# MUHAMMADAN LAW

## AN ABRIDGEMENT

### ACCORDING TO ITS VARIOUS SCHOOLS

BY

SEYMOUR VESEY-FITZGERALD

*Of Gray's Inn, Barrister-at-Law; M.A. Oxon.; I.C.S. retd.; Lecturer in Hindu and Muhammadan Law to the Council of Legal Education; sometime Legal Remembrancer, Central Provinces, India*

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THIS treatise is primarily intended as a comprehensive introduction to the subject for the use of those who will be concerned with its practical applications in the tropical African dependencies. Relevant decisions of the East African, Indian, and Cyprus courts, and of the Privy Council are discussed, and it is hoped that the book will be useful as a work of reference to judges and legal practitioners, while, in the absence of any English manual outlining the principal conceptions of Muhammadan Law apart from their British Indian developments and limitations, it should also prove of value to Comparative Lawyers.

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M.A. SECTION

# AN ABRIDGEMENT OF MUHAMMADAN LAW

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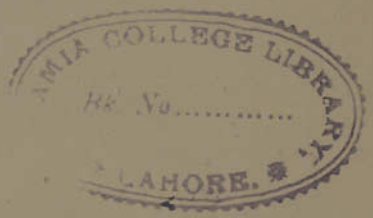

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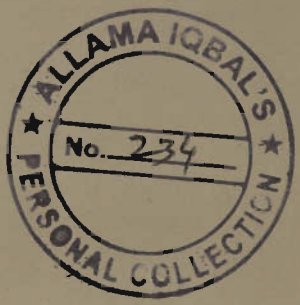


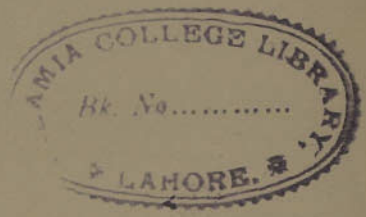


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*Forget not to watch over those for whom God hath charged thee to administer: then thou thyself shalt not be forgotten. Neglect them not nor aught that may advantage them, and thou thyself shalt not be neglected.*

IMAM ABU YUSUF *to* CALIPH HARUN-AR-RASHID.
*Kitab ul Kharaj* (Fagnan, p. 4)




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# PREFACE

THIS Abridgement (*Mukhtasar*) is intended primarily for the purely legal part of a course of instruction on the law, history, and institutions of Islam for probationers entering the Civil Service of the tropical African dependencies. These officers will meet in the course of their service Moslems of every school of law, every shade of religious thought, and in every stage of civilisation from half-converted savages to the highest products of the Universities. The problem, therefore, of compressing what they ought to know about Islam into a course consistent with the other demands upon their time has not been easy. Writing for administrative officers I have included some matter which in a practitioner's manual might be thought out of place. But in order to provide a handy work of reference which may remain of use to them when they are no longer beginners I have also discussed or referred to all the relevant East African and Privy Council decisions and a selection of those of the Indian and Cyprus Courts. I hope that this may also render the book useful to judges and legal practitioners.

In common with other English writers, I am indebted to the recognized text-writers on Muhammadan law as understood in India; Ameer Ali (*carum et venerabile nomen*), Wilson, Mulla, and Tyabji. Where I have ventured to differ from one or other of these it has been with a due sense of my own temerity and only on the direct authority of original texts. I do not enter into competition with them, but I hope that even for Indian lawyers my book may be of use as a supplement, breaking, as I believe it does, new ground, especially in regard to putative marriages, legitimacy, marriage guardianship, and the history and Shafii doctrines of inheritance.

For Comparative Lawyers there is at present no manual in English giving an outline of the principal conceptions of Muhammadan law apart from their British Indian developments and limitations. This book may perhaps go some part of

the way to fill the gap. The necessity for extreme compression has compelled me to omit much; but I intend before long to supplement it by a study of the relations between Muhammadan and Roman law, excluded from this volume.

My debts of gratitude are innumerable; but first I must thank Professor D. S. Margoliouth of Oxford; and with him Professor C. Snouck Hurgronje of Leyden, and Professor Morand, Dean of the Faculty of Law at Algiers, who have been generous and patient in answering questions. Among their published works, the former's *Achehnese* and the latter's *Études* are exemplars of the work which a great colonial power requires in the study of the relation between law and custom. To other published works I have acknowledged my debt in the bibliography and notes. H.B.M.'s Consul-General at Algiers, the Librarians of the India and Colonial Offices, and the Registrar of Colonial Laws have helped me officially; Mr. P. E. Mitchell, of the Tanganyika Civil Service, and Professor Z. Smogorzewski of Lvov have given information. I must also thank Dr. G. C. Cheshire and Professor F. de Zulueta; S. Abdur Rahman, I.C.S., Saiyyid Siddiq Hasan, I.C.S., Hafiz Abdul Majid, and Saiyyid Wasif Kamal al Nablusi; Mrs. Fricke, Miss Livingstone, Mr. F. W. Gribble, and Mrs. R. W. Porter. No pupil of the late Sir Paul Vinogradoff could attempt a work of comparative law without remembering his debt to the methods and example of that great teacher. To the Delegates of the University Press I am indebted for publication, and for all their usual consideration and forbearance; and to Dr. R. H. Ferard for that judicious and genial use of the spur which a man may expect from his old tutor.

Mr. A. Sabonadière, Reader in Indian Law in the University of London, has crowned his many kindnesses by assisting me with the proofs, and by valuable criticism.

Finally, the faults and shortcomings of the work are my own; and I am painfully conscious that in the endeavour to cover so vast a field in so short a span they are probably numerous. I trust that there is nothing which can give offence to any Moslem; but if there is I would ask his pardon; with the assurance that

I fully subscribe to the graceful tribute to Islam rendered by Count Ostrorog in his *Angora Reform*.

S. V. FG.

*Note*.—In the transliteration of Oriental words it is impossible for an English legal writer to satisfy either himself or his public. The simple little Arabic word for a judge is transliterated by reputable writers in at least thirteen different ways, and by British Governments in six of those ways: *qadi*, *qazi*, *kazi*, *cadi*, *al-kali*, and *kathi*. Much of the difficulty is due to differences of pronunciation in different places and languages. I have been content in the text to follow any reasonable transliteration: in the glossary I have added such diacritical marks and quantities only as are necessary to convey an idea of the original spelling

S. V. FG.

# CONTENTS

CHAPTER XIV. INHERITANCE: GENERAL OUTLINE



CHAPTER XV. THE LEGAL HEIRS



CHAPTER XVI. THE EXTRA-ORDINARY HEIRS

# PRINCIPAL ABBREVIATIONS

A. = Indian Law Reports, Allahabad Series.
A.C. = Law Reports, Appeal Cases.
A.L.J.R. = Allahabad Law Journal Reports.
b. = *ibn* (son of) or *bint* (daughter of).
B. = Indian Law Reports, Bombay Series.
B.H.C. = Bombay High Court Reports.
B.L.R. = Bengal Law Reports.
Bom.L.R. = Bombay Law Reporter.
C. = Indian Law Reports, Calcutta Series.
C.A. = Court of Appeal.
Ch.D. = Chancery Division.
C.W.N. = Calcutta Weekly Notes.
Cyp. = Cyprus Law Reports.
E.A. = East African Law Reports (Kenya).
F.B. = Full Bench.
F.Q. = Fath ul Qarib.
Gaz. Trib. = Gazette des Tribunaux (Egypt).
*h.h.s.* = how high soever } i.e. continuing the same line as far as conceivable—a son's son's son's son is a son's son *h.l.s.* (or sometimes a son *h.l.s.*), a father's father's father's father is a true grandfather *h.h.s.*
*h.l.s.* = how low soever }
I.A. = Law Reports, Indian Appeals.
L.T. (N.S.) = Law Times, New Series.
I.C. = Indian Cases.
K.B. = Law Reports, King's Bench Division.
Kyshe = Kyshe's Reports, Strait Settlements.
Lah. = Indian Law Reports, Lahore Series.
Luck. = Indian Law Reports, Lucknow Series.
M. = Indian Law Reports, Madras Series.
M.I.A. = Moore's Indian Appeals.
Md. = Muhammad (as a private name, not as the name of the Prophet).
N. = Nagpur Law Reports.
O.H. = Omar Hilmi, Laws of Evqaf.
P. = Indian Law Reports, Patna Series.
P.C. = Privy Council.
P.D. = Law Reports, Probate Division.
Perry = Perry's Oriental Cases.
P. and M. = Law Reports, Probate and Matrimonial.
P.R. = Punjab Record.
Q. = THE QORAN.*
Q.B.D. = Law Reports, Queen's Bench Division.
Q.E. = Queen Empress.
Q.P. = Kadri or Qadri Pasha, Code of Egyptian Hanifite Personal Law.
R. = Indian Law Reports, Rangoon Series.
*R.* = *Rex* or *Regina* (King or Queen).
R. and S. = Russell and Suhrawardy, First Steps in Muslim Jurisprudence.
Sw. and Tr. = Swabey and Tristram's Reports.
T.† = Law Report Supplements to Tanganyika Gazette.
T.L.R. = The Times Law Reports.
U.† = Uganda Law Reports.
Ves. = Vesey Junior's Reports.
V.G. = Snouck Hurgronje's *Verspreide Geschriften.*
V.O.J. = Vienna Oriental Journal.
W.R. = Sutherland's Weekly Reporter (Calcutta).
Z.† = Zanzibar Law Reports.

* The usual abbreviations have also been used in quoting the Bible.

† These initials have also been used for the compilations of laws of the several dependencies, the context making it clear whether Laws or Law Reports are referred to: in the case of Kenya K = Laws, E.A. = Law Reports.

## CHAPTER I

# MOSLEM JURISPRUDENCE

MUHAMMADANS rightly date their system of civilization not from the birth of the Prophet nor the commencement of his preaching but from his flight (*Hijra*, July A.D. 622)—that is, from the day on which he embarked upon a course which resulted in his attaining earthly sovereignty and enforcing his religion by secular means. Islam is not only a religion, it is a political system; and, though in recent times Moslem modernists have arisen who have endeavoured to separate the two aspects, its whole classical literature is based upon the assumption that they are inseparable. Law in our sense of a system of commands enforced by the sanction of the state is but a part of the whole system; or, rather, it is not even a part but an element inextricably combined with other elements therein. High spiritual aspiration, valuable outward religious discipline, sometimes passing into formalism—these are some of the other elements in the compound, the whole being bound together by a spirit of reasonable compromise, a dislike of pushing things to extremes, which was of the essence of the Prophet's own character. The name given to the whole system is *Shari'a* (commonly *Sheria*) a word inadequately translated by sacred law. To the building up of this go a whole series of sciences, a technical vocabulary of great wealth and precision, and a vast literature. The science of law is called *fiqh*.

The word *Islam* means, literally, 'complete surrender', i.e. surrender to the will of God; and the will of God is that we should pursue *husn*, i.e. beauty of life and character as expressed in revelation, from which alone we can discover what is right or wrong. The law being concerned first and last with the relation between God and the human soul, it follows that the individual is the paramount consideration; the law is strongly individualist and is primarily subjective in form. We are to consider the value of each action in the sight of God: its earthly consequences are incidental. Thus, Nawawi in the Preface to the *Minhaj-u't-Talibin* well sums up the spirit of the system when he says that 'the best way to manifest obedience to God and to make right

use of precious time is assuredly to devote oneself to the study of the law'.

Of these values in the sight of God (*ahkam*, commandments) Muhammadan lawyers distinguish five:

1. *fard* or *wajib*, i.e. expressly commanded, usually in the Qoran; categorical commands in the Traditions are also in this class.

2. *sunna*, *masnun*, *mandub*, or *mustahabb*—recommended or desirable.

3. *ja'iz* or *mubah*—permitted or indifferent.

4. *makruh*—reprobated.

5. *haram*—absolutely forbidden and abominable.

The norm is (3) *ibahat*, or permission. All human acts are permitted, or indifferent, unless and until some authority can be discovered in the sources of the law which either raises them to a higher or degrades them to a lower class. This postulate of *ibahat* has important consequences. It has allowed pre-Islamic law and social usage to become the foundation on which the edifice of Islam has been raised, though with the spirit of that earlier law and usage completely transformed. And the large class of acts indifferent in the sight of God is open to human ordinance, *qanun*, the earthly potentate being at liberty to forbid, enjoin, or regulate them.

It should be noticed that even the absolute commands, *fard*, and prohibitions, *haram*, of the sacred law do not necessarily imply the sanction of the state. Thus it is an absolute command based upon well-authenticated tradition[1] that a bridegroom should give a marriage feast according to his means, and that the guests whom he invites should not refuse to attend without lawful excuse.[2] But though absolutely binding *in foro conscientiae* these rules do not look to the state for enforcement, nor will their infraction affect the validity of the marriage.

In many of the best-known treatises[3] the reader will find the whole field of human life and conduct divided into two categories: *'ibadat*, or *huquq-ullah*, the service or rights of God, and *mu'amalat* or *huquq ul 'ibad*, civil affairs, or the rights of God's servants. The former includes purification, prayer, fasting,

[1] Bokhari, 67, 68; cf. *Minhaj*, p. 314.

[2] cf. St. Matt. xxii., 2–9.

[3] Aghnides, p. 28; v. d. Berg, *Principes*, p. 273; Ruxton, Index.

pilgrimage, holy war, and lastly the payment of taxes (for the commonwealth is a religious commonwealth with God at its head; and the *zakat*, originally almsgiving, became a compulsory levy like a tithe, and eventually both income-tax and death duties). But this dichotomy is more apparent than real. Throughout the sphere of *mu'amalat* the question of the ethical value of acts is uppermost and colours everything. Instances will be given below, particularly under the law of acknowledgement (ch. iii, *c*), of sale (ch. xxii, *b*), of gifts (ch. xxv), and of *waqf* (ch. xxvi). The last topic in particular cannot begin to be understood unless we start from the postulate that God is interested in the welfare of his creatures.[1] One further instance: a plea of guilty in a criminal case (distinguished from a confession of judgement in a civil suit) may, as in other systems, be withdrawn. But why? Because punishment is regarded as belonging unto God, and a plea of guilty is the acknowledgement (*iqrar*) of a debt due to Him. He knows the whole truth and will not be deceived whether the acknowledgement be true or false.

The sources or bases of Muhammadan jurisprudence, *usul-ul-fiqh*, are four, at least according to all Sunni schools:

1. The Word of God—*Qoran sharif, kitab-ullah.*

2. The Traditions—*hadith*, pl. *ahadith.*

3. The consensus (of the founders of the law, *ijma'a-ul-aimma*, or of the community, *ijma'a-ul-ummat*, but of the community as expressed by its most learned members).

4. *Opinion, rai*, but only in its legitimate use, *rai fi'l qiyas*, or deduction by analogy. Each of the three principal schools, however, recognizes a further use of opinion under the names of *istihsan* (*elegantia juris*), *istislah*, public policy, and *istishab*, or concordance.

1. *The Word of God.* Every word of the Qoran is regarded as being the direct utterance of the Almighty, communicated in His actual words by the angel Gabriel, the Holy Spirit, to the Prophet. The correct method of introducing a quotation from the Qoran is not 'It is written' but 'God saith'. These utterances of the Almighty, themselves excerpts from a greater or complete Qoran, 'the Mother of the Book', which lies open before Him in

[1] See Mahmood J.'s definition in *Jawahra* v. *Akbar Husain*, 7 A. 178; below, p. 207.

Heaven, were received by the Prophet in a state of trance and *recited* (hence the name Qoran) by him. They were jotted down by his followers in hurried memoranda on any handy material, and were collected after the Prophet's death, first under the Caliph Omar, and, later, authoritatively under Othman, by Zaid b. Thabit, who is also regarded traditionally as an authority on the law of inheritance. Zaid's text of the Qoran is equally authoritative for all schools of Islam, though in the past some heretics denied the authenticity of *sura* 12 (Joseph). Even the Shias, who maintain that Othman suppressed passages favourable to the house of Ali, do not in practice restore them. Of no other great religion have we the actual revelation of the original founder with quite the degree of textual authenticity which attaches to the Qoran. Doubts of it were only held by a small minority of scholars and have long since been discredited. A volume, which may perhaps be Othman's own original, is or was just before the Russian Revolution in the Imperial Library at Petrograd.

The Qoran is divided into *suras*, readings, or chapters of uneven length. These are arranged not chronologically but (save for one famous prayer, the *fatiha*, placed at the beginning) in decreasing order of length. There are commonly said to be five hundred texts (*nass*[1]) of the Qoran bearing on questions of law, mainly in the long Medinese *suras*; but on positive law in the European sense only from eighty to one hundred.

2. *The Sunna*, or Path, i.e. the practice of the Prophet together with the practice of his companions (*ashab*), and even of their successors (*tabi'un*), so far as authority can be found showing that the practice was enjoined, approved, or permitted by the Prophet.

This authority is embodied in traditions regarding the Prophet's utterances and conduct, *hadith*, pl. *ahadith*. 'The science of traditions,' says Nawawi,[2] 'is among the chiefest means of drawing near to the Lord of all the worlds. For why? It is the study of the paths trodden by the best of creatures, the most magnanimous of beings that have been or shall be.'

Every tradition is vouched by an *isnad* or chain of reporters

[1] The word *nass*, however, is also used of any authoritative text, sometimes of the Traditions, and even by Nawawi (*Minhaj*, Introduction, p. xii) of the opinions of Shafi.

[2] *Taqrib*, *Journal Asiatique*, ix ser., vol. xvi, p. 479, translation by Marçais.

through whom it reached the first editor. It is usually an account of some saying or action of the Prophet or even of his silence from which an inference is drawn. Less often it is a judgement or exhortation of Abu Bakr, Omar, Othman, Ali, or a companion, reflecting the Prophet's mind.

Everybody admits that there has been wholesale fabrication of traditions. The conclusions of modern Western scholars, however, are perhaps rather extreme in their scepticism, and in any case do not commend themselves to Moslems. Six great collections are regarded as authentic by all Sunnis and were undoubtedly compiled with the most meticulous care and with such critical apparatus as was available. Of these the two most important are the *Sahih* (true or reliable) collection of al Bokhari (died A.H. 257=A.D. 870) and that of his friend Muslim (died A.H. 261=A.D. 874). 'Of the two, *al Bokhari* is preferred, both for authenticity (*sahhiyat*) and usefulness.'[1] This dictum of the Shafii Nawawi is strongly followed by his commentator Ibn Hajar, and is the opinion of all Sunni lawyers except a minority of the Malikis. Bokhari's aim was to provide a firm basis for *fiqh*. He arranges his matter under legal titles and rubrics. Nevertheless the bulk of tradition is non-legal in character: history, polemics, piety, or even mere gossip.

Tradition can explain but normally cannot repeal a Qoranic text. For an exceptional case see p. 167.

Witticisms, both kindly and sardonic, concerning the law and the state of Moslem society are fathered on the Prophet and his companions in the form of *hadith*, the authors of *bons mots* in Islam as elsewhere preferring anonymity; e.g. pp. 35–6; 129; 203.

The Word of God and the Traditions are the *usul-ul-usul*, the bases of the bases, or, as we might say, the historical or material sources of the law of Islam. No one can expect to understand that law without a considerable knowledge of them. But Muhammadan lawyers are emphatic in saying that though God has given us a revelation he also gave us brains to understand it; and he did not intend to be understood without careful and prolonged study. The word used for the highest degree of legal authority, *ijtihad*, means literally 'great striving'. The Qoran and the Traditions supply the matter of the law; the

[1] *Taqrib*, ibid., p. 484.

authoritative enunciation of the great *mujtahids* supplies its form A man who should attempt to enunciate Muhammadan law on a knowledge of the Qoran would be in exactly the same position as one who should attempt to enunciate English or Roman law from a knowledge of its materials without a knowledge of the form into which those materials have been cast by succeeding generations of lawyers. This is the pitfall against which Lord Hobhouse uttered a warning in *Abul Fata* v. *Russumoy*, 22 I.A. 76 (22 C. 619); but it is a pitfall from which (be it said with all due respect) his lordship did not altogether escape.

The authority of the *usul-ul-usul* is admitted by all schools of Moslem thought, even heretical; and the statement commonly made that either the Khawarij or the Shias reject the Sunna is entirely incorrect.[1] The latter, however, have their own collections of traditions, refusing to admit the authenticity of the Sunni collections, a refusal which was inevitable when Bokhari rigorously excluded all traditions having a Shia tinge, either of origin or doctrine (see next chapter).

3. The authoritative enunciation of the great *mujtahids* supplies, we have just said, the form of the law. Of this enunciation the most perfect kind is *ijma'a*, the universal agreement of the founders or sources of the law, preferably of all schools, but at the least of a single school. Malik ibn Anas, by a natural extension of the doctrine of the Sunna, had laid great stress on the custom of Medina in his own time as evidence of the practice of the Prophet and his companions in Medina a hundred and fifty years before. The next step was easy: the universal practice of Islam as expressed in the unanimous opinions of those who have studied the law is also evidence of the approval of the Prophet and therefore infallible. 'My people', the Prophet was represented as saying, 'will never agree in a lie.'[2] But the agreement required is that of the sources, the founders of the law schools. It is a *de facto* agreement, for no general councils or meetings of great lawyers to decide disputed points were ever held. The idea that there might perhaps be *ijma'a* at any later date is one of the suggestions put out by Islamic modernism.

[1] Goldziher, *Dogme et Loi de l'Islam*, pp. 193, 194).

[2] Just as a *hadith* is produced to consecrate *ijma'a*, so also *ijma'a* is one of the reasons for preferring Bokhari to Muslim (*Taqrib*, p. 484, notes).

The most famous doctrine resting on *ijma'a* only is in the law of *waqf*: 'The direction of the founder is as an express text of the lawgiver.' [1]

4. *Qiyas*, analogy: argument from the known to the unknown: the use of man's reason in developing and bringing out every implication of the commandments in the Qoran and the Sunna. The Prophet is represented as having approved the words of Mu'izz, a newly appointed provincial governor who said that in default of revelation or exact precedent from the Prophet's own practice he would rely on his own reason to deduce a rule and to deal with any difficulties which might arise. Inevitably, until the law hardened into a settled system, the great lawyers of all schools were forced to rely upon their own reason. The Hanafis did so more freely than the other schools (see next chapter, *ahl ul rai*, *ahl ul hadith*); but all were anxious in varying degrees to prevent jurists from legislating on the basis of personal opinion without reference to the material sources.

In addition to *qiyas*, however, Abu Hanifa recognized what he called *istihsan*, commonly translated 'preference'. The root meaning of the word is 'a desire for beauty (*husn*) or symmetry'; and as the doctrine was one of the removal of discrepancies or inequalities in the law *elegantia juris* would perhaps be a better translation. The aristocrat Malik, speaking with authority in the City of the Prophet, was not afraid to introduce public policy (*maslihat*, *istislah*) as a source of law. Shafi, whose object was to reconcile the two schools, though he merely succeeded in setting up a third, propounded the doctrine of *istishab*,[2] or concordance, according to which a practice once proved to be widespread may be presumed to be both ancient and still continuing. The logical connexion of this with Malik's insistence on the custom of Medina is obvious.

Every rule of the system partakes of the sacred character of the whole. Even though its connexion with the Qoran or the traditions may be far from obvious it is felt to be part of the logical consequences of divine revelation. Thus the system as a whole, and no one part of it more than any other, is, in Maine's sense, a system of equity: 'a set of principles invested with a higher sacredness than those of the original law and demanding

[1] See ch. xxvi, p. 218. [2] Aghnides, p. 103; Goldziher in V.O.J. (i) 228.

application independently of the consent of any external body.'[1] Like other systems of equity, it is addressed to the individual conscience and acts *in personam*; see above, p. 1. It differs from other systems of equity in that it is not content to exist alongside the original law which it supersedes, but either abrogates or absorbs it.

This fact explains the rapidity with which Muhammadan law reached its full development and the rigidity which has ever since been its marked characteristic. Within three hundred and fifty years of the *Hijra* a complete Corpus Juris was evolved. From that day to the present it has not changed or been added to in any essential. As Maine says:[1] 'A time always comes at which the moral principles originally adopted have been carried to all their legitimate conclusions, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal.' The phenomenon is the same in Muhammadan law as in other systems; but its consequences have been more serious, for the claims of divine revelation are all-embracing and preclude the acceptance of new streams of legal thought; also because Muhammadan law is exceptionally free from fictions, and was unable to have any considerable recourse to the device of changing the spirit while leaving the letter of the law untouched.

The great *mujtahids* themselves fought against this coming rigidity. Shafi has several warnings about it; and even Ahmad b. Hanbal, staunch conservative though he was, is credited with two sayings: 'The gate of interpretation will be open so long as Islam shall endure,' and 'Draw your knowledge whence the Imams drew theirs, and do not content yourself with following others, for this is certainly blindness of sight.'

In spite of these warnings the fact of rigidity came to be generally recognized, and was spoken of as the closure of the Gate of Interpretation, *sadd u'l bab u'l ijtihad*, and an artificial account of it was elaborated. We are told of seven classes of law professors, of whom the first three have *ijtihad* in descending degrees,[2] and the last four are mere copyists, *muqallidun*,[2] even the latter humble title being denied to the lawyers of to-day. Such

[1] *Ancient Law*, ch. 2.

[2] cf. St. Matt. vii. 29.

meticulous classification is unreal, and modern writers have even suggested that a *mujtahid* of the first class might still arise. They prefer to speak of *insidad*, a closing which can be reopened. The Shias have never admitted the closure, though their law is in fact as rigid as the Sunnis. It is only by comparison with other systems of law that we arrive at a just appreciation of the phenomenon.

Nevertheless, it would be incorrect to suggest that the law has been devoid of growth or life since the Closure of the Gate. The writers to whom we habitually refer, such as the authors of the *Hedaya* and the *Minhaj* and their commentators, were almost all of later date. They were lawyers of great insight, and many of them have left their personal mark upon the law. 'Cases of first impression' do not cease to occur, and must be decided somehow. In addition to formal treatises, we have a long line of collections of *fatwas*, or answers of the learned to actual and hypothetical questions. But these *responsa* are sometimes rather a source of confusion, for the *mufti* never gives his reasons; and the authorities, notably the *Hedaya* and the *Mejelle*, contain examples based upon bygone decisions, from which it is very difficult to discover the actual decision, the rule being obscured rather than illuminated. For the restricted province allowed to human legislation, custom, and changing conditions, see next chapter.

CHAPTER II

# SCHOOLS OF LAW

THERE are at the present day four Sunni, or orthodox, Schools of Law: the Hanafi, Maliki, Shafii, and Hanbali. Of unorthodox schools in the direction of extreme puritanism (*Khawarij*, seceders) one remains, the Ibadi. Of unorthodox schools (*Shia*, sectaries) tending to a more emotional religion there are traditionally said to be two-and-seventy. In tropical Africa the Hanafi, Maliki, Shafii, and Ibadi schools, and at least three different varieties of Shias, are all common; other types may perhaps be encountered occasionally.

## A. THE SUNNI SCHOOLS (*and Ibadis*)

### i. *The Hanafi School*

(a) *Distribution.*

The oldest in time, though reputed the least archaic in outlook. It is the school followed by the immense majority of Moslems in India, Asia Minor, Palestine, and Cyprus. But in the continent of Africa it is confined to Indian and other immigrants and to an official predominance in the territories of the late Ottoman Empire as having been the school favoured by the ruling dynasty. Thus in Egypt, though the large majority of the inhabitants are of the Shafii persuasion, the state code of personal law is Hanafi; the Qadis and the Chief Mufti are Hanafis. The same code has been introduced into the Sudan by the Anglo-Egyptian administration, though the native population professes the Maliki doctrine.

(b) *Early history; Abu Hanifa.*

The Hanafi school takes its name from a name of honour given to its founder, Nu'man b. Thabit, who was styled *Abu Hanifa* (literally, father of upright religion), and is also referred to as the *Imam 'Azam*, the great or excellent law teacher *hors concours*. The son of a freedman, of either Syrian or Persian descent, his origin contrasts with that of the other great founders of law schools who were without exception pure Arabs. Having steadily refused judicial office, and confined himself to the more

honourable employment (as he regarded it) of *ijtihad*, he died A.H. 150.

(c) *The Two Disciples: Abu Yusuf.*

He was succeeded by 'the Two Disciples', Abu Yusuf Ya'qub al Ansari and Imam Muhammad as Shaibani. Of these the former was Qadi of Baghdad and eventually Qadi of Qadis (*Qadi-ul-quda*) or Chief Justice, a post created for him by Harun-ar-Rashid. His judicial career lasted from A.H. 166 to A.H. 182. To speak of him merely as a time-server on the strength of such evidence as is provided by the *Arabian Nights* is unfair. On one occasion at least he is known to have given judgement against the Caliph in favour of a Christian. His *Kitab-ul-Kharāj* (Book of the Land Tax) [1] renders the fiscal exactions and powers of the State less arbitrary, and remains the basis of the land law and of the law of religious status in the provinces of the late Ottoman Empire and even, though more remotely, of Indian land-revenue law at the present day. By his recognition of *waqf ala'l aulad* he provided a means of escape from the unpractical nature of the Muhammadan law of inheritance as well as a defence against arbitrary power. Doctrines ascribed to him bear the mark of the practical lawyer and man of affairs.

(d) *Muhammad as Shaibani.*

Muhammad as Shaibani held minor judicial office, but resigned it and refused worldly promotion in order to confine himself to *ijtihad*. A keener dialectician than Abu Yusuf, his doctrines are apt to be more complicated and less practical; though to this there are some exceptions, e.g. his recognition of custom in relation to the *waqf* of movables.

(e) *Differences between the three founders.*

Abu Hanifa's work survives only in the copious quotations and references of his followers: of Abu Yusuf one complete work is extant, the *Book of the Land Tax* mentioned above. Several works of Shaibani are known to survive in whole or in part, the principal being entitled *Jami-us-Saghir*. It is commonly said that where the three great founders of the Hanafi School differ the rule is to take the opinion of the majority, but that Abu Yusuf

[1] Trans. into French by Fagnan, Paris, 1921.

will outweigh either Abu Ḥanifa or Shaibani alone. Although this rule is laid down, it is by no means always followed; and for European students a safer rule is to follow the later history and endeavour to ascertain from succeeding authorities what if any is the settled doctrine of the school.

The differences of opinion which on some points separate the Two Disciples from each other and from their master are at least as great as those which separate them from the heads of the other three schools. Nevertheless, the Hanafi school is a single school with a single history, and has achieved something like unanimity in spite of the differences of its founders. In the beginning a sharp line of cleavage existed between it and the other schools, the Hanafis being styled *ahl-ul-rai*, or people of opinion, by their opponents, who arrogated to themselves the title of *ahl-ul-hadith*, or people of tradition. The critics regarded the Hanafi use of *qiyas*, or analogical deduction, as merely a cloak for legislation on the basis of personal opinion; and in any case to impute man's logic to the Almighty is to make Him subject to the limitations of human mentality. The early Hanafis, in reply, suspected their opponents of fabricating tradition.

(f) *Characteristics.*

At Baghdad, at Delhi, and at Constantinople the Hanafi school has enjoyed from its foundation the continuous favour of Caliphs and Emperors. This favour and the statesmanship of Abu Yusuf make its doctrines on the whole more humane and practical than those of other schools, notably in the treatment of women, of *dhimmis* [1] and of *mustamins*.[2] The same practical character is noticeable in the recognition of human legislation, custom, and changing conditions as having some part.

(g) *Qanun*, *'urf* or *'adat*, and *zarurat*.

*Qanun*, probably the only word in the Arabic legal vocabulary which can be definitely said to be borrowed from Rome, signified at one stage of its Roman history administrative regulations by provincial governors within the limits of Imperial law: in

[1] Non-Moslem subjects of a Moslem prince. Originally only *kitabis* (including for purposes of public law but not of marriage Zoroastrians), the word was extended in India to include Hindus.

[2] Non-Moslem foreigners residing in a Moslem country under a guarantee of protection whether private or public, e.g. the Capitulations.

Hanafi law it signifies regulations by the earthly prince within the limits, at least according to orthodoxy, of the Law of God.

*'Urf* or *'adat.* The Hanafi attitude summarized in articles 36-45 of the *Mejelle* recognizes that custom 'when continuous or preponderant' has the full force of law within the limits of the sacred law. It also recognizes the importance of custom in the interpretation of contracts, and even in the interpretation of the law, going so far as to admit that 'with a change of times the requirements of the law change'. No great reform, however, has been based on this admission.

*Zarurat.* A more revolutionary doctrine is that of necessity. There are Qoranic texts which show that necessity is sometimes a valid excuse for the non-performance of religious duties. A mounted soldier expecting battle may say his prayers without dismounting to prostrate himself (but only if to dismount involves probable annihilation). If there were no other food in the world (the next step in the argument ran), a true Moslem might eat of unclean things to save his life. Therefore if there is no other means of financing our livelihood except such an infraction of the rule against usury as the *bai bi'l wafa* (see ch. xxiv) we may borrow and *e converso* lend on such terms. It goes without saying that this subversive doctrine has been but sparingly applied.

### ii. *The Maliki School.*

(a) *Distribution.*

The Maliki school predominates to the extent of being almost the only school in the whole of North-West Africa from Nigeria to the Gulf of Tunis. It has still a few followers in Upper Egypt, and is the old-established school in the Anglo-Egyptian, as in the Western, Sudan. A small colony of *Maghrabis* settled in Jerusalem are probably also Malikis in their private lives.

(b) *History.*

Abu Abdulla Malik ibn Anas was Imam of Medina 150 years after the death of the Prophet: he died A.H. 179. Medina was but little changed from the time of the Prophet, and in its conservative atmosphere this haughty aristocrat combined the functions of religious leader, public teacher, and judge. His work, the *Muwatta* (the Path made plain), a small collection of traditions arranged under legal titles with his own views and

decisions thereon, is probably the oldest work of Muhammadan law still extant. The founder of the *ahl-ul-hadith*, he nevertheless does not hesitate on occasion to use *qiyas* and even to propound his own opinion as authoritative.

The Maliki school was introduced into West Africa very early. Developing independently of oriental influence, this conservative school became for a time the most radical of all. Its doctors varied a perfunctory lip-service to tradition in the manufacture of apposite *hadith* with outspoken contempt; and based their system on the manuals of *furu'* (practice), the authority of which was admitted by their school. The immense respect which is paid to the *Mukhtasar* of Sidi Khalil b. Ishak (d. A.H. 769) is due in part to the fact that he harmonized these Western Maliki doctrines with those of the Maliki doctors of Egypt, and so with the general body of Islam. Averroes, the great philosopher, was a Maliki lawyer and judge (as also his grandfather with whom he is sometimes confused).

(c) *Characteristics.*

Perhaps the most outstanding characteristic of the Maliki school is the power of the head of the family over his wife's property and over his children. It is the only school in which a married woman is not completely mistress of her own property, and in which the *patria potestas* over adults of both sexes remains a reality. The combination of two streams in its history, one rigidly conservative and orthodox, the other innovating, has had, as might be anticipated, curious results in the law of contracts; its views on usury are of the sternest, yet it is the only school to recognize a debt as a legal thing. But the great teachers of the Maliki school were almost without exception judges and practising lawyers, and the prevailing tone of their work is therefore practical. They recognize custom perhaps more emphatically than any other school (*qanun* in West Africa has the same meaning as *'urf* and *adat*). Khalil says 'customary law has the force of law', and Al Wansharisi 'Ancient custom should if possible be brought under one of the known rubrics of law, but is valid even when it cannot be so brought'. Much good work has been done by the French in investigating local customs in their territories as well as in editing the texts.

### iii. *The Shafii School.*

(a) *Distribution.*

In spite of the 'establishment' of Hanafi law, Egypt is and always has been the great home of Shafii doctrines, and the majority of Egyptian Moslems are Shafii. The school also predominates throughout East Africa, Southern Arabia, the Malay Peninsula, and the East Indian Archipelago. It has adherents also on the southern coasts of India and in Ceylon.[1]

(b) *History.*

Imam Muhammad b. Idris as Shafi'i came of the Bani Hashim, being through his father a collateral and through his mother a descendant of the Prophet. (Hanafi rivalry has a story that he was only the son of a freedman of the Bani Hashim, as Abu Hanifa was the son of a freedman.) He studied at Medina under Malik and at Baghdad with the disciples of Abu Hanifa, and conceived the idea of harmonizing their two schools. He is the first Moslem scientific writer on jurisprudence whose work has survived, and he has even been estimated as one of the world's greatest lawyers. His followers sometimes distinguish between the doctrines of his early period, when he taught in Baghdad, and those which he held after his migration to Cairo. In the latter city he died, and his tomb is still an object of reverence. From that day to this a succession of famous teachers have expounded his doctrines in Cairo, and in the great Mosque of Al Azhar Shafii teaching has preponderated. The only other country which has produced Shafii writers of eminence has been Southern Arabia. A commanding position is occupied in the literature of the school by the treatise called *Minhaj-u't-Talibin*, by Imam Nawawi (d. A.H. 676). Of the three great commentaries on this (see bibliography) two are by Egyptian and one by a South Arabian writer. All three are quoted indifferently in East Africa; see e.g. *Re Abdul Gafoor*, 1 Z. 575; and in *Joha* v. *Iki*, 4 E.A. 27. Hamilton J. discussed a difference of opinion between the Egyptian and Arabian authorities, and held (agreeing with the Shaikh ul Islam) that in such a case a judge could choose between his authorities for himself. Of modern writers

[1] Subject in Ceylon to a code based on local inquiry.

Ibrahim al Bajuri, who was Rector (*Shaikh*) of Al Azhar and died A.D. 1861, enjoys an almost classical reputation.

The Shafii school, being in force in the Dutch East Indies, has long been studied in Holland, more especially in the University of Leyden, which holds the same distinguished position in Islamic scholarship to-day that it held in the time of Sir William Jones.[1] In recent years the Dutch under the lead of Snouck Hurgronje have also made very careful study of the customary law in their Muhammadan dominions.

(c) *Characteristics.*

Shafii doctrines are definitely less favourable[2] to women than either the Hanafi or the Maliki. With a very keen dialectic and a somewhat more academic tone (as having had much less to do with the practical problems of government), the school is uncompromising in its attitude to custom. Custom has had its revenge; and wherever Shafii doctrines predominate a large and flourishing body of custom exists alongside the law.

### iv. *The Hanbali School.*

Of the Hanbali school very little is known. No Hanbali work of authority appears to have been translated into any European language. Ahmad ibn Hanbal himself (d. A.H. 240) was a voluminous collector of traditions and a conservative of unreasoning reverence in matters of religion, and the school named after him can hardly be said to have been founded until after his death. A certain Abdul Wahhab in the eighteenth century A.D. inaugurated a puritanical reform in the Arabian kingdom of Nejd, and his followers, the Wahhabis, who now rule Nejd and the Hajjaz, are the principal exponents of Hanbali doctrine. A few Hanbalis exist in Palestine, and the modern Indian *ahl-ul-hadith* or *ghair muqallidun* derive their puritanism from Wahhabi missionaries of about 70 years ago. In purely legal questions these Indian *ahl-ul-hadith* are Hanafis.

### v. *The Ibadi School.*

As early as the reign of the Caliph Ali a body of puritans called by the name of *Khawarij*, or Seceders, split off from the general body of Islam, holding that the office of Imam and Commander of the Faithful must be filled by the worthiest, and

[1] Fourth Discourse, 15 Feb. 1787.

[2] With one exception; see p. 81.

apparently believing in some primitive form of election and even of 'recall'. They were among the earliest Moslem invaders of North-West Africa, where they had at one time two considerable kingdoms. Under the name of Ibadi (from Abdulla ibn Ibad, an early teacher) one sect of them survives to-day in parts of Algeria, Tunisia, and Tripoli, in Muscat, and East Africa. In North-West Africa they are governed by an ancient republican system and hold themselves socially aloof from other Moslems. In Muscat also the sentiment is predominantly republican and separatist, and the present reigning house is said to owe its continuance to British support. The sultanate of Zanzibar is held by the same family; and East African Ibadis, being all connected with it,[1] are royalists—a fact which has brought them into closer sympathy with orthodox Sunnis than elsewhere.

They recognize the authority of the Qoran and the Sunna, including the authority of the first two Caliphs as Caliphs and of Othman and Ali as prominent companions, whose decisions they accept. In *Shawana* v. *Ali*, 3 Z. 6, the Ibadi Qadis rested their decision on an *ijma'a* of all schools. There may be a few genuinely ancient, as there are certainly some deliberately archaic elements in their *fiqh*; but the great bulk of their *fiqh* literature is admittedly modern; and there are very few law points on which they do not agree with one or other of the Sunni schools. In Zanzibar courts Shafii and Ibadi Qadis adjudicate side by side, and regularly quote each other's works of authority to illustrate their own doctrines. The decision in *Hamed* v. *Sadha*, 1 Z. 398, places the Ibadis in East Africa on the local footing of a fifth Sunni school.

Some caution is probably necessary in applying legal doctrines of Algerian Ibadis in Zanzibar.

'DIVERSITY OF OPINION AMONG MY PEOPLE IS A MERCY FROM GOD.'

This apocryphal but salutary *hadith* embodies the catholicism of Islam. The Sunni Sects admit one another's orthodoxy: their expounders tread the same narrow path, giving the same classifications and definitions, and propounding not very dissimilar answers to identical problems. It follows that where one school is silent regarding a legal difficulty we may with due caution

[1] But the local history of the sect is older than the sultanate.

have recourse to another—a common practice, as already noted in East Africa;[1] and a Qadi of one school will recognize as *res judicata* and may be asked to enforce the decree of a Qadi of another school.[2] A more important result is the ease with which a believer may transfer his allegiance in whole or in part from one orthodox school to another.

The duty of a believer is *taqlid*, to follow (literally to copy) the doctrines of an Imam. Normally a man's law is personal and hereditary. He is a Hanafi or a Maliki because his ancestors were so, and he will normally take his ancestral law with him on a change of domicile: *Fazalan* v. *Tehran*, 8 E.A. 200, F.B.; *Fatmabai* v. *Md. Ladha*, 6 T. of 1928. But the presumption of his doing so is not a strong one when he goes to new surroundings and associates who do not practise that law, and accordingly it may easily be rebutted in favour of the local law: see *Abdur Rahim* v. *Halimabai*, 43 I.A. 45, and Palgrave, *Central and Eastern Arabia*[3] (writing of Muscat)—'Among the Sonnees we must reckon the natives of Beloochistan, Bokharah, Balkh, and the neighbouring provinces. Hanafis in their own land, they are here Shafiis in compliance with the wealthier Mahometans from Basrah and the West.'

Change of doctrine may be partial, to escape an inconvenient rule of law of one's own school. Thus Shafii women who desire to defeat the rights of their marriage guardians do so by professing their conviction of the correctness of Hanafi doctrine in this respect—a practice which has been recognized as valid in the Dutch East Indies,[4] in the Straits Settlements,[5] in Bombay,[6] and in Southern Arabia.[7] The same principle has been applied in Zanzibar to an Ibadi girl following Shafii doctrines.[8] In Northern Africa Malikis and Shafiis often make *waqf* by Hanafi law in order to retain enjoyment of the property for life. But a *Qadi* acting judicially must always follow the same school; and a private litigant cannot mix the law of two schools in a single transaction.

[1] But caution is needed in accepting the statements of one school about the doctrines of another. Even the *Hedaya* is not always reliable when quoting Shafi or Malik: and Averroes, the philosopher, is particularly unreliable in this respect.

[2] Zeys and Sidi Said, no. 22.

[3] 3rd ed., vol. 2, ch. 17, p. 366.

[4] *Achehnese*, i. 344.

[5] *Salmah* v. *Soolong*, Kyshe, Civil i. 421.

[6] *Md. Ibrahim* v. *Gulam Ahmed*, 1 B.H.C. 236.

[7] *Mekkawi*, ii. 263.

[8] *Hamed* v. *Sudha*, I.Z. 398.

There is no interchange, for there is no admission of common orthodoxy, between Sunnis and Shias. Nevertheless, except where they have been coloured by political theory or a particular view of history, Shia legal doctrines do not greatly differ from Sunni; and an outward submission (*taqiya* prudence, *kitman* secrecy) to a prevailing Sunni political and legal system is recognized by both Ismaili and Ithna Asharia law: see the *Agha Khan* case, 12 B.H.C. 323; 1 Z. 630.

### B. THE SHIA SCHOOLS

The word Shia, a party or sect, denominates those who believe that the leadership of the faithful descended of legal right to Ali on the death of Muhammad and remains imprescriptibly vested in the descendants of Ali and Fatima. Ali and Fatima had two sons, Hasan and Husain.[1] The descendants of the elder have ruled for centuries as sultans and caliphs in Morocco and the West and also as local chieftains in the Hajjaz; but they have always been orthodox Sunnis. The martyrdom of the younger son, Husain, at Kerbela, introduced a new religious note into Islam,[2] and the Shias are followers of the house of Husain. During the period in which their *fiqh* developed they were always a minority and in opposition; and the Shafii school, which was not favoured by the Baghdad caliphs, is the Sunni school on which they have most frequently drawn.[3]

#### i. *The Zaidis.*

Imams tracing their descent from Zaid, grandson of Husain, have ruled at Sana'a in Southern Arabia since A.H. 280. The present Zaidi Imam welcomes commercial relations with the outside world, and cases involving his subjects may perhaps arise in Aden and the East African ports. The Zaidis admit the caliphate of Abu Bakr and Omar. Sunnis in private law, Shias in political theory, their *fiqh* is interesting as the half-way house between Sunni and Shia doctrines, and is referred to in chh. xv to xviii below as essential to understanding the historical development of Shia inheritance.

[1] Also a third son who died young, and a daughter.

[2] See Goldziher, *Dogme et Loi*. p. 194.

[3] cf. Burton, *Pilgrimage*, ch. iv. and *Encyclopaedia of Islam*, Art. Shia.

### ii. *The Ismailis.*

Zaid's nephew, Imam Ja'far as Sadiq (d. A.H. 148) is the reputed founder of Shia *fiqh*. He had two sons, Ismail and Musa, of whom the elder, Ismail, predeceased him, leaving a son, Muhammad. Contrary to the most universally accepted rule of Muhammadan law, the Ismailis (of whom the most famous were the Fatimi Caliphs of Egypt) assert the title of Muhammad b. Ismail and his descendants to the Imamate in competition with Musa. Of their *fiqh* nothing is known, though Mr. Tyabji, himself an Ismaili, mentions a treatise named *Da'ayam ul Islam*.[1] It appears to be Mr. Tyabji's opinion, as well as that of the French authorities in Syria, that Ismaili and Ithna Asharia law, the Ja'fari rite, are the same. The Bohras, Khojas, Druses, and many minor sects are of Ismaili origin.

### iii. *The Ithna Asharias.*

Followers of a line of twelve Imams, of whom Musa is the seventh and the twelfth is hidden and will some day reappear, they predominate in Persia and Oudh, and are numerous in the Nizam's dominions. A section of Khojas in East Africa have in recent years joined themselves to this sect.

For principles of Shia *fiqh* see above, pp. 6, 9; and ch. xvii. They reject *in toto* the authority of the caliphs Abu Bakr, Omar, and Othman, and they also reject Sunni traditions relating to Ali, since these traditions have the effect of representing him either as the lieutenant or the successor of the first three caliphs. They have their own collections of traditions, an essential step in the pedigree of any tradition being that it should be traced through one of their Imams, usually Ja'far as Sadiq. The authoritative position which they assign to the Imam as the living source of law makes *ijma'a* and *qiyas* alike unnecessary, though they admit occasional instances of the former. The title *mujtahid* is not confined to bygone lawyers, but is the common title of their religious leaders to-day.

## C. MEMONS, SURTIS, BOHRAS, KHOJAS

Drawn from Gujarat and Kathiawar and Cutch, these powerful communities are usually held to be Hindu castes converted *en masse* to Islam. Members of one or more of them will be

[1] Tyabji, *M.L.*, p. 34.

found in every large trading centre throughout the tropics. They are particularly numerous in Zanzibar, Dar-es-Salam, and Mombasa. Their law is ordinary Muhammadan law, except so far as they may have retained Hindu usages. The Memons and Surtis (including in the latter term the Sunni Bohras) are Sunnis; the Bohras and Khojas are Shias, and, except for the modern split in the latter community, Ismaili Shias.

(a) *The Sunni communities.*

In view of the decision in *Abdur Rahim* v. *Halimabai*,[1] and of their own well-known desires for many years, these communities may safely be regarded outside India as orthodox Hanafi Sunnis. The unfortunate description of the Memons in that ruling as 'Hindus following Muhammadan law' is mere accidental surplusage. Even in India it has never been suggested that these communities followed Hindu law or usage, save to a very limited extent in the matter of inheritance; and in that connexion it is probable that the case of the Memons suffered from being confused with that of the Khojas.[2]

Caste exclusiveness is, of course, entirely contrary to Sunni orthodoxy. Nevertheless some relic of caste feeling has occasionally come before the courts in the shape of a desire for the exclusive control or management of a mosque or graveyard. Such cases have been decided without any reference to caste: see *waqf*, ch. xxvi, below, p. 221; and see also *Alias* v. *Ismail*, 1 Z. 30, where a burial ground established by two subcastes of Memons 'for their caste relations belonging to the religion of the Iman Hanafi'[3] was held to be open to all Indian Hanafis in Zanzibar (the possibility of still wider use was not in issue).

(b) *The Shia communities.*

(*Shia Bohras, Khojas, Ithna Asharia Khojas.*)

The first two of these are Ismailis, and in spite of the partial retention of Hindu belief and usage by the Khojas maintain

[1] 43 I.A. 35; 6 E.A. 113 (l.c. 5 E.A. 34 and 130); 1 Z. 669; 18 B. 635; 20 C.W.N. 362.

[2] For India, see *Hirbai* v. *Gorbai*, 12 B.H.C. 294 (Cutchi Memons); *A. G. Bombay* v. *Jinjiabai*, 41 B. 181 (Cutchi Memons; the principal case). The Cutchi Memons Acts 1920 and 1923; *Khatubai* v. *Md. Haji Abu*, 50 I.A. 108; 47 B. 146 (Halai Memons); *Bai Baiji* v. *Santok*, 20 B. 57 (Sunni Bohras).

[3] *sic.*

close relations with Ismaili communities of the same persuasion as themselves in other parts of Asia and Africa. Hindu caste exclusiveness is intensified by Ismaili particularism and by the absolute submission to a religious head.

(i) *The Bohras.* Followers of Musta'ali, the younger son of the Fatimi caliph Mustansir.[1] Nothing is known as to how such a community came to be established in India; and many Bohras deny the alleged Hindu origin of their sect, preferring to derive its title from an Arabic root meaning 'They escaped'. The name which is commonly pronounced in India *Bohri*, is in the latter form the same as that of a small caste of Brahmans, and is said to be derived from the Sanskrit *vyavahar-i* through Hindi and Gujarati forms, in the sense of 'men of affairs', merchants. Old-fashioned Bohras still sometimes use the Hindu merchant's title, 'Seth'. They are divided into numerous subcastes, of which the Daudi and Sulaimani are the most important. Their religious head in India[2] is styled *Sayadna Mulla* and has his head-quarters at Surat. Whatever may be the truth as to their origin or their religious tenets, there is no ground for supposing that they retain any vestige of Hindu law except in the matter of caste organization. Until recent years they have kept conspicuously clear of litigation. But since about 1910 there have been acute religious differences between a modernist and a conservative party, and frequent excommunications of prominent Bohras. Litigation is pending, from which we may perhaps learn more of their tenets.

(ii) *The Khojas.* The name is a corruption of the Persian *Khwaja*, a lord or master, and is used as the equivalent of the Hindi *Thakur* for the title of a Muhammadan sect which retains much more of Hindu belief and usage than any similar body of converts. They are followers of H.H. the Aga Khan, the lineal representative of the Shaikh ul Jabal, the 'Old Man of the Mountain', and Chief of the Assassins at the time of the Crusades. An Ismaili missionary, Pir Sadr Din, some five hundred years ago, converted them by putting a Muhammadan construction on the Hindu doctrine of the ten incarnations of Vishnu;[3] and the resulting hybrid, the Dasavatar, became the sacred book, to

[1] Tyabji, *M.L.*, p. 34; Lammens, p. 161.

[2] The supreme head is a shadowy potentate said to reside somewhere in Southern Arabia.

[3] Dubois, ed. 1906, p. 616.

the practical exclusion at one time of the Qoran.[1] They commonly bear two names, one Muhammadan and the other Hindu, e.g. Abdulla Visanji or Qasim Premji; but it would probably be correct to say that under the present Aga Khan the Hindu element in their faith and life is becoming less marked. For specific differences alleged between Khoja and ordinary Shia law, see below under Marriages, Second Marriages, Inheritance, Wills, and Gifts.

*Ithna Asharia Khojas*

A large section of the Khojas split from the main body some thirty or forty years ago, calling themselves Subhanya or Ithna Asharia Khojas.[2] Although they still professed to reverence the Aga Khan they were outcasted by him in person in 1899, and have been a separate community ever since. The outcasteing of an Ismailia Khoja on his becoming Ithna Asharia was regarded in *Nanji Jiwa* v. *Jesuda Versi*, 1 Z. 351, as sufficient excuse for his wife refusing to live with him. He had, however, at the date of the suit rejoined the Ismailia fold. For many years the Ithna Asharia Khojas made a practice of directing by will that their estates should be disposed of 'according to the law of Muhammad the Prophet of God' (see *Nasur Jesa* v. *Hirbayu*, 1 Z. 14. It is not clear whether this was an Ithna Asharia or an Ismailia case). And in *Shumbana b. Juma* v. *A.G.*, 3 Z. 51, it has now been held, following *Abraham* v. *Abraham*, 9 M.I.A. 195, that the custom governing their succession and inheritance by Hindu law has fallen into desuetude, and that they are in all respects governed by Muhammadan Shia law. Their position as a separate community is also recognized in the Zanzibar Marriage and Divorce (Muhammadan) Registration Amendment Decree, No. 34 of 1925. Shumbana's case has been distinguished as regards Ismailia Khojas in Tanganyika *in re Kassim Premji*, T. 5 of 1928, also *Fatmabai* v. *Md. Ladha*, T. 6 of 1928. In *Allarakhia* v. *Lakha*, 1 Z. 119, a further split arose within the Ithna Asharia community, apparently on a question of caste exclusiveness *vis-à-vis* other Ithna Asharias not of Khoja descent.

[1] See *A. G. Bombay* v. *Md. Husen Aga Khan*, 12 B.H.C. 322, 1 Z. 630; Lammens, ch. vii; Wilson's *Digest* (Introduction); Macdonald, *Muslim Theology*, p. 49.

[2] See *Sakinabai* v. *Allarakhia*, 1 Z. 44.

*Caste organization and Outcasteing*[1]

Primarily a Hindu question, but important to Ismailis[2] whom excommunication may deprive of every decency of life and death, even proper burial. The courts must steer between condoning injustice and interfering with religious liberty, which implies liberty of religious tribunals to enforce their own discipline. The English law of clubs is the law applied.

i. The court will not ask 'Are the tenets of the caste reasonable?'[1] but only 'Are its objects lawful?'

ii. For these objects the caste may lawfully restrain its members from a lawful act; e.g. widow remarriage[3] or 'interdining';[4] but it may not constrain to illegality or immorality.[5]

iii. No man's company can be forced on those to whom (no matter why) it is unwelcome; no suit for restoration to caste.[1]

iv. Similarly, a caste having, *on good grounds*,[6] expelled a member may ask the court to uphold its order by injunction.

v. *Civil* and *property* (not merely social) rights are protected:

(a) *Natural justice*, primarily a question of procedure: e.g. none may be condemned unheard[7] or without definite accusation and due notice: the tribunal must be duly constituted;[8] not vindictive[9] nor corrupt. *Remedy: Damages.*

(b) *Civil Reputation*[3] apart from caste. *Remedy: Damages.* Caste tribunals have privilege,[10] but lose it by bad faith.

(c) *Property. Remedy: Restoration to Possession*,[11] e.g. the caste may be restrained from preventing access to a caste temple,[10] use of caste furniture,[4] or burial in a caste graveyard.

vi. The caste constitution, being autonomous and unwritten, may be altered from time to time: *Lalji* v. *Walji*.[4] But see the *Aga Khan* case:[2] cf. *Free Church* v. *Overtoun* (1904) A.C. 515.

[1] *Nathu* v. *Keshawji*, 26 B. 174, 1 Z. 127, the principal case; cf. *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615.

[2] *A.G. ex rel. Daya Muhammed* v. *Md. Husain Aga Khan*, 12 B.H.C. 322, 1 Z. 630; cf. *Sakinabai* v. *Allarakhia*, 1 Z. 44; *Allarakhia* v. *Lakha*, 1 Z. 19.

[3] *R.* v. *Sankara*, 6 M. 381.

[4] *Lalji* v. *Walji*, 19 B. 507; and *Nathu* v. *Keshawji*.

[5] *Ghasiti* v. *Umrao*, 20 I.A. 193.

[6] *Appaya* v. *Padappa*, 23 B. 122.

[7] *Krishnasami*, 10 M. 133, *Vallabha*, 12 M. 496; but see *Nathu* and *Appaya*.

[8] *Young* v. *Ladies' Imperial* (1920), 2 K.B. 523; *Rama* v. *Sivagnanam*, 51 M. 68.

[9] *Jagannath* v. *Akali*, 21 C. 463.

[10] *Ganapati*, 17 M. 222, *Vallabha*, 12 M. 496, and note 1, above.

[11] *Rigby* v. *Connol*, 14 Ch.D. 482.

CHAPTER III

# JURISPRUDENCE—GENERAL QUESTIONS

## A. LAW AND CUSTOM

MOSLEMS obey their sacred law, when they do obey it, because they believe it to be the divine command. We administer it because and in so far as it satisfies them. For them it has a divine, for us a customary, sanction. But peoples and tribes on accepting Islam have not necessarily accepted, or even heard of, the whole of the *Sheria*, and much injustice may be done by applying its provisions to them without clear information on this point. Survivals of previous law are particularly common in the law of inheritance: for the principles which may guide the court in accepting evidence about them see *Ahmad Khan* v. *Channi Bibi*, 52 I.A. 379 (a case of Punjab agriculturists, among whom such survivals are well known).

But a purely immoral custom definitely repugnant to Islam will not be tolerated, whether as a survival or on any other ground: see *Ghasiti* v. *Umrao Jan*, 20 I.A. 193; 21 C. 149. This is of importance in tropical Africa, where customs such as *kogwika* (5 E.A. 115) and *ayefaru* (see Danquah's Akan Law) are possible for a pagan but not for a Moslem.

Further, the Sheria, in matters of property law and obligations, has rarely if ever been enforced in its entirety,[1] though it has always had its influence on the custom of the markets and has seldom been openly denied.

But once the extent to which Muhammadan law is in force in a locality or people is established it has the advantage of being a single ascertainable whole. Customs detracting from that whole must be specifically pleaded, and unless already judicially noticed must be proved in the same manner as customs detracting from English common law, i.e. they must be shown to be ancient,[2] definite, continuous, notorious, and

[1] Snouck Hurgronje, *V.G.* ii. 300–2, 318; *Achehnese*, ii. 277; Burton, *First Footsteps* (1st ed., p. 126).

[2] In India and the Colonies in spite of some early decisions no hard-and-fast time limit of ancientry is now accepted.

reasonable: see *Harprasad* v. *Sheo Dayal*, 3 I.A. 259, at 285,[1] and *Ramalakshmi Ammal*, Supp. I.A. 1;[1] and they must be shown to have been obeyed, not merely of choice, but as binding law (*Protap* v. *Jagadish*, 54 I.A. 289).[1]

### B. CONFLICT OF LAWS

Questions involving conflict of laws are particularly questions of marriage, divorce, guardianship, and contracts, especially those affecting immovables. For a detailed discussion, see under the respective heads.

The conceptions by which English or European lawyers are dominated in their approach to this subject are those of sovereignty, allegiance, nationality, and domicile, all of which are, in origin, alien to Muhammadan ideas. Although Islam has known many despots, it has always insisted that sovereignty belongs to God alone, and in theory has never conceded to any human being any greater right than that of enforcing His law and protecting and leading His people. Allegiance, as a counterpart of sovereignty, is due only to God. Nationality is impossible in a world-wide brotherhood, and domicile is unimportant beside religious belief, whether Moslem, *kitabi*, or idolater.

Residence imposes a duty of obedience to a ruler who observes God's law; and in conjunction with religious belief may confer rights. Where Muhammadan law is the *lex loci* it may affect even the rights of non-Muhammadan foreigners *inter se* in respect to immovable property.

### C. INTENTION AND FORMALITY. EVIDENCE

(a) Bokhari, Bk. 1, ch. 1, *et al. loc.* Omar b. Al Khattab said from the pulpit: 'I have heard the Messenger of God say, "Actions are judged by their purposes. No man shall receive credit but for the thoughts of his heart".' . . .

(b) Bokhari, 68, 33. The saying of the Prophet to a husband and wife who were separating by imprecation (*li'an*): 'You must settle your account with God, for one or other of you is lying.'

The first of these traditions refers to the divine judgement. To God the secrets of all hearts are open, and He will judge men accordingly. The second refers to the fallibility of human judgement in assessing human evidence.

[1] These are not Muhammadan law cases, but the principles are applicable.

These two traditions, of which the former is infinitely the weightier and more famous, express the attitude of Moslem law to a question which lies at the root of all jurisprudence—the question between intention and formality.[1] Being the law of God, it is based unswervingly on the criterion of intention. But it finds the difficulty of 'knowing what is in the heart of man'[2] enhanced at every turn by an inadequate and formal system of evidence. Some knowledge of this is vital to an understanding of Muhammadan law.

Northern Nigeria is the only territory under British control or tutelage where the Muhammadan Law of Evidence is still in force in its entirety. But it has only recently been repealed by the Evidence Enactments of the East African Territories (see especially Zanzibar Evidence Decree, sec. 2, and *Korshed* v. *Mwanate*, 7 E.A. 194). Many of the earlier cases turn upon it; and the Qadis, even now, continue to follow Muhammadan procedure, with which the Muhammadan law of evidence is inextricably mixed; nor is it always easy to demarcate procedure from substantive law: see below as to acknowledgements.

The principal rules are:

(a) There is no privilege of written over oral evidence, nor does the strict law admit such a thing as a dispositive document. True, Qoran, 2, 282, 283, recommends that where money is borrowed or a time is given for payment of money due the details of the transaction should be written down. But this has always been regarded as an aid to fallible human memory, and not as constituting the actual transaction; Ibadi legal theory is alone in recognizing dispositive documents.

The Qadi's or other official's warrant of appointment is not valid except as evidence that the appointment has actually been made by word of mouth by the Sovereign.[3] A written testament is of no value except as evidence of the actual words in which the testator word by word spoke his will.[4] A written deed of foundation of a *waqf* can only be regarded as evidence of the

[1] e.g. Holland: *Jurisprudence*, ch. xii; cf. Morand, Introduction, pp. 119, 120, and authorities there cited.

[2] Compare per Bryan C.J.: 'No averment will lie regarding the mind of man. For the devil himself knoweth not what is in the heart of man.'

[3] *Minhaj*, 65, 3, 503, and *Achehnese*, i. 333.

[4] *Mirathi*, p. 69.

verbal declaration which is essential to any act in law.[1] In *Ma Mi* v. *Kalandar Ammal* (II), 54 I.A. 61, and in other Indian cases, a distinction has been drawn between oral and written divorce; but apart from the Indian Evidence Act divorce or any other act in law, even though written, must be spoken in full. Even the judicial acts of a judge must be orally delivered in the presence of two witnesses.[2]

Writing having no special privilege, dispositions evidenced by writing, where they are capable of being revoked or modified, may be revoked or modified by word of mouth as easily as by writing.

(b) Every transaction must be proved: either

(i) By the formal acknowledgement in court of the person who is to be bound, or

(ii) By the evidence of two irreproachable witnesses, who testify either:

(1) To the fact itself, *or*

(2) To an acknowledgement of it by the party aforesaid.

Acknowledgement, *iqrar*, therefore, fills a large place in the Law of Evidence, and even makes inroads on the substantive law, since formal acknowledgements are used fictitiously to enlarge or to defeat the provisions of the substantive law: see ch. vii, Payment of Dower; ch. xi, Paternity; ch. xxi, Acknowledgement *mortis causa*, and particularly the cases there cited. The root idea is perhaps an ethical one—that no man should be allowed to retract his own deliberate statement. In *Abdi Nuri* v. *B.E.A. Corporation*, 3 E.A. 12, the decision rested on the English doctrine of estoppel: but the wider *sheria* rule was enunciated by the Shaikh ul Islam as follows: 'It is a maxim of Muhammadan law that when once a party to a suit[3] has deliberately and intentionally made a declaration or an admission he cannot afterwards retract it and profit by it. Such declaration or admission is binding on his heirs and would debar them from suing to recover property sold to a third party in accordance with such declaration or admission, even though the heirs were in ignorance of its having been made.'

[1] Per Karamat Husain J. in *Fakhruddin* v. *Kifayat Ullah*, 7 A.L.J. 1093.

[2] *Minhaj*, **65**, 1, 3, 505.

[3] But it makes no difference whether the acknowledgement was made in connexion with litigation or not.

The Cyprus Supreme Court has consistently refused to be bound by the formalism of the Muhammadan doctrine of acknowledgements. In *Harit Effendi* v. *Mullah Mostafa*, 10 Cyp. 16, and *Christophi Haji* v. *Haji Michael*, 10 Cyp. 41, the court would not endorse an acknowledgement, however valid, if given in pursuance of an agreement void in law, nor if given under such circumstances as to render it fraudulent or inequitable for the person to whom it was given to sue for its enforcement. See also cases, ch. xxi, p. 177, under Death-Sickness. In *Abdi Nuri's* case, the Indian doctrine of *benami* was considered. Under that doctrine evidence which has been created for the purpose of perpetrating a fraud may always be repudiated before the fraud has actually been perpetrated. Where, however, it has been perpetrated, and cannot be remedied, the court will not interfere: 'Let the property lie where it falls.'

(c) *Procedure.*

The parties before a Muhammadan court are the *muddai* (the *allegans* on whom the burden of proof rests, not necessarily the plaintiff), and the *muddaa alaih* (or opposite party). Elaborate rules exist determining presumptions—rules which are in the main founded on common sense, but are carried to a high degree of technicality. The *muddai* must bring evidence. If he does not, then the *muddaa alaih* is obliged to clear himself with an oath.[1] If the *muddai* has failed to produce evidence, and the *muddaa alaih* has refused to take the oath, the *muddai* gets still another chance. He may now take an oath, and his oath will be conclusive. [In the *li'an* procedure there are no witnesses, but each side takes a fivefold oath. That is purely a ritual procedure, and the court does not attempt to judge between them.] The parties are the only persons who are ever called upon to take an oath; witnesses are not sworn or cross-examined. An *amin* or a *wasi* is usually allowed to clear himself by an oath. Thus, in *Khamis* v. *Said b. Suleman*, 1 Z. 608–9, it was held that there was no provision in Muhammadan law requiring a transferee in a position of active confidence to prove that the transfer was made in good faith; all he need do is to take an oath that it was made in good faith.

[1] 'Evidence with claim, oath with denial', a maxim from pre-Islamic times.

(d) *Production of evidence.*

(i) A belief in his own evidence is an essential part of a witness's evidence, therefore ordinarily he must testify to his own observation. This is qualified as follows:

(1) He may give hearsay evidence of descent, death, marriage, and the authority of a judge, if he himself believes it. But the court looks at his own belief and not the source of his information. Therefore he must state the fact as a fact, and not the name of his informant.

(2) He may give evidence of an acknowledgement of the fact (*iqrar*; see above) made in his presence by the person whom it is proposed to render liable.

(ii) Any interest in the case, e.g. as a relative to one or other party to it, or even in an official capacity, will disqualify the person concerned from giving evidence. Thus in *Athman* v. *Ali and Kathi Suliman*, 6 E.A. 91, the Qadi gave a girl in marriage on the refusal of her lawful *wali*, duly brought before him, to do so. It was held that the Qadi was not competent to give evidence as to the correctness of a transaction before himself where the correctness of his own consequent action as a guardian was challenged.

(iii) No witness can be heard who is not *adl*—that is to say, known to be of irreproachable character. Cross-examination is unknown, and oaths are not taken from witnesses, because, their character being *ex hypothesi* irreproachable, oaths are superfluous. [See *addendum* on p. 33.]

The Qadi was expected to employ a *mozakki*, a confidential inquiry agent; and in spite of express prohibition in the *Minhaj*[1] the *udul* became official witnesses. They were necessary to testify to the acts of the judge. They could testify to the irreproachable character of others, and so introduce evidence on points of which they were not cognisant, and transactions naturally tended to take place in their presence. In Northern Nigeria they have developed into assessors of the court, and in Algiers and Morocco into *quasi* notaries public. Their irreproachable character has always been a butt for the humorists.[2]

(iv) In pure Muhammadan law no evidence can be accepted

[1] 65, 1, 4, 506.

[2] e.g. *Arabian Nights*, 343rd night. (The Chief of Police and the two perfect witnesses.)

against a Moslem except that of a Moslem; against a *dhimmi*, *dhimmis* will also be admitted.

(v) Two adult male witnesses are necessary to prove any fact[1] but women or boys may give evidence of matters which would not ordinarily be seen by grown men.[2] A criminal charge of adultery requires four irreproachable witnesses to the act.

(vi) Evidence can normally only be offered on one side of an issue, though there appear to be exceptions in Maliki law.

(vii) Formally perfect evidence binds the judge exactly as the verdict of a jury would do in England. Indeed it more nearly resembles the verdict of a jury acting on private information (as formerly in England) than evidence in the modern sense.

### D. COURTS AND THE APPLICATION OF LAW

Except in Gambia (Laws of Gambia, ch. 20) and Zanzibar (Zanzibar Courts Decree 1923, cap. 7), there are no definite enactments recognizing Muhammadan law; but its continuance in protectorates and mandated territories requires no recognition, and elsewhere is, at least so far as personal and succession law are concerned, a matter of justice, equity, and good conscience.

The extent to which the administration of Muhammadan law has been left in the hands of Muhammadan tribunals varies greatly, as does also the degree of control exercised over them by the Supreme Courts. In Zanzibar, Tanganyika, and Kenya the Muhammadan courts exercise jurisdiction over indigenous Muhammadans or Arabs in all matters of personal and family law and succession, but jurisdiction over British Moslem subjects from elsewhere (e.g. Indian immigrants) is normally exercised by the ordinary courts.

In order to exercise judicial functions a Qadi must be personally appointed by a ruler genuinely possessing supreme authority,[3] even though that ruler be non-Moslem.[4] There can be no question of an autonomous tribunal, nor of hereditary office. The Qadi will ordinarily administer the school of law to which he personally belongs.[5] A judge who belongs to no school, e.g. a European magistrate, may decide a case according

[1] Except the occurrence of the new moon which ends Ramadan.

[2] Hanafi law allowed women as witnesses on all questions in the ratio 2 = one man.

[3] *Minhaj*, 5, 1, 1, 501.

[4] *Achehnese*, i. 333.

[5] *Saleh Lalji* v. *Md. b. Ahmed*, 1 Z. 423.

to whatever school of law he thinks just.[1] *Sed quaere?* He should *normally*, it is submitted, abide by the school to which defendant belongs. Where Qadis belonging to different schools have concurrent jurisdiction, the plaintiff by choosing his court can also choose his law.[2] But this has been denied on the ground that he cannot compel the defendant to submit to his choice.[3] There is no limit to a Qadi's power to review his own orders.[4] **It is his duty in all cases to endeavour to bring the parties together in a spirit of friendly compromise.**[5] For the rule of *res judicata* see *Nasoro* v. *Selim*, 1 E.A. 77, and *Sheriff Abdulla* v. *Zuena*, 4 E.A. 86: and for the powers of an appellate court see *Bakari* v. *Mahomed*, 1 Z. 495; *Nasor* v. *Awena*, 1 Z. 542; and *Joha* v. *Iki*, 4 E.A. 27.

The Sultan or other head of the government can be sued in his own courts according to Muhammadan law, which does not recognize the theory that the king can do no wrong.[6] Omar himself and Harun-ar-Rashid are recorded to have been thus sued and to have submitted to decrees passed against them. But by section 6, Zanzibar Courts Decree 1923 (re-enacting in this respect the Zanzibar Courts Decree 1908), no suit can be brought either against the Sultan or any member of the Zanzibar Royal Family in Zanzibar without the permission of the British Resident.

In cases between Arab or African Moslems it has been held both by the Zanzibar and the Kenya Supreme Courts that the decisions of the Indian courts and the Privy Council on appeal from India, though 'of extreme interest for purposes of illustration and comparison', are not binding.[7] In such cases the Supreme Courts take the advice in Zanzibar of the Qadis and in Kenya of the Chief Qadi, who bears the title *Shaikh ul Islam*; but they are not conclusively bound by that advice.

In several cases the Supreme Courts have claimed (*obiter*) a

[1] *Brit. Res.* v. *Hafiz*, 1 Z. 526.
[2] *Nasor* v. *Awena*, 1 Z. 542.
[3] Morand, *Études*, p. 400.
[4] *Zwena* v. *Ahmed*, 1 Z. 563.
[5] *Ali* v. *Mwana*, 2 Z. 2; *Minhaj*, Bk. 5, sec. 2; Sachau, p. 703, l. 19; Hurgronje, V.G. 2, p. 406. Hence delays!
[6] *Brit. Res.* v. *Hafiz*, 1 Z. 526; but not in a British court (*Kesavji* v. *Lalji*, 1 Z. 93), where he is regarded as an independent sovereign. The distinction is narrow, since the same court sits both as a British and as a Sultan's Court.
[7] *Talibu b. Mwyaka* v. *Exors. of Siwa Haji*, 2 E.A. 33; *Shawana* v. *Ali*, 3 Z. 6.

jurisdiction as Courts of Equity to override the strict provisions of Muhammadan law where such provisions appear inequitable.[1] But there is no reported case of their exercising such a jurisdiction, though there are cases in which the judges were obviously not satisfied with the law which they declared,[2] and in *Seif* v. *Mohamed*, 3 Z. 21, Tomlinson C. J. said: 'The rules of the *sheria* are inelastic, and it is by the strict letter of the *sheria* that the case must stand or fall.'

[1] *Talibu* v. *Exors. of Siwa Haji*, 2 E.A. 33; *De Souza* v. *Pestanji*, 1 Z. 22; *Abdulla* v. *Abdulla*, 1 E.A. 11.

[2] *Athman* v. *Ali*, 6 E.A. 91. See also *Sidik* v. *Ima*, 6 E.A. 43.

## ADDENDUM

In Northern Nigeria a practice exists by which after a witness's evidence has been heard the court may tender him an oath as to any part of his statement which appears doubtful, e.g. where there is only one witness. If he agrees he is taken to the mosque, purifies himself ceremonially as for prayer, and swears on the Qoran in the mosque. Until such time as the art of cross-examination is locally understood, this appears to be a salutary custom.

CHAPTER IV

# MARRIAGE

## I. HISTORY

FROM the normal position of women in paganism[1] to the privacy and decency of Moslem marriage is to-day, as in the days of the Prophet, a marked improvement in the status of womanhood. Group marriage, flag marriage, or prostitution, the sending of a wife to stud, marriage by barter,[2] all these the Prophet forbade.[3] In the Days of the Ignorance free women were in law chattels:[4] a man inherited his father's wives, except his own mother (Q. 4, 25), and the husband's relatives had more right over the widow than her own kindred.[5] To-day, in Arabia, the wife's kindred afford her, if need be, a refuge and protection against her husband.[6] Even temporary or leasehold marriage, originally permitted, was ultimately forbidden by the Prophet-reformer.[7]

The most respectable form of marriage (since the idea of sale implies value) had been a sale of the woman by her relatives to a husband. This conception Islam adopted and reformed, making the woman the principal contracting party, as well as the object of the contract. The Muhammadan law of marriage is an offshoot of the law of sale. The technical terms (e.g. *sahih*, *batil*, *fasid*, see pp. 45–50) and traces of the conceptions of sale persist; but the lawyers of all schools are careful to distinguish.[8] In marriage a husband acquires only conjugal rights,

[1] 1 E.A. Appendix I on Native Laws and Customs, *cited below*, p. 230.

[2] Forbidden because based on the idea of the guardian's property in his ward; *Minhaj*, p. 283. Reciprocal treaties of marriage are permissible, but the brides must not be deprived of their right to dower.

[3] Bokhari, **67**, 137.

[4] But it is clear, from the position of Khadija, that public opinion was already in advance of the law.

[5] In parts of North-West Africa the husband still has a property even in the wife whom he has divorced. His consent is necessary to her remarriage and is only given on payment.

[6] Burchhardt: *Notes on the Bedouins and Wahabys* (1831), i. 112. A marriage treaty between families resembles a treaty of alliance between nations, and a wife's person has something of the protection which attaches to that of an ambassador. Parallels from elsewhere are well known.

[7] Bokhari, **67**, 32. This is one of the *hadith* for which the Sunnis vouch the authority of Ali but the Shias deny.

[8] Hurgronje: *Achehnese*, i. 330. Traces of the origin in sale are more noticeable in Maliki and Shafii than in Hanafi or Shia law.

not absolute property as he would do, e.g. in the purchase of a slave. In spite of the ease of divorce, marriage is in intention a lifelong union: purchase may be with a view to resale. *Mahr*, or dower, though originating in bride-price, is no longer regarded as payment of the equivalent, *'ewaz*, of the woman,[1] and is strictly for her own benefit.

Nevertheless, among the ignorant classes, among recent converts, and even in parts of North-West Africa among persons of a more advanced civilization, marriage is still a sale of the woman by her guardian to a husband; and in spite of the express prohibition of the lawyers[2] the guardian puts the price in his own pocket. Normal among savages, this has at any rate the advantage of putting a pecuniary value on the upbringing of that 'domestic misfortune', a daughter.

In *Abbas Khan* v. *Nur Khan*, 1 Lah. 574, the custom of purchasing a bride from her relatives was held to be prevalent among Pathans but unenforceable, being immoral and opposed to public policy. In *R.* v. *Alifairi Mahomed*, 1 U. 67, a Nubian case, the accused pleaded the custom in defence to a charge of slave-trading but was convicted, since his conduct was not in accordance with the custom he pleaded. In *Ambar* v. *Elmi*, 6 E.A. 115, a husband whose wife had absconded sued for recovery of the bride-price from her parents but failed, because the marriage had been consummated. The Swahili recognize both a *mahr* paid to the bride and a purchase-price called *kilemba*[3] paid to the bride's father, portions of which he hands over to the mother and the two grandfathers of the bride.

## II. GENERAL CONCEPTION

Sa'id ibn Jubair, asked by Ibn Abbas if he were married, replied 'No.' 'Then marry,' said Ibn Abbas, 'for the best of our nation is he who has had most wives.' (Bokhari, 67, 4, 3.)

Other traditions, perhaps less authentic but more picturesque, are numerous in the same sense. 'The man who does not marry', the Prophet is reported to have said, 'is not one of my followers.' 'The worst of mankind are those who die celibate.' 'A married

[1] *Ibn Arfa*, quoted in footnotes to *Ibn Asim*, p. 170: but see below, p. 66, under *mahr ul mithl*.

[2] *Mekkawi*, pt. 2, ch. 12. 'When the people of the wife took anything on delivering her . . . the husband may recover it . . . because it is a bribe.'

[3] Niese, par. 5.

man is more pleasing in the sight of God than the most pious bachelor.' 'Marry and beget children to your heart's content: at the last judgement my name will be exalted among the nations by your fecundity.' The character of the Lord Jesus is commonly regarded in Islam as being unfinished in that he was not married, an omission he is expected to remedy at his second coming. Marriage and family life are the normal duty (*wajib*, a religious obligation) of almost every adult Muslim, and even religious ascetics are married. 'There is no monkery in Islam.'

The Muhammadan law of marriage begins, as do other systems, from the physical fact which is its basis; on that basis it defines marriage.

Abu Hanifa: 'The contract of union with a woman on undertaking to feed and clothe her.' 'In marriage', says another, 'physical enjoyment is the determinative object of the contract.' Ibn Arfa, quoted in a footnote to the French edition of the *Tohfat* of Ibn Asim, p. 170: 'A contract having for its sole object to secure after the intervention of witnesses physical union with a female without the necessity of paying her value and on the condition that there shall be no legal impediment or that the parties shall be ignorant thereof.'

But it would be unfair to suggest that Muhammadan law remains at this level. In another tradition (Bokhari, **67**, 14, 3) the Prophet is reported to have said: 'Men marry for beauty, for rank, for wealth, for piety: choose piety.' It is on this higher level that the Futawa Alamgiri [1] says that 'marriage was instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age and after hope of offspring has ceased and even in the last or death illness'. Similarly, the Maliki [2] and Shafii [3] lawyers say that it is recommended to every man who feels the need of it, provided he is able to undertake the pecuniary obligations resulting from it. They distinguish cases where marriage is merely permissible, and even one case where it would be *makruh*, namely, where a man does not feel the need of it, and it would interfere with a life of prayer. One may perhaps question whether this last distinction is not foreign to Islam, an importation perhaps from some

[1] Baillie's *Digest*, i. 4. Fagnan, *Khalil*, p. 1.
[2] *Ibn Asim*, Rule 332 and note; [3] *Minhaj*, p. 281; **33**, 1, 1.

Christian notion of religious celibacy. 'Believers,' it is said in the Qoran, 'deny not to yourselves the pleasures which God has declared lawful. Do not exaggerate your prohibitions.' And the Prophet himself rebuked those who claimed credit for abstaining from family life in order to undertake an excessive burden of fasting and prayer.[1]

Although a religious duty, marriage is emphatically not a sacrament. There are no sacraments in Islam. Nor is it coverture. The woman enters into no disabilities in respect of her property (save in Maliki law, see pp. 43–4); and if it be argued that third parties must respect the mutual rights of the spouses, that is equally true of any other contract. Muhammadan marriage is purely contractual; and though from the nature of the case certain stipulations are essential and cannot be abrogated—so that there is a normal or type contract to which marriages must conform—a great latitude exists for variation in all non-essentials.

Although Moslem marriage represents a great improvement on preceding conditions, and although monogamous marriages of ideal happiness are possible under the conditions of Muhammadan law, and although the wife retains her legally separate identity, yet in the absence of special safeguards the wife remains at her husband's mercy owing to polygamy and the inequality of the law of divorce. The devices by which Muhammadan, particularly Hanafi, lawyers have endeavoured to safeguard the wife are an interesting chapter of legal history.

### III. ESSENTIALS

The 'pillars' (*arkan*) or essentials of a contract of sale are sometimes said to be the thing sold and the price, and sometimes the declaration and acceptance. So also in marriage. Marital privilege and *mahr* are the objects interchanged:[2] the consent of both parties, bride and bridegroom, is a *sine qua non*.

For the resemblance between *mahr* and price, see ch. vii: Dower.

Consent is expressed by declaration (*ijab*) and acceptance (*qabul*).[3] As in other contracts, these must be *per verba de praesenti*—

[1] Q. 5, 89; Bokhari, 67, 1; cf. 67, 8, 1 and 2.

[2] *Khalil*, Ruxton, p. 106.

[3] Baillie, *Digest*, p. 14; *Hedaya*, 2, 1, 1; *Minhaj*, p. 283; Fagnan, *Khalil*, p. 8.

not *de futuro*. And as Arabic has only two tenses, the perfect and the aorist, ambiguity is avoided by the use of the perfect. Both parties must be in good faith—that is, they must not be aware of any impediment,[1] and (except in a *muta*ᶜ or leasehold marriage under Shia law) must intend a lifelong contract. The effect of a stipulation limiting the duration of the marriage in Sunni law is uncertain. The prevailing opinion seems to be that it renders the whole contract contradictory, meaningless, and void. Mr. Ameer Ali suggests that the marriage will be *fasid* and the stipulation void.

For the functions of a guardian in expressing the woman's consent, see ch. vi. For the functions of mandataries (*vakils*) see the same chapter and also next section.

*Witnesses*. The presence of two witnesses, according to Sunni or Ibadi law, is more than a mere matter of evidence,[2] for a marriage without witnesses is not *sahih* but *fasid* (see below). In Maliki law the witnesses may be summoned either (i) to the declaration and acceptance, or (ii) to the ceremony of conducting the bride to her husband's house—the hymeneal ceremony which takes place some time after the contract. In Hanafi law the place of one of the two male witnesses may be taken by two women. In Shia law witnesses are not essential—the marriage is *sahih* even without them.

### IV. CEREMONIES

'Marriage may be constituted without any ceremonial.'[3] The question, therefore, mooted in *Omar Mohidin* v. *Sikuthani*, 2 U. 91, as to the validity of a Muhammadan marriage in a place where there is no one 'appointed to perform the rites' does not arise. There are no rites, and nobody need be appointed to perform them.

The following ceremonies, however, of a social nature, among many others, are usual; and though not essential to the validity of the marriage they are designed to give it publicity. The evidence of a marriage in which they were alleged to have been omitted without good reason would require to be severely scrutinized.

[1] *Ibn Arfa*, quoted above.

[2] *Minhaj*, p. 527; *Ibn Asim*, Rule 34, p. 173.

[3] *Habib-ur-Rahman* v. *Altaf Ali*, 48 I.A. 114; 48 C. 856, *per* Ameer Ali.

(a) A marriage feast to be given by the bridegroom.[1] This is a religious duty dealt with at considerable length in all the law-books.

(b) The presence of one or more *vakils* (mandataries or envoys) to represent each side. These go through the form of settling on behalf of their principals the treaty of alliance between the two principals, all the details of which have in sober fact been settled beforehand.

(c) The presence of the Qadi (whom failing, of some other learned man), who usually reads the *fatiha* and other prayers (but must not interpose these between the declaration and acceptance). The Qadi commonly keeps a register of marriage contracts; but it is a mistake to suppose that he joins the couple in marriage. His function is purely evidentiary.

The Qadi's registers have been held to be declarations in the course of business or professional duty, within the rule of *Price* v. *Torrington* (1703), 2 Smith L.C. 294, and Indian Evidence Act, sec. 32 (ii).[2]

The following local legislation in East Africa[3] deals with the registration of Muhammadan marriages and divorces:

*Zanzibar.* The Marriage and Divorce (Muhammadan) Registration Decree 1922, as amended by no. 34 of 1925.

*Kenya.* The Muhammadan Marriage and Divorce Registration Ordinance (cap. 172: to be read with cap. 171. The Muhammadan Marriage, Divorce, and Succession Ordinance).

*Uganda.* The Muhammadan Marriage and Divorce Ordinance (cap. 53: see also the Native Marriages Ordinance, cap. 52).

(Sec. 19 is an enabling, not a disabling section; *Sefu* v. *Maliamu*, 2 U. 264.)

*Tanganyika.* The Asiatics' Marriage, Divorce, and Succession Ordinance, no. 12 of 1923.

The Uganda and Kenya Ordinances apply to all Muhammadans. They provide for the registration of marriages and divorces and penalize failure to register, but expressly provide that lack of registration does not affect validity: see *Lalli* v. *Asha*, 5 E.A. 165. The Tanganyika Ordinance only applies to Asiatics; the Zanzibar Decree does not apply to certain excepted

[1] Bokhari, 67, 68 : above, p. 2. [2] *Zakeri* v. *Sakina*, 19 I.A. 157; 19 C. 689.
[3] Cf. also Ceylon Ordinance 27 of 1929.

classes (of Indian origin). The Zanzibar Decree makes the presence of a Qadi or other marriage officer essential to a marriage, and the register itself (subject to an exception to cover neglect or default) essential to proof of either marriage or divorce.

### V. CAPACITY AND IMPEDIMENTS

Marriage is lawful between any Muhammadan man and any Muhammadan or Kitabiya[1] woman of whatever age, unless:

(a) The man has four wives living, or

(b) The woman has a husband living, or

(c) The woman is in an *iddat* period after a previous marriage, or,

(d) They are within the prohibited degrees. These are of six kinds; see below.

Marriage of infants by their guardians[2] is lawful, the precedent being Ayesha's marriage to the Prophet at the age of six. Neither lunacy, impotence, nor disease is a complete bar to matrimony, but a lunatic, like an infant, can only be contracted in marriage by a guardian (*wali*). Sexual incapacity or deformity existing at the date of the marriage and not disclosed are, if incurable, grounds for dissolution of marriage. So also are madness, leprosy, or elephantiasis whenever incurred.[3] But sexual incapacity if disclosed is not a bar, since the right, e.g., of a very old man to marry for comfort and companionship is expressly recognized; see above, p. 36.

#### *The Prohibited Degrees*

Qoran, 4, 27–8. A man not marry:[4]—

(a) *Kindred:*

any ascendant; any descendant; the immediate child of any ascendant; the descendant h.l.s.[5] of his father or mother whether legitimate or illegitimate, cognate or agnate.

In popular language a man may not marry his daughter,

[1] i.e. believer in a written revelation (*Kitab*) and not a worshipper of idols or creatures: Jew, Christian, Samaritan, or some Sabaeans. Another definition of *Kitabi* would make it mean a follower of a religion promulgated by a prophet acknowledged in the Qoran, the Book of God. The result is the same.

[2] But see pp. 59, 60.

[3] Ruxton, p. 104.

[4] Prohibitions for women are of course the counterpart of those for men.

[5] See list of abbreviations.

mother, sister, aunt, or niece, and no amount of 'greats' or 'grands' (e.g. great-great-niece) will affect this.

Marriage of cousins, far from being forbidden, is encouraged by Moslem sentiment. Muhammad and Khadija were third cousins; Ali and Fatima were first cousins once removed. Marriage with the daughter of a father's brother is strongly recommended by public opinion, and in some countries almost amounts to a right.[1] *Per contra*, in Somaliland marriage of cousins is forbidden, but marriage of uncle and great-niece permitted.[2]

(b) *Affinity:*

wife of any ascendant h.h.s.;[3] wife's ascendant h.h.s.;[3] wife's descendant h.l.s.;[3]—but only if first marriage actually consummated; wife of any descendant h.l.s.

In popular English, a man may not marry his step-mother, mother-in-law, step-daughter, or daughter-in-law: and again, no number of 'greats' or 'grands' will affect this.

Marriage with a brother's widow, or divorcee, or a deceased or divorced wife's sister is not forbidden. Among Somalis, when a man dies without issue, his goods and chattels are seized by his nearest male relatives, one of whom generally marries the widow, or she is sent back to her family. (See 2 E.A. Appendix I, and 3 E.A. Appendix, p. 122; see also Burton, *First Footsteps*.) The courts recognize the duty on the husband's relatives to maintain the widow if she is excluded from inheritance, but of course a compulsory *levirate* cannot be recognized.

Wife in this paragraph includes widow and, where the sense permits, deceased or divorced wife, or person with whom cohabitation, or even undue familiarity,[4] has taken place; but not a woman whose *invalid* (*fasid*, see below, p. 49) marriage was not consummated.

Shafii law (*Minhaj*, p. 291) has some fine-drawn and rather revolting distinctions as to kindred or affinity arising out of criminal connexion.

[1] See *Arabian Nights*, *passim*, and *Blackwood's Magazine*, July 1923, p. 128. Many instances could be given from reigning families to-day.

[2] Burton, *First Footsteps*, p. 120.

[3] See list of abbreviations.

[4] *Khilwat-us-sahih:* valid retirement, i.e. privacy together in such circumstances that the court will infer marital intercourse.

(c) *Fosterage, or milk-kinship:*

The general rule is that whatever is prohibited by reason of kindred or affinity is prohibited by reason of fosterage.[1] All schools admit exceptions to this rule, but the doctors even of a single school fail to agree as to what these exceptions are.[2] The schools also differ as to what constitutes fosterage. Fosterage has exactly the same effect as kindred in rendering a marriage incestuous, except that there is a larger loophole for *bona fide* ignorance, since the facts must often be difficult to prove. In doubtful cases the parties are not required to separate without the order of a judge. See below as to *batil* marriages, p. 47.

(d) *Conjunction:*

A man may not be married at the same time to two sisters, or to aunt and niece, whether the relationship between the two is by kindred or fosterage. So far the Shafii lawyers.[3] This is the Sunni rule of all schools; the *Hedaya* generalizes it into a rule against conjoining two women who would have been barred by blood from marrying one another, supposing one of them had been a male. It is difficult to imagine other cases not barred in class (b) above. In Shia law marriage with an aunt and a niece is permitted, subject to consent of the aunt.

(e) *Ownership:*

An owner cannot marry his or her own slave without first freeing the slave (though a man may have rights of concubinage over his slave). Consequently, in Maliki and Shafii law, a woman may be seen unveiled by her own slaves.

(f) *Divorce:*

A triply divorced wife cannot be married by her divorcer except after consummated marriage to some one else. In Shia law a triply divorced wife can never be lawful to the divorcer.

### VI. RIGHTS AND DUTIES OF SPOUSES

In a valid (*sahih*) marriage (see below, p. 46)—

(a) *The husband has the right:*

(i) To the sexual obedience and of course the sole enjoyment of his wife, due regard being had to health and decency.

[1] Bokhari, 67, 21 and 23. The Prophet permitted his wife's (Hafsa in one story, Ayesha in another) foster-uncle to see her unveiled.

[2] Cf. *Minhaj*, 291; F.Q. 461; *Mekkawi*, pt. ii, ch. vii, p. 230.

[3] *Minhaj*, 292; F.Q. 461–3; *Mekkawi*, ii. 230, 232.

This right, being of the essence of the contract, cannot be abrogated.

(ii) As in other systems of law, the husband decides the place of conjugal residence. It has been held that this right is subsidiary to (i) and of the essence of the contract. The husband's discretion cannot be abrogated, and a stipulation that the wife shall live in her parents' home and that the husband shall only visit her there is void.[1]

(iii) The husband has the right to insist at his discretion that his wife shall neither see, be seen by, nor speak to male strangers without his permission. This does not prevent her seeing her children by a previous marriage or her own relatives within the prohibited degrees, or her slaves—with due regard to his convenience. The husband, however, is not bound to restrict his wife's liberty in this matter, and may in the marriage contract deprive himself partly or wholly of the power to do so.

(iv) If the husband cannot afford a wet nurse, or if no wet nurse is available, the wife is bound to suckle her own children. That the duty of suckling is not one of the essentials of marriage is clear from the fact that an agreement by the wife to suckle her own children and thereby relieve the husband from pecuniary liability may be a sufficient consideration for a *khula* divorce (see below, p. 79).

(v) The wife is bound to a general conformity with the husband's wishes, but the management of the house is not necessarily part of her duties, as is obvious from the possibility of more than one wife, and she cannot be compelled to perform menial duties if unbefitting either her rank or his means. In this connexion Muhammadan law, in common with most other systems until recently, recognizes the right of the husband to punish his wife for disobedience by moderate corporal chastisement. Maliki law (Ruxton, p. 119) lays down that it is not to be inflicted till other means of correction have failed, and that the blows are to cause no fracture, wound, or serious bruise. Shafii law is less careful.

(vi) In Maliki law, but in no other system, the husband acquires certain rights over his wife's property:

1. He has the right to live in his wife's house.

[1] *Fatima* v. *Nur Muhammad*, 1 Lah. 597.

2. Alienation of property exceeding one-third of her estate is invalid without his consent.

(b) *The wife has the right to:*

(i) Dower—*mahr*, *sadaq*; see below, ch. vii.

(ii) Maintenance; see below, ch. xii.

(iii) Privacy. The husband must provide a suitable matrimonial residence for his wife. If he has more than one wife, he must provide each of them with a separate apartment, according to his means; a separate room with a separate bathroom at the least, or, in the case of a wealthy man, a separate suite or house.

(iv) Impartiality. Subject to the rights of brides and of the fact that a husband going on a journey need not take all his wives with him, the husband must divide his time according to regular rotation equally between his wives. This does not mean that his sexual attentions must be equally divided among them, but he must treat them with equal affection and impartiality. Muhammadan modernists treat this as an injunction in favour of monogamy, since, they argue, it is manifestly impossible for an ordinary man to attain the degree of impartiality laid down.

(v) *Hizanat*. Rights to the society and upbringing of her own infant children, even in case of divorce, although the husband is legally liable for their maintenance. (See under *Hizanat*, p. 99, and Maintenance, p. 96.)

(c) *Both parties, it is submitted, have the right to:*

(i) Marital confidence. In English law, subject to certain exceptions, neither spouse can be compelled (or, according to the Indian Evidence Act, sec. 122, even permitted) to disclose without the consent of the other spouse communications which have passed in confidence between them during marriage.

In *R.* v. *Amkeyo*, 7 E.A. 14, it was held that the pagan custom of obtaining wives by purchase did not constitute a marriage within the terms of Sec. 122 Indian Evidence Act. The reasoning adopted, namely, that such a marriage is not marriage as understood by English law, would perhaps apply to Muhammadan marriage. Its application, however, to a Muhammadan marriage would, it is submitted, be unduly harsh, and in India no doubt has ever been thrown upon the privilege of marital confidence in polygamous marriages, whether Muhammadan

or Hindu. Perhaps the position might be different in temporary marriage.

N.B.—Although it is undoubtedly a right of the husband that the wife shall have no other spouse, and of the wife that the husband shall not have more than three others (irrespective of slave concubines), this right is hardly ever protected by criminal law.

Sec. 494 Indian Penal Code (Sec. 370 Nigerian Criminal Code is practically the same): 'Whoever having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the lifetime of such husband or wife shall be punished . . .' (&c.). This provision cannot be applied against a Muhammadan husband, his, e.g., fifth marriage not being void but merely invalid (*fasid*) by reason of his previous marriages. It is doubtful whether it can be applied against a Muhammadan wife who remarries; certainly not where she acts in good faith. (See pp. 47–50 as to *batil* and *fasid* marriages and cases there cited, and *Badal aurat* v. *Q.E.*, 19 C. 79.)

### VII. VALID (*SAHIH*), IRREGULAR (*FASID*), AND VOID (*BATIL*) MARRIAGES

The law of marriage takes over from the law of sale a division of contract into three classes:

(i) *Sahih*, true, or *ja'iz*, lawful—a completely valid contract.

(ii) *Fasid*, defined as good in its foundation (*asl*) but unlawful in its attributes.[1]

(iii) *Batil*, bad in its foundation—completely void.[2]

A *batil* contract whether of sale or marriage is devoid of effect as between the parties.[3] A *fasid* marriage has no legal effect till consummation, just as a *fasid* sale has no legal effect till delivery of the goods. There is no right to dower, and a single declaration will suffice (not to effect divorce, of which there is no question, but) to annul the irregular contract. Even after consummation (as after delivery of the goods in a *fasid* sale) the rights of the parties are not the same as in a *sahih* contract. There are no mutual rights of inheritance; nor has the wife any right to maintenance. She is entitled, by reason of consummation, to dower (*mahr*),

[1] *Mejelle*, Art. 109. [2] Ibid., Art. 110. [3] Ibid., Art. 370.

proper (*mithl*) or specified, whichever is less;[1] and she must observe the *iddat* of three menstrual periods or three months on termination of the marriage whether by divorce, cancellation, or death, i.e. she need not observe mourning.

It is the duty of the Qadi, as guardian of the rights of God, on his attention being called to a *fasid* marriage to see that the connexion is either legalized or terminated.

The children of a *fasid* marriage are legitimate, so also (see below) are those of a *batil* marriage where the parents acted in good faith.[2] Muhammadan law agrees with Civil and Canon, but differs from English law in that it does not penalize children for the innocent mistakes of their parents.

### *Sahih Marriages*

Marriage being purely a civil contract it is possible to introduce clauses in the contract varying the rights of the parties.[3] Commentators distinguish three categories:

1. Conditions contrary to the essential object of marriage, e.g. that the wife need not live with her husband, or is to be allowed an *unrestricted* right to divorce him, that the parties forgo their mutual rights of inheritance; or a clause limiting or forgoing the husband's absolute duty to maintain his wife, or a clause by which the wife absolutely forgoes all right to dower, or barter of daughters so as to avoid the payment of any dower.[4] All such stipulations are void; but the marriage is valid.

2. Clauses furthering the natural consequences of marriage, as, e.g., a promise by the husband to maintain his wife in a certain style. Such promise is not to be construed as limiting her right to be maintained in a better style, should the husband's position in the world justify it.

3. Clauses accidental to the contract, e.g. limiting or forgoing the husband's right to take a second wife, or to inflict corporal chastisement, or stipulating for the wife a measure of freedom from seclusion. Such clauses have been known to Muhammadan law in both the Hanafi and Maliki schools for centuries and, with increasing sentiment in favour of monogamy and modern ideas, are increasingly common. They are enforced by arming

[1] Proper (*mithl*) in all cases; *Minhaj*, 34, 1, 307.

[2] Cf. *Berthiaume* v. *Dastous* (1930), A.C. 79.

[3] *Ibn Asim*, Rule 379.

[4] Ibid. 377.

the wife with the husband's power of divorce in the event of their violation. (See under *Talaq-Tafwiz* and *Talaq-Ta'liq*, pp. 77–8.) The husband's unrestricted right of divorce is penalized by means of the dower (see p. 67); it may be rendered illusory except at the cost of financial ruin, but it cannot be entirely forgone.

### *Batil Marriages*

(a) Those in which both parties are aware:
(i) that they are within the prohibited degrees of kindred;
(ii) or affinity; (iii) or fosterage;
(iv) that the bar of triple divorce still subsists (p. 42);
(v) or that the woman is the lawful (*sahiha*) wife of another;
(vi) or that she has not completed her *iddat* on the termination of a previous marriage whether *sahih* or *fasid*.

Some modern writers assert that the bar of fosterage merely renders a marriage *fasid*, not *batil*. This view is based on Baillie, *Digest*, p. 200 (at foot). But it is submitted that that passage merely deals with the presumption in favour of innocence. Parties who have doubts of the legality need not separate without an order of the Qadi. Obviously, there must often be room for *bona fide* doubt in cases of fosterage. But fosterage if established is equivalent to blood kindred. In Maliki[1] and Shia[2] law *iddat* is an absolute prohibition, any infringement of which will render marriage between the parties *for ever* unlawful. Many modern writers suggest that in Hanafi law an infringement of *iddat* will only render the marriage *fasid*. But marriage with a married woman and marriage with a woman in *iddat* are dealt with in the same sentence in Fatawa Qadi Khan,[3] Fatawa Alamgiri,[4] and the Egyptian Code,[5] the last named expressly classing both as *batil*. In *Jhandu* v. *Husain Bibi*, 4 Lah. 192, such a marriage was held void (*batil*), though the result would apparently have been the same had it been held *fasid*. In *Aisha* v. *Fatuma*, 1 E.A. 44, a Shafