7.

3. Q.—A person dies, leaving an only daughter and the son of a half-brother by the same father only.

Here the daughter is a legal sharer and the other residuary. The daughter having no brother or sister, her share is $\frac{1}{2}$ and the remaining $\frac{1}{2}$ goes to the son of a half-brother as a residuary.

4. Q.—A person dies, leaving as his heirs a widow and a brother. How will his property be distributed between them; and what shares will each of them receive?

A.—Of the two heirs left by the deceased the widow is a legal sharer, and the brother is a residuary.

The deceased having left no children. The widow's share is $\frac{1}{4}$.

This leaves a residue of $1-\frac{1}{4}$ or $\frac{3}{4}$.

The whole of this $\frac{3}{4}$ must go to the brother.

Therefore the property will be divided into *four* equal parts, of which the widow will take *one* and the brother the remaining *three*.

5. Q.—A woman dies, leaving as her heirs a husband, a daughter and a paternal uncle.

A.—The husband and daughter are legal sharers and the paternal uncle is a residuary.

The deceased having left a child.

The husband's share is $\frac{1}{4}$.

The deceased having left only one daughter and no son, the daughter's share is $\frac{1}{2}$.

This leaves a residue of $1-(\frac{1}{4}+\frac{1}{2})$ or $\frac{1}{4}$.

This $\frac{1}{4}$ must go to the paternal uncle.

By reducing the fractions of the claimants to a common denominator, the husband's share becomes $\frac{1}{4}$, the daughter's share $\frac{2}{4}$ and the paternal uncle's share $\frac{1}{4}$.

The estate of the deceased will be made into *four* parts, of which her husband will take *one*, the daughter *two*, and the paternal uncle one.

6. Q.—A person dies leaving two widows, the one married by the ceremony of Shadee, the other by that of Nikah. By the former he left three sons and five daughters, by the latter two sons and one daughter. How will is property be distributed among the persons above mentioned, and in what proportions ?

A.—There is no difference as to the legal effect of the Nicka and Shadi marriage.

The solution of the rest of the problem is precisely similar to that of Problem 2.

The property will be made into *one hundred and twenty-eight* parts, of which each widow will take *eight*, each son *fourteen* and each daughter *seven*.

7. Q.—A person dies, leaving a widow, a son of his paternal uncle, two sons of his sister, three daughters of his sister, and six grand-sons of his paternal uncle.

A.—Of the survivors mentioned in the question, the widow is a legal sharer, the son of the paternal uncle, and the grand-son of the paternal uncle are Residuaries, the sons of the sister and the daughters of the sister are Distant Kindred.

The sons and daughters of the sister being Distant Kindred, the deceased having left some legal sharers and Residuaries they are excluded from all shares by the latter.

The grand-sons of the paternal uncle are excluded from all shares by the son of the paternal uncle, the latter being a nearer collateral Residuary to the deceased than the grand-sons.

The property should therefore be distributed between the widow and the son of the paternal uncle.

The estate will be made into *four* parts of which the widow will take *one*, and the son of the paternal uncle *three*.

8. Q—A and B, two brothers, inherited equally their patrimonial property. The former died, leaving a son C, who next died, leaving a son D. B, then died, leaving a widow and four daughters. The widow also is since dead. Under these circumstances, how is the property of the two brothers to be distributed among their surviving heir ?

A.—In this case $\frac{1}{2}$ the property belonged to A and $\frac{1}{2}$ to B.

At the death of A, the claimants to his property were, C, his son, and B his brother.

C is a descendant Residuary and B, a collateral Residuary.

C therefore takes the whole property of A to the exclusion of B. ✓

On the death of C, his heirs are D his son and B his paternal uncle.

And for the same reason as above mentioned the whole property of C would go to D to the exclusion of B. ✓

B having died subsequent to C, his heirs were, his widow, his daughters and D.

Of these, the widow and daughters are legal sharers and D a Residuary.

B having left children. The widow became entitled to $\frac{1}{8}$.

There being more than one daughter and no son.

The daughters jointly became entitled to $\frac{2}{3}$.

This leaves a Residue of $1-(\frac{1}{8}+\frac{2}{3})$ or $\frac{5}{24}$.

This $\frac{5}{24}$ must go to D.

On the death of the widow the daughters are the only persons entitled to succeed to her property.

D being neither a legal sharer nor a Residuary, nor a Distant Kindred as regards the widow, he cannot be counted among her heirs.

But the death of the widow cannot affect, D's right to the Residue of B's property which became vested in D as soon as B died.

The result of the whole is that of the 4 persons, *viz.*, D, and the 3 daughters of B, D, retains what he inherited from A, through C, and gets $\frac{5}{24}$ of B's property. B's daughters take $\frac{2}{3}$ of B's property and take the whole of the widow's property which is $\frac{1}{8}$ of B's property or in other words $\frac{11}{24}$ of B's property.

No distribution is required as regards the property, which was originally inherited by A. As regards the property originally inherited by B, the same will be divided into *twenty-four* parts, of which B's daughters will take *nineteen* and D *five*.

9. Q.—A person turned away his wife on account of her misconduct. She went to another place and maintained herself by her own exertions for a period of four years. On her death, leaving her husband and a brother's son, which of these two persons is entitled to succeed to her property according to the law of inheritance?

A.—Separation without a divorce does not dissolve the marriage.

Therefore the husband is in this case entitled to succeed to the wife.

Then the claimants to the woman's property at her death are her husband and her brother's son.

Of these the husband is a legal sharer, and the brother's son a Residuary.

The deceased having left no child.

The husband's share is $\frac{1}{2}$.

This leaves a Residue of $1-\frac{1}{2}$ or $\frac{1}{2}$.

This $\frac{1}{2}$ must go to the brother's son.

The property will be divided into *two* parts, of which *one* will be taken by the husband and *one* by the brother's son.

10. Q.—A person died, leaving him surviving, mother, three sisters, a brother, a widow and a father-in-law. In what proportion will the property of the deceased be distributed, among them?

A.—Of the claimants mentioned in the question, the father-in-law is not an heir at all.

Of the rest, the mother and the widow are legal sharers, the brothers and the three sisters are Residuaries.

The deceased having left no child, the widow's share is $\frac{1}{4}$.

The deceased having left more than one sister.

The mother's share is $\frac{1}{6}$.

This leaves a Residue of $1-(\frac{1}{6}+\frac{1}{4})$ or $\frac{7}{12}$.

This $\frac{7}{12}$ must go to the brother and sisters.

The Residuaries being of the same degree but of different sexes, this $\frac{7}{12}$ must be distributed among them in such a manner that the share of the male, may be double the share of each female.

The share of each sister will therefore be $\frac{1}{5}$ of $\frac{7}{12}$ or $\frac{7}{60}$.

The share of brother, will be $2\times\frac{1}{5}$ of $\frac{7}{12}$ or $\frac{14}{60}$.

If the fractions of all the claimants be reduced to a common denominator the widow's share will be $\frac{15}{60}$, the mother's share $\frac{10}{60}$, the brother's share $\frac{14}{60}$, and the share of each sister $\frac{7}{60}$.

The property will be distributed into *sixty* shares, of which *fifteen* will go to the widow, *ten* to the mother, *fourteen* to his brother and *seven* to each of the sisters.

11. Q.—A person dies leaving a widow, four sons of his brother, an uterine sister and a son of his paternal uncle. In this case according to Law, will the property be shared by all the heirs or not; if it devolves on all of them how will it be distributed among these individuals?

A.—Of the claimants mentioned in the question, the widow and the sister are legal sharers the sons of the brother, and the son of the paternal uncle are collateral Residuaries.

The sons of the brother being nearer Residuaries than the son of the paternal uncle, the latter is excluded from all share by the former.

The distribution among the rest should be as follows:—

The deceased having left no children. The widow's share is $\frac{1}{4}$.

The deceased having no children, &c., the sister's share is $\frac{1}{2}$.

This leaves a residue of $1 - (\frac{1}{4} + \frac{1}{2})$ or $\frac{1}{4}$.

This $\frac{1}{4}$ must go to the brother's sons.

The Residuaries being all of the same degree and sex, the $\frac{1}{4}$ should be equally divided among them.

Therefore the share of each nephew is $\frac{1}{4}$ of $\frac{1}{4}$ or $\frac{1}{16}$.

If the fractions of all the sharers be reduced to a common denominator, the widow's share will be $\frac{4}{16}$, the sister's share $\frac{8}{16}$, and the share of each nephew $\frac{1}{16}$.

The property will therefore be divided into *sixteen* shares of which the widow will take *four*, the sister *eight* and each nephew *one*.

12. Q.—The heirs of a deceased person being five daughters and a husband and the estate to be divided, Rupees ten thousand, find the value of the share of each of these claimants.

A.—All the claimants mentioned in the question are legal sharers.

The deceased having left children, the share of the husband is $\frac{1}{4}$.

There being more than one daughter.

The shares of all the daughters taken together is $\frac{2}{3}$.

And the share of one of the daughters is $\frac{1}{5}$ of $\frac{2}{3}$ or $\frac{2}{15}$.

This leaves a Residue of $1 - (\frac{1}{4} + \frac{2}{3}$ or $\frac{1}{12})$.

This $\frac{1}{12}$ would go to the Residuaries if any were in existence.

But as there are no Residuaries it forms what is called the *Return* and must come back to the legal sharers.

But the husband being, not an heir by blood, he is excluded from all share in the return by the daughters.

The $\frac{1}{12}$ must therefore be divided among the daughters only.

As all belong to the same class of sharers the return should be divided equally among them.

Therefore the share of each daughter in the return is $\frac{1}{5}$ of $\frac{1}{12}$ or $\frac{1}{60}$.

Therefore the entire share of each daughter in her mother's property is $\frac{2}{15} + \frac{1}{60}$ or $\frac{9}{69}$.

If the fractions of all the sharers be reduced to a common denominator the husband's share will be $\frac{15}{60}$ and the share of each daughter $\frac{9}{60}$.

Therefore the value of the husband's share is $\frac{15}{60}$ of 10,000 Rupees or Rupees 2,500.

The value of the share of each daughter or $\frac{9}{10}$ of 10,000 Rs. or Rs. 1,500.

13. Q.—A woman (A) had three daughters B, C and D. The last mentioned (D) died before her mother leaving children. On the death of A, her two surviving daughters (B and C) take possession of her property; afterwards B dies. Under these circumstances, how will the property of B, be divided between her sister (C) and late sister's (D's) children, being a son E and a daughter F?

A. At the death of A the surviving members of the family are B, C, E and F.

Of these B and C are legal sharers, E and F Distant Kindred.

Owing to the existence of legal sharers E and F are excluded from all shares.

As between B and C, there being more than one daughter, and no son, &c.

Their joint share is $\frac{2}{3}$.

The share of each daughter is $\frac{1}{2}$ of $\frac{2}{3}$ or $\frac{1}{3}$.

This leaves a Residue of $1 - \frac{2}{3}$ or $\frac{1}{3}$.

This $\frac{1}{3}$ would go to the Residuaries if any.

But as there are no Residuaries it forms what is called the *Return* and comes back to the daughters, the legal sharers.

The daughters being sharers of the same class, the Return must be equally shared by them.

Therefore the share of each daughter in the Return is $\frac{1}{2}$ of $\frac{1}{3}$ or $\frac{1}{6}$.

Therefore the entire share of each daughter is $\frac{1}{3} + \frac{1}{6}$ or $\frac{1}{2}$.

On the death of B, the claimants to her property, are her surviving sister C and the children of the deceased sister E and F.

Of these C is a legal sharer, and E and F, Distant Kindred.

Owing to the existence of a legal sharer, E and F get no share in the inheritance.

B having left no children, &c., and C being her only sister.

C's share is $\frac{1}{2}$ of B's property or $\frac{1}{2}$ of $\frac{1}{2}$ or $\frac{1}{4}$ of the property left by A.

This leaves a Residue of $1 - \frac{1}{2}$ or $\frac{1}{2}$ of B's property or $\frac{1}{4}$ of property left by A.

This $\frac{1}{4}$ for the reasons explained in the case of B and C comes back to C as a Return.

Therefore the entire property inherited by C from B is $\frac{1}{2}$ of the property left by A.

But C already inherited $\frac{1}{2}$ of A's property as A's daughter.

Therefore on the death of B, the whole property left by A devolves on C.

14. Q.—A person dies leaving a mother, two paternal half-grand-uncles, and two daughters of a paternal grand-uncle, who claim his estate. In this case which of the claimants are entitled to succeed according to the Law of Inheritance?

A.—Of the claimants the mother is a legal sharer, the paternal half-grand-uncles, as the half-brother by the same father only, of the paternal grand-father of the deceased are Residuaries; the daughters of the paternal grand-uncle are Distant Kindred.

Owing to the existence of legal sharer and residuaries, the daughters of the paternal grand-uncle get nothing.

The deceased having left no children, &c.

The mother's share is $\frac{1}{3}$. This leaves a Residue of $1 - \frac{1}{3}$ or $\frac{2}{3}$.

This $\frac{2}{3}$ must go to the paternal half-grand-uncles.

Residuaries being of the same degree and sex, the Residue should be equally divided between them.

Therefore the share of each half grand-uncle is $\frac{1}{2}$ of $\frac{2}{3}$ or $\frac{1}{3}$.

The property should therefore be divided into *three* parts, of which, the mother would take *one*, and the paternal half grand-uncles one each.

15. Q.—The heirs of Mussulman deceased are two widows, a mother and three daughters, one by the first wife and the other two by the second. One of the daughters, of the second wife, dies before the

distribution of the estate. How will the property be distributed among the survivors?

A.—At the death of the original proprietor his heirs were two widows, the mother and three daughters.

All these claimants are legal sharers.

The deceased having left children.

The joint share of 2 widows is $\frac{1}{8}$.

The share of each widow is $\frac{1}{2}$ of $\frac{1}{8}$ or $\frac{1}{16}$.

The deceased having left children.

The share of the mother is $\frac{1}{6}$.

There being no sons and more than one daughter.

The joint share of all the daughters is $\frac{2}{3}$.

The share of each daughter is $\frac{1}{3}$ of $\frac{2}{3}$ or $\frac{2}{9}$.

This leaves a Residue of $1-(\frac{1}{8}+\frac{1}{6}+\frac{2}{3})$ or $\frac{1}{24}$.

This $\frac{1}{24}$ would go to a Residuary if any existed.

But as there is no Residuary it must form what is called the *Return* and come back to the legal sharers.

Of these the mother and daughters being blood relations of the deceased, the widows cannot get any share in the return.

As the mother and daughters belong to different classes of shares, the return must be divided between the mother on the one side and the three daughters on the other in the proportion of $\frac{1}{6}$ and $\frac{2}{3}$ or one and four.

The share of the mother in the Return therefore is $\frac{1}{6}$ of $\frac{1}{24}$ or $\frac{1}{120}$.

The joint share of all the daughters in the Return is $\frac{4}{6}$ of $\frac{1}{24}$ or $\frac{4}{120}$.

Therefore the entire share of the mother is $\frac{1}{6}+\frac{1}{120}$ or $\frac{21}{120}$.

The entire joint share of the 3 daughters is $\frac{2}{3}+\frac{4}{120}$ or $\frac{84}{120}$.

And the entire share of one of the daughters is $\frac{1}{3}$ of $\frac{84}{120}$ or $\frac{28}{120}$.

If the fractions of all the claimants be reduced to a common denominator the share of each widow becomes $\frac{15}{240}$, the share of the mother $\frac{42}{240}$, and the share of each daughter $\frac{56}{240}$.

On the death of one of the daughters of the second widow her heirs, are her full sister, that is, the surviving daughter of the second widow her half-sister by the same father, *i. e.*, the daughter of the first widow, her mother, her step-mother, and her paternal grand-mother.

Of these the step-mother, gets no share in the property.

The paternal grand-mother is excluded from all share by the mother.

Therefore the persons entitled to succeed are, her mother, her full-sister, and her half-sister by the same father only.

The deceased having left no child, &c., but a sister of whole blood and a sister of half-blood.

The mother's share is $\frac{1}{6}$ of the daughter's property, *i. e.*, $\frac{1}{6}$ of $\frac{56}{240}$ or $\frac{28}{720}$ of the property of the original ancestor.

But the mother was already entitled to $\frac{15}{240}$ directly from her husband.

Therefore on the death of the daughter, the entire share of the second widow is $\frac{15}{240}+\frac{28}{720}$ or $\frac{73}{720}$.

The deceased having left no child, &c., and only one full-sister.

The share of the full-sister is $\frac{1}{2}$ of daughter's property,

i. e., $\frac{1}{2}$ of $\frac{56}{240}$ or $\frac{28}{240}$ of the property of the original ancestor.

But this full-sister was already entitled to $\frac{56}{240}$ directly from her father.

Therefore on the death of the said daughter, the entire share of this full-sister is $\frac{28}{240}+\frac{56}{240}$ or $\frac{84}{240}$.

The deceased having left no child, but only one full-sister.

The share of the half-sister by the same father $\frac{1}{6}$ of the daughter's property.

i. e., $\frac{1}{6}$ of $\frac{56}{240}$ or $\frac{28}{720}$ of the property of the original ancestor.

But this half-sister was already entitled to $\frac{56}{240}$ directly from her father.

Therefore on the death of the said daughter,

The entire share of this half-sister is $\frac{28}{720}+\frac{56}{240}$ or $\frac{196}{720}$.

The distribution of the deceased daughter's share among her, mother, full-sisters and half-sisters, leaves a residue of $1-(\frac{1}{6}+\frac{1}{2}+\frac{1}{6})$ or $\frac{1}{6}$ of her property,

or $\frac{1}{6}$ of $\frac{56}{240}$ or $\frac{28}{720}$ of the property of the original ancestor.

This $\frac{28}{720}$ would go to a Residuary if any existed.

But there being no residuaries, it must form what is called the *Return* and must come back to the legal sharers.

As the sharers belong to different classes the said $\frac{28}{720}$ must be divided among them in the proportion of their legal shares, *i. e.*, in the proportion of $\frac{1}{6}$, $\frac{1}{2}$ and $\frac{1}{6}$ or 1, 3, and 1.

The share of the mother in the return therefore is $\frac{1}{5}$ of $\frac{28}{720}$ or $\frac{28}{3600}$.

But the mother had already $\frac{73}{720}$. Therefore her entire share, on the death of her daughter including the return is $\frac{73}{720} + \frac{28}{3600}$ or $\frac{393}{3600}$ or $\frac{131}{1200}$.

The share of the full-sister, in the return is $\frac{3}{5}$ of $\frac{28}{720}$ or $\frac{28}{1200}$.

But this full-sister had already $\frac{84}{240}$.

Therefore her entire share on the death of her sister including the return is $\frac{84}{240} + \frac{28}{1200}$ or $\frac{448}{1200}$.

The share of the half-sister, in the return is $\frac{1}{5}$ of $\frac{28}{720}$ or $\frac{28}{3600}$.

But this half-sister had already $\frac{196}{720}$.

Therefore her entire share on the death of her half-sister including the return is $\frac{196}{720} + \frac{28}{3600}$ or $\frac{1008}{3600}$ or $\frac{336}{1200}$.

If the fractions of all the claimants be reduced to a common denominator, the share of the mother of the original ancestor will be $\frac{310}{1200}$, the share of his first widow $\frac{75}{1200}$, the share of his second widow $\frac{131}{1200}$, the share of his second wife's daughter $\frac{448}{1200}$, and the share of his first wife's daughter $\frac{336}{1200}$.

The property will therefore be divided into *one thousand and two hundred* parts, of which, the mother will take *two hundred and ten*, the first widow *seventy-five*, the second widow *one hundred and thirty-one*, the first wife's daughter *three hundred and thirty-six* and the second wife's daughter *four hundred and forty-eight*.

16. Q.—A woman dies, leaving as her heirs a daughter, a mother, a father and a husband. Under these circumstances to what proportion of the dower of the deceased woman is her mother entitled?

A.—In this case, the husband, mother and daughter are legal sharers.

As the deceased left a daughter only.

The father is both a legal sharer and Residuary.

The deceased having left a child, the husband's share is $\frac{1}{4}$. For the same reason, the mother's share is $\frac{1}{6}$.

Also for the same reason, the father's share is $\frac{1}{6}$.

There being only one daughter and no other daughter or son, the daughter's share is $\frac{1}{2}$.

If the fractions of all the claimants be reduced to a common denominator the husband's share will be $\frac{3}{12}$, the mother's share $\frac{2}{12}$, the father's share $\frac{2}{12}$, and the daughter's share $\frac{6}{12}$.

If the rules of distribution should be strictly carried on the property should be divided into *twelve* parts, of which, the husband should take *three*, the mother *two*, the father *two*, and the daughter *six*.

But this is evidently not possible because after the husband takes *three*, the mother *two*, and the father *two* only, *five* shares are left and not *six*.

If therefore instead of dividing the property into *twelve*, we divide it into *thirteen* parts then the husband may take *three*, the mother *two*, the father *two*, and the daughter *six*.

17. Q.—A person dies, leaving two daughters begotten by himself on slave girl, who also survives him. In his case is the slave girl, who is the mother of those daughters, entitled to any portion of the estate of her master? If so, how will the property be shared among the three individuals abovementioned?

A.—Of the persons mentioned in the question, the slave girl cannot succeed to the master.

The daughters by the slave girl can succeed.

Both the daughters are legal sharers.

There being more than one daughter, their joint share is $\frac{2}{3}$.

And the share of each daughter is $\frac{1}{2}$ of $\frac{2}{3}$ or $\frac{1}{3}$.

This leaves a Residue of $1-\frac{2}{3}$ or $\frac{1}{3}$.

This $\frac{1}{3}$ would go to a Residuary if a Residuary was in existence.

As there is no Residuary the $\frac{1}{3}$ must form what is called the *Return* and must come back to the daughters. As both the sharers belong to the same set of sharers, the Return must be equally divided between them.

The share of each daughter therefore in the Return is $\frac{1}{2}$ of $\frac{1}{3}$ or $\frac{1}{6}$.

The entire share of each daughter is $\frac{1}{3}+\frac{1}{6}$ or $\frac{1}{2}$.

The property should therefore be equally divided between the two daughters.

18. Q.—A woman dies, leaving a sister, a husband, several brother's sons, a paternal uncle's son, and children of her other sisters. Under these circumstances on whom, among the persons enumerated, will her property devole on her death?

A.—In this case, the husband and the sister are legal sharers the brother's sons and the paternal uncle's son are Residuaries and the children of the sisters are Distant Kindred.

Of these the children of the sisters are excluded from all shares by the legal sharers and Residuaries.

The paternal uncle's son is excluded by the sons of the brother, because the latter are nearer Residuaries to the deceased than the former.

As the deceased left no child, the husband's share is $\frac{1}{2}$.

As the deceased left no child, &c., the single sister's share is $\frac{1}{2}$.

This leaves no Residue and therefore the brother's sons get nothing out of the estate.

The property will therefore be divided equally between the husband and the sister.

19. Q.—A man dies, leaving as his heir, a sister, and no other relation, on whom will his property legally devolve under such circumstances?

A.—The sister is a legal sharer.

As the deceased left no children, &c.

The sister's share is $\frac{1}{2}$.

This leaves a Residue of $1-\frac{1}{2}$ or $\frac{1}{2}$.

This $\frac{1}{2}$ would go to a Residuary if a Residuary was in existence.

As there is no Residuary it must form what is called the *Return* and must vest in the sister.

The sister therefore inherits the whole property left by the deceased.

20. Q.—A woman dies, leaving a full-sister, and a half-sister by the same father only. How will the property be distributed between them?

A.—Both the sister and the half-sister are legal sharers.

The deceased having left no children, &c.

The sister's share is $\frac{1}{2}$.

The deceased having left no children, &c., but only one full-sister.

The half-sister's share is $\frac{1}{6}$.

This leaves a residue $1-(\frac{1}{2}+\frac{1}{6})$ or $\frac{1}{3}$.

This $\frac{1}{3}$ would go to a Residuary if any existed.

As there is no Residuary, it must form what is called the *Return* and must come back to the legal sharers.

As the sister and half-sister belong to different classes of legal sharers each should get a part of the return proportional to her legal share.

Their legal shares being respectively $\frac{1}{2}$ and $\frac{1}{6}$ the $\frac{1}{3}$ must be distributed between them in the proportion of $\frac{1}{2}$ and $\frac{1}{6}$ that is, 3 and 1.

The half-sister's share will therefore be $\frac{1}{4}$ of $\frac{1}{3}$ or $\frac{1}{12}$.

The full-sister's share is $\frac{3}{4}$ of $\frac{1}{3}$ or $\frac{3}{12}$.

Therefore the entire share of full-sister is $\frac{1}{2} + \frac{3}{12}$ or $\frac{3}{4}$.

The entire share of the half-sister is $\frac{1}{6} + \frac{1}{12}$ or $\frac{1}{4}$.

The property should therefore be divided into *four* equal parts of which the full-sister should take *three* and the half-sister *one*.

21. Q.—A person died, leaving a mother, a wife and two daughters of his uterine brother. In what proportions will his patrimonial property be distributed among the claimants above enumerated?

A.—Of the persons mentioned in the question, the mother and widow are legal sharers and the brother's daughters Distant Kindred.

Owing to the existence of legal sharers, the Distant Kindred are excluded from all shares.

The deceased not having left any child.

The widow's share is $\frac{1}{4}$.

The deceased having left no child or child of a son, &c.

The mother's share is $\frac{1}{3}$.

This leaves a Residue of $1-(\frac{1}{4}+\frac{1}{3})$ or $\frac{5}{12}$.

This $\frac{5}{12}$ would go to a Residuary if a Residuary was in existence.

As there is no Residuary, the $\frac{5}{12}$ must form what is called the *Return* and must come back to the legal sharers.

Owing to the existence of the mother who is an heir by blood, the widow cannot get any share in the Return.

The whole Return therefore vests in the mother.

Therefore the entire share of the mother is $\frac{1}{3}+\frac{5}{12}$ or $\frac{3}{4}$.

Therefore the property will be divided into *four* shares of which, the widow will take *one* and the mother *three*.

22. Q.—A proprietor of a landed estate dies, leaving a son, a daughter, and a half-brother by the same father only. After his death the son also dies childless; and the daughter, during the life-time of her paternal half-uncle takes possession of the entire estate. Is she, under these circumstances, entitled to the whole, or to what part?

A.—At the death of the original proprietor his heirs were, his son, daughter, and his half-brother by the same father only.

All the heirs are Residuaries.

Of these the paternal half-brother is excluded from all share by the son, the latter being a descendant Residuary, the former a collateral Residuary.

The property should therefore be distributed between the son and daughter only.

The son's share is $\frac{2}{3}$ and the daughter's $\frac{1}{3}$.

At the death of the son his heirs are his sister, and his paternal half-uncle.

The sister gets $\frac{1}{2}$ of her brother's property and the paternal half-uncle the remaining $\frac{1}{2}$.

In other words the sister gets $\frac{1}{2}$ of $\frac{2}{3}$ or $\frac{1}{3}$ or of her father's property and the paternal half-uncle another $\frac{1}{3}$.

But the sister was entitled to $\frac{1}{3}$ of her father's property directly from the father.

Therefore the entire share of the daughter is $\frac{2}{3}$ and that of the half-brother $\frac{1}{3}$.

The property should therefore be divided into *three* parts, of which the daughter should take *two* and the half-brother *one*.

23. Q.—A person dies, leaving a widow, a brother, a sister, his widow's mother and his widow's brother. The widow dies before the distribution. In this case, which of the survivors are entitled to inherit the estate of the deceased, and in what proportions?

A.—At the death of the original proprietor his heirs were his widow brother and sister.

The share of the widow is $\frac{1}{4}$, the share of the brother $\frac{1}{2}$ and that of the sister $\frac{1}{4}$.

On the death of the widow, her heirs are her mother and brother.

The mother's share is $\frac{1}{3}$ and the brother's $\frac{2}{3}$ of the woman's property, that is, $\frac{1}{4}$ of $\frac{1}{3}$ or $\frac{1}{12}$, and $\frac{3}{2}$ of $\frac{1}{4}$ or $\frac{2}{12}$ of property, of the original proprietor.

If the fractions of all the claimants be reduced to a common denominator, the share of the brother of the original proprietor will be $\frac{6}{12}$, of his sister $\frac{3}{12}$, of widow's mother $\frac{1}{12}$, and that of the widow's brother $\frac{2}{12}$.

The property of the original proprietor will therefore be divided into *twelve* parts, of which, the brother will take *six*, his sister *three*, his widow's mother *one*, and his widow's brother *two*.

APPENDIX—C.

QUESTIONS ON MAHAMADAN LAW FOR SOLUTION.

1. State the sources of the Mahamadan Law.

2. Name the schools of law which chiefly prevail in India.—State some of the leading differences between them.

3. State the several legal sharers. How many sharers are there among males and females?

4. Into how many classes have Mahamadan lawyers divided heirs?

5. Why are they called sharers? If no sharers be living, who take the property?

6. Who take the Residue where there are no Residuaries? and on failure of sharers and Residuaries, among whom is the property distributed?

7. Should there be some of the distant kindred living and capable of inheriting, and there is no widow or widower, who succeeds?

8. In the case of descent of the property to "acknowledged kindred" what are the three conditions to be observed?

9. In the event of the failure of the five previous classes, who next succeeds? and who is the ultimate successor?

10. How many characters have the father and mother?

11. Enumerate the three classes of Residuaries by kindred and what is the order of succession according to Sunni school?

12. Were there any and what causes of exclusion from inheritance? Do any of these still exist?

13. What is the effect of adoption?

14. When the deceased has left two daughters and two sisters, how will the property be divided ?

15. With regard to inheritance, is there any difference between real and personal, ancestral and self-acquired property ?

16. Is there any law of primogeniture ?

Do females share in the inheritance ?

17. What are the sources according to Shiah doctrine from which the right of inheritance proceeds ?

18. To how many classes of claimants is the estate of a deceased person liable before the heirs are entitled to distribution ? and in what cases has the legatee priority over the heir ?

19. Name the heirs who are liable to exclusion and who are not ?

20. Explain the meaning of "right of representation," and the grounds on which it does not obtain in Mahamadan Law.

21. Define increase and in what cases does it occur ?

22. Who are excluded from legally getting any Return and who are entitled to the Return ?

23. Why is it necessary to have recourse to the doctrine of Increase and Return in the distributiou of property ?

24. Define the Return and in how many cases does it occur ?

25. Who would exclude the widower and widow from a share of the Return ?

26. Define Pre-emption and who may claim the right ? And in what cases does it arise ?

27. When part of the estate is sold in execution, is a co-sharer entitled to the right of pre-emption ?

28. When a plurality of persons claim pre-emption, what are the rates of each ?

29. What is necessary to be proved in order to establish the right ? Is mere possession sufficient ? Could a tenant claim it ?

30. Does pre-emption arise in the case of a fictitious sale or of a conditional sale ? What is necessary with reference to sale to create the right ?

31. How long is the property of a missing person to be kept in abeyance, and give an example of the rule of succession where two or more persons meet with a sudden death at the same time, and it is not known who died first?

32. What are the conditions necessary to constitute a valid marriage? And what is essential to a contract of marriage?

33. Define Nikah and Shadee? Is there any difference between these two?

34. How may a proposal of marriage be made and what are the effects of a contract of marriage?

35. How many wives may a man have? and when will the marriage be presumed without the testimony of witness?

36. Are there any, and what, prohibited degrees?

37. Can a female contract herself in marriage? Who can enter into a contract of marriage on behalf of an infant?

38. Define dower. When does dower become due?

39. When no amount of dower has been stipulated, what is the woman entitled to receive?

40. How may a wife be divorced? And what are the essentials of divorce, and in how many ways can it be effected?

41. Can a husband receive back and cohabit with a wife three times irreversibly divorced?

42. What would be presumptive evidence of legitimacy? Is it necessary to prove a marriage in order to establish legitimacy?

43. An ante-nuptial child is illegitimate. In such case, how would the status of legitimacy be acquired? Can illegitimate children inherit property? If so, from whom do they inherit?

44. Can a husband recover possession of a wife who leaves him without his consent? If so how? Can marriage be enforced specifically?

45. Are there any impediments to marriage recognized by the Mahamadan Law?

46. Does claim to dower take precedence of claim to inheritance? Can a widow take possession of her husband's real estate in lieu of her dower?

47. Is there any difference between money and other property in cases of dower? Is it possible for the right of the heirs to be destroyed in real property as dower?

48. What are the four denominations of sale and state the several conditions in a contract of sale?

49. What constitutes a sale and who are competent to sell?

50. How long does minority continue? How many kinds of guardians are there? And what rights have mothers and widows to the custody of children?

51. Under what circumstances is a guardian at liberty to sell the immovable property of his ward?

52. Define Gift and what conditions are necessary to constitute a gift?

53. What is necessary as to the subject of gift? Can a gift be made of a thing to be produced in future?

54. Are there any exceptions to the rule that a gift is null and void where the donor continues to exercise any act of ownership over it?

55. When is a gift viewed in the light of a legacy. And to what extent does such a gift take effect? Can a death-bed gift be made to one of several heirs?

56. Give instances in which a donor cannot resume his gift?

57. What are (1) Hiba-bil-Iwaz and (2) Hiba-ba-shart-ul-Iwaz?

58. What does an endowment signify? Is an endowment a fit subject of sale, gift or inheritance?

59. Under what circumstances may endowed property be sold? Can the superintendent of an endowment appoint his own successor?

60. Define Will. Is there any difference between a written and verbal one?

61. Is it necessary that the subject of legacy should exist at the time of the execution of the Will? Is the general validity of a Will affected by its containing illegal provisions?

62. A bequeathes property to B in January 1865; and in 1867 makes a bequest of the same property to C. What effect has the subsequent bequest over the former one?

63. Where a legacy is left to A, and subsequently a large legacy is left to A, which legacy takes effect?

64. Where no executors are appointed by Will, who may act as executor?

65. To what extent are the heirs answerable for the debts of their ancestors ?

66. A and B jointly contract a debt of 100 Rupees and before payment B dies ; will A be held responsible for the whole amount borrowed ? Is the rule same when two partners engage in traffic ?

67. Define several grants and state their difference between each.

68. State and define in order the different classes of heirs entitled to succeed to the property of a deceased individual.

1st. According to the Sunni School.

2nd. According to the Shiah School.

69. A person of the Sunni School dies, leaving two daughters, a son's son, a son's daughter, and an adopted son. Into how many shares must his property be divided, and what is the extent of the portion which each of the aforesaid persons would take ? Give your reasons.

70. State the provisions of the law as to wills.

1st. As to persons competent to take wills.

2nd. As to persons competent to take legacies.

3rd. As to the extent of the legacies.

State the reason and object of the law in imposing limitations in respect of the qualifications of the legatee and the extent of the legacy.

71. 1st.—What is the legal distinction between Gifts and Endowments ?

2nd. What are the essentials of a gift ? To what extent can a man give away his property in gift ?

3rd. What are the powers of the superintendent of an endowment as to management and alienation thereof ?

72. What are the peculiarities of the Mahamadan Law ?

1st. As to warranty in cases of sale.

2nd. Mortgage.

3rd. Interest.

73. Enumerate the conditions, and prohibited degrees of marriage, and state law of dower.

1st. As to its extent.

2nd. As to liability of husband's property thereto.

74. In how many different ways may property be acquired ? and define the terms you may use.

75. (*a*) Give the substance of the law of inheritance as prescribed by the Qoran.

(*b*) What are the causes of exclusion from inheritance and how have they been affected by the British legislation?

76. A man dies, leaving his father, mother, two wives, five sons, four daughters, and two grand-sons by a son who died during the lifetime of his father. Into how many shares would you divide the estate? and how many shares would you allot to each survivor, according to the Sunni School?

77. (*a*) What is a legacy, and under what restrictions are legacies placed?

(*b*) Who are competent to make wills, and under what circumstances may a testator will away his whole estate?

78. What are the essentials to constitute a gift? When is a gift invalid or null and void; and when is a gift not resumable by the donor?

79. (*a*) Name the different descriptions of guardians, distinguishing their respective rights of control, as well as their power to bind their wards in regard to immovable and personal property.

(*b*) Point out the most remarkable differences between the Hindu and the Mahamadan Law.

80. What is the distinction between legal sharers and residuaries?

81. Give a list of residuaries by relationship, exhibiting the order of their succession.

82. The heirs of a man are a mother, two wives, three sons, and five daughters. Into how many shares would you divide his estate, and how many would you allot to each claimant, according to the Sunni school?

83. What do you understand by increase and return? Give an example of each.

84. Distinguish between a gift and legacy, and state whether a person is under any restrictions in regard to their bestowal.

85. (*a*) A and B possess certain lands jointly. A sells his share to C, a stranger, without the knowledge of B. Can B or any other person interfere with the sale, and if so, on what grounds?

(*b*) How might B's claims be defeated, if he have any?

86. A Mussulman, by a deed of gift in favor of a distant kinsman conferred upon him the proprietary right to an estate not in the donor's

possession, but for which he had instituted a suit. By the same deed he bestowed on him a parcel of land and a house, delivering immediate possession of the land alone. Both donor and donee jointly occupied the house until the decease of the former. State how far the claims of the donee to the several properties mentioned in the deed are sustainable?

87. Define the terms Willa, Vasiyat, Altumgha, Wuki, Zihar, and Nicka.

88. "The share of a female is half the share of a male of parallel grade, when they inherit together." What are the exceptions to this rule?

89. Mention the legal sharers who are always entitled to some share or other, and those who are liable to execution by others.

90. When is a father a sharer—when residuary—and when both a sharer and a residuary?

91. (*a*) How may a Will be revoked?

(*b*) When is a donor not at liberty to resume a gift?

92. What completes sale, and how many kinds of sales are there?

93. A man dies leaving his heirs; but before his death he executes a Will bequeathing one-half of his property to one of his heirs, without knowledge of the other two, and the other half to a stranger—Apply the Mahamadan Law to the case.

94. A minor's nearest relations are his mother, paternal uncle, paternal grand-father. Which of these has a right to the guardianship of the boy, and which to his custody up to the time of his attaining his majority. If the minor were a girl, would the case be altered in any way?

95. A Mussulman dies leaving a widow, A, three daughters, B, C and D, and two paternal uncles, E and F. Subsequently, one of the daughters of B dies, leaving an only daughter G. Distribute the estate among the survivors according to the Sunni School, and say how many shares you would allot to each?

96. A married woman contracts a debt without her husband's authority, express or implied, and she and her husband are jointly sued for the amount. She pleads "coverture," and he pleads "indebted." What is the liability of each?

97. Supposing there were two claimants amongst distant kindred of equal degree, one the daughter of a son's daughter, the other the son of a daughter's daughter; to which would you give the preference, and why?

98. A pledged a ring worth Rupees 100 to B, as security for a debt of Rupees 15. B loses the ring. On what principle would you adjust the respective claims of the Pawner and Pawnee?

99. A Mahamadan left a will containing following terms:—"I die possessed of Rupees 1,000. Of this sum, I bequeath Rupees 150 to my wife A, an equal amount to my daughter B, Rupees 100 to my son C, and Rupees 50 to my son D. I direct that the remaining Rupees 350 be distributed to the poor." Apply the Mahamadan law to the several bequests, assuming the parties to be the only heirs. The results to be given in Rupees.

100. What is the presumption of law with regard to contemporaneous deaths?

101. Define the terms, Hadis, Ijama, Hiyas, Willa, Altumgha and Wukf.

102. When are full sisters legal sharers, and when residuaries, and what are their shares in either case?

103. A Mussulman, possessed of certain landed property died, leaving a wife and two young children, one a boy and the other a girl. Shortly afterwards the boy dies. Reduce the estate to shares, and say how many you would give respectively to the mother and daughter, who are the only heirs.

104. Who are "residuaries," and into what classes are they divided?

105. State some of the general rules regarding the law of inheritance.

106. What qualification is generally necessary to enable a person to be a legatee; what is the legal extent of a bequest; and under what circumstances can a higher amount be upheld?

107. In inheriting property, what are the relative shares of a male and of a female of equal grade?

108. If no amount of dower is specified, what sum is a woman entitled to claim?

109. What formalities are requisite to render a gift valid?

110. What is the general rule with respect to conflicting claims, when the dates can be ascertained, and when they cannot be ascertained?

111. When a person has died to whom one who is missing is an heir, what course should be pursued with regard to the latter's share of the property?

112. What is meant by the expression "true grand-father, grand-mother."

113. Who are a person's "distant kindred." Under what circumstances do they inherit, and into what classes are they divided?

114. Describe what is meant by "the right of representation, and show why it is not allowed by Mahamadan Law.

115. What course ought to be pursued, if the sum of the shares to which the sharers are entitled exceeds the whole estate that has to be divided between them? What is this process called, and when only can it occur?

116. To what extent is a person answerable for the debts of one whose property he has inherited? What is the legal presumption when two or more persons jointly contract a debt, and to what extent is each person liable?

117. A Mussulman died intestate without issue. Five nephews, being the sons of his two sisters of the whole blood and three cousins, being descendants in the male line of his paternal great-grand-father, were his only surviving relatives. Which of them were entitled to inherit his property? Give the reason for your answer.

118. When can the superintendent of an endowment appointed by the grantor thereof be removed, and under what circumstances can the grantor himself dismiss him?

119. Suppose a donor continues in possession after he has given away a portion of his property, what are the rights of the donee?

State the exceptions to the rule.

120. What is the distinction between a "successor by contract" and "acknowledged kinsman."

121. Define the right of pre-emption. Who can claim this right and to what kind of property does it apply?

122. To what extent does homicide act as a bar to the inheritance of property, and what is the difference in this respect in the law according to the Shiah School?

123. What is the rule when a gift is made to two or more donees?

124. A man dies, leaving a widow and two daughters. What shares of his property will each take?

125. Can a piece of land given as an endowment be exchanged for another similar piece, and can the superintendent of the endowment lease it to a Ryot under a Cowle.

126. Can illegitimate children and the children of a female slave, inherit their father's property.

127. Name in order the collateral residuaries.

128. What is the presumption, when the time for the payment of dower is not expressed; and what remedy has a woman, when her dower is withheld.

129. When only is the sale by a guardian of property belonging to a minor permitted. Can an elder brother assume the position of a guardian having power as much over the property of his minor sisters?

130. Explain the origin of the two Schools of the Mahamadan Law of Inheritance, and state the general rules governing Inheritance.

131. What is the position of a posthumous issue; how do males and females of equal grade share; is there any exception to the general rule?

132. Who come under the heads of "Residuaries;" What is meant by a successor by Contract? State the form of Contract.

133. Explain the terms "Increase" and "Return." How ought the "Return" to be divided? In what respect does the "Shiah" principle of the Return differ from that of the "Sunnis?"

134. Specify the circumstances which bar resumption of a gift.

135. How ought the profits of an "Altumgah" grant to be divided among the descendants in the event of a descendant demising without heirs; on whom does his share devolve?

136. Who are competent to sell? Enumerate the several kinds of sales. In what respect does a conditional sale differ from a conditional gift? Is a sale by one of several heirs valid?

137. Does the death of a contracting party affect the Contract? Explain your answer.

138. Can a choses-in-action form the subject matter of a sale according to Mahamadan Law? Explain your answer?

139. (*a*) What is the presumption of law as to joint debtors and sureties?

(*b*) What is the rule as to the responsibility of the drawer of a Bill of Exchange which has been accepted?

140. In the Text Book, under the head of "endowments," the following occurs—"undefined property is a fit subject of endowment." What meaning is intended to be conveyed by these words?

141. What is the rule as to the validity of legacies in case where the status of the legatee undergoes a change prior to the death of the testator?

142. (*a*) How is the doctrine 'ut *ut res magis valeat quam pereat*' applicable to the administration of Wills?

(*b*) How can a Will be impliedly revoked?

143. (*a*) Who are competent to make a will?

(*b*) Does Mahamadan law entail any disability on married woman in this respect?

144. How does the principle as to the distribution of the return amongst Shias differ from that prevailing amongst Sunnis?

145. In what order are charges upon an inheritance payable?

146. A has three sons B, C, and D. C has a son E, and D has a son F. A makes a Will bequeathing one-third of his property in equal shares to B, F, and E. B and C die before A. On A's death what becomes of the bequest?

147. What is the exception to the rule that joint superintendents of an endowment cannot act independently?

148. A makes a gift of 100 Bigahs of land to B. Has C, the adjoining landholder, any right of pre-emption? Explain your answer.

149. According to Mahamadan law where two persons, jointly contract an obligation, they are held, in the absence of an express stipulation to the contrary, to be liable each for half the amount of the obligation only. What is the exception to this rule?

150. How far does the law imply a warranty in sales? To what extent can the option of inspection be exercised, and how is it forfeited?

151. What distinction does the law draw as to the validity of a guardian's acts according to the class to which the minor's property belongs?

152. A Sunni woman dies leaving a husband, a daughter and both parents; her property is worth Rs. 1,000. Calculate the "increase" in this case, shewing in figures the amount which falls to each of the abovementioned persons.

153. As a rule the share of a female is half the share of a male of parallel grade when they inherit together. What are the exceptions to this rule?

INDEX.

Page of the Text.

Acknowledged kindred 41, 66.

Acknowledgment ... ... 18.
- Effect of ... ... 18.
- Of whom valid ... ... 18.
- Of a child when valid ... 19.
- Of parents ... ... 19.
- Of wife ... ... 19.
- What it comprehends ... 20.

Bequest ... ... 87.
- Conditions of ... ... 87.
- Distinction between property inheritable and that of ... 87.
- Effects of ... ... 88.
- What may be given ... ... 88.
- Who can and who cannot ... 89.
- When annulled ... ... 89.
- Abatement of ... ... 89.
- For pious purposes ... ... 91.

Children ... ... 19.
- Legitimate ... ... 19.
- Illegitimate ... ... 19.
- Inheritance of illegitimate children ... ... 20.
- Of slaves ... ... 20.
- Inheritance of ... ... 20.

Distant kindred.
- Definition of ... ... 59.
- Absence not sufficient ... 59.
- Order of succession ... ... 59.
- Divisions of 59
- Rules of preference ... ... 61.
- Succession of children ... 65.
- Descendants of their children. 66.

Divorce.
- Definition ... ... 20.
- How effected ... ... 21.
- Time of ... ... 21.
- Special conditions ... ... 21.
- Classes of ... ... 21.
- No cause necessary ... ... 21.
- Cancellation and Tulak ... 22.
- Kinds of ... ... 22.

Page of the Text.

DIVORCE.—(*continued.*)
- Who may ... ... 22.
- By a dumb man ... ... 23.
- When not effective ... ... 23.
- Number of ... ... 23.
- By agents ... ... 23.
- Other forms of ... ... 23.
- Effects of—by Tulak and Khoola ... ... 24.
- Must avoid luxury ... ... 25.
- Time for retaking ... ... 25.
- When may remarry ... ... 25.
- Effects on inheritance ... 26.

Dower.
- Definition ... ... 11.
- What it is ... ... 11.
- Division of ... ... 11.
- Limit of ... ... 12.
- What may be given as ... 12.
- Is a debt ... ... 12.
- Determination of proper ... 12.
- When perfected ... ... 12.
- When whole cannot be claimed ... ... 13.
- When can be claimed ... 13.
- Not bound to sue ... ... 13.
- When whole is demandable... 13.
- Does not drop after perfection ... ... 13.
- Addition to ... ... 14.
- Abatement of ... ... 14.
- Gift of... ... ... 14.
- What it constitutes now ... 15.
- When a wife may refuse ... 15.
- Division of prompt and deferred ... ... 15.
- Who may take possession of.. 16.

Endowment.
- Definition ... ... 100.
- Conditions ... ... 100.
- Nature ... ... 100.
- Ingredients ... ... 100.
- Mismanagement of ... ... 101.
- Inalienable ... ... 101.
- What may be given ... ... 101.

Page of the Text.

ENDOWMENT.—(*continued.*)

When existence of grantee necessary ... ... 101.
When Superintendent may be removed ... ... 102.
Succession of... ... ... 102.
Reversion ... ... 102.
When can Court interfere ... 102.
Not inheritable ... ... 102.
Appointment of Superintendents ... ... 103.
Rules as to management ... 103.
Granter's injunctions should be observed ... ... 104.
Public and private ... ... 104.
Classifications of ... ... 105.

Escheat ... ... 66.

Gift.

Definition ... ... 95.
Conditions ... ... 96.
Effects of ... ... 96.
Kinds of ... ... 96.
Seizin necessary ... ... 96.
To the heirs ... ... 97.
Who can give... ... ... 97.
Of dower ... ... 97.
Who can receive ... ... 98.
What property can be given.. 98.
No form necessary ... ... 99.
Conditional gifts ... ... 99.
To two persons ... ... 99.
Of undivided property ... 99.
Indefiniteness ... ... 99.
When can be revoked ... 99.
When cannot ... ... 100.

Guardian.

Kinds of ... ... 28.
Power of maternal relations. 28.
———of mother ... ... 28.
———Of paternal relations. 28.
Power of ... ... 29.
Acts when binding on minor. 29.

Iddut.

Definition of ... ... 25.
Who are not subject to ... 25.
Duration of Iddut ... ... 25.

Increase.

Definition of ... ... 71.
What is increase ... ... 71.
Cases in which increase occurs ... ... 72.
When cannot be increased .. 84.

Page of the Text.

Inheritance (Sunni).

Right of ... ... 30.
Conditions necessary for ... 30.
Order of succession ... 30.
No distinction of property ... 31.
No right of representation. 31.
No specific share to sons ... 32.
Females not excluded ... 32.
Who are preferable heirs ... 33.
No one can be disinherited... 33.
Succession of plurality of heirs. ... ... 33.
Surrender of shares ... ... 33.
Renunciation of ... ... 34.
Posthumous children ... 34.
Primogeniture ... ... 34, 85.
Of illegitimate children ... 35.
Impediments to ... ... 35.
Insanity ... ... 35.
Exclusion of persons ... 35.
Persons never excluded ... 36.
Adoption ... ... 35.
Missing persons ... ... 36.
Period of absence ... ... 37.
Of co-heirs ... ... 37.
Contemporaneous death ... 38.
Application of the deceased's estate ... ... 39.
Debts ... ... 39.
Legacies ... ... 40.
Increase ... ... 40.
Addition ... ... 40.
Right of inheritance is founded on what... ... ... 40.
Order of succession ... ... 41.
The sharers ... ... 41.
Number of sharers ... ... 42.
Father ... ... 44.
True grand-father ... ... 45.
Half-brothers by the same mother only ... ... 45.
Daughters ... ... 45.
Son's daughters ... ... 46.
Mother ... ... 46.
True grand-mother ... ... 47.
Full-sister ... ... 47.
Half-sister by the same father ... ... 48.
Half-sister by the same mother ... ... 48.
Husband ... ... 48.
Wife ... ... 49.
Sister's son ... ... 49.

Inheritance (Shiah.)

Origin of Shiahs ... ... 77.

Page of the Text.

INHERITANCE (SHIAH).—(*continued.*)

Sources of succession ... 78.
By consanguinity ... ... 78.
First degree ... ... 78.
Sub-division of ... ... 79.
Of co-heirs with children ... 79.
Offspring of sons ... ... 79.
Second degree ... ... 79.
Sub-division of ... ... 79.
Third degree ... ... 80.
Other heirs ... ... 80.
Half and whole blood ... 81.
Exclusion of the half-blood ... 82.
Half-sisters ... ... 82.
Double relation ... ... 82.
Succession by marriage ... 82.
Of husband and wife ... 83.
Of not consummated wife ... 83.
Of death-bed divorce ... 83.
Of reversible divorce ... 83.
Of irregular marriage ... 83.

Khoola.

Definition of ... ... 24.
Effects of divorce by Khoola and Tulak ... ... 24.

Legal sharers ... ... 41.

Maintenance.

Liability to ... ... 26.
What it includes ... ... 26.
Of wives ... ... 26.
Of children ... ... 27.
Of son's wife ... . 27.
Of other relations ... ... 27.

Marriage.

Definition of ... ... 2.
Summary of marriage law ... 2.
Necessity for ... ... 2.
Incidents of ... ... 3.
Object of ... ... 3.
Object of dower and maintenance ... ... 3.
Dower may be due without an agreement ... ... 3.
Number of wives ... ... 3.
Essentials of ... ... 3.
Time of proposal and acceptance ... ... 4.
Conditions of marriage ... 4.
Puberty ... ... 4.
Kinds of ... ... 4.
Nikah ... ... 4.
Shadee ... ... 5.

Page of the Text.

MARRIAGE.—(*continued.*)

Other kinds of ... ... 5.
How contracted ... ... 5.
By agents ... ... 5.
Effects of ... ... 6.
Impediments to ... ... 6.
Prohibition of ... ... 6.
By consanguinity ... ... 6.
Affinity ... ... 6.
Fosterage ... ... 7.
How fosterage may be established ... ... 7.
Exceptions to... ... ... 7.
Women who cannot be joined 8.
Other relations ... ... 8.
Women prohibited by reason of polytheism ... ... 9.
By reason of marriage ... 9.
By repudiation ... ... 9.
Invalid marriage ... ... 9.
Minor cannot enter into contract of ... ... 10.
When binding ... ... 10.
Whom may marry ... ... 10.
Promise of, cannot be enforced 11.
Presumption of ... ... 11.

Moobarat. ... . 24.

Origin and sources of law.

Origin ... ... 1.
Sources of law ... ... 1.
Authorities ... ... 1.
Schools of law ... ... 1.
Law books ... ... 1.

Parentage ... ... 17.

Partition.

When may be ... ... 85.
With consent... ... ... 85.
Mode of distribution ... 85.
By usufruct ... ... 86.

Pre-emption.

Definition of ... ... 92.
Object of ... ... 92.
Of what property ... ... 93.
By whom claimed ... ... 93.
Rights of ... ... 93.
Who has the first right ... 93.
Must declare... ... ... 93.
When void ... ... 93.
May be resumed ... ... 94.
When cannot claim ... ... 94.
First purchaser ... ... 94.
A part cannot be claimed ... 94.

Page of the Text.

Residuaries.

Definition of ... ... 54.
Kinds of ... ... 54.
Classes of ... ... 54.
Rules of succession ... .. 54.
Sub-divisions of ... ... 55.
Descendants ... ... 55.
Ascendants ... ... 55.
Collaterals 55
Preference of... ... ... 56.
Division of ... ... 56.
In another ... ... 56.
With another... ... ... 57.
Preference of... ... ... 57.
By special cause ... ... 57.
Character of ... ... 58.

Return.

Definition of ... ... 74.
Operation ... ... 74.
Who are entitled to ... ... 75, 85.
Who are not ... ... 75.
When occurs ... ... 76.

Table of succession.

Of sharers ... ... 67.
Of residuaries ... ... 67.
Of distant kindred ... 69.

Willa.

Description of ... ... 38.

Page of the Text.

WILLA.—(*continued.*)

Preference ... ... 84.
Of exclusion ... ... 84.

Wills.

Definition ... ... 86.
Who can and who cannot make ... ... 86.
Written and oral ... ... 87.
Conditions of ... ... 87.
Distinction of property subject to inheritance and that of legacy ... ... 87.
Effects of ... ... 88.
Legacies to whom may be given ... ... 88.
To what extent ... ... 88.
Not to heirs ... ... 88.
Order of payment ... ... 88.
What may be given ... 88.
Who can and who cannot take ... ... 89.
Abatement ... ... 89.
When annulled ... 89.
Joint legacy ... ... 90.
Existence of property at the time not necessary ... 90.
Revocation of 91
Who may be executors ... 91.
Joint executors ... ... 91.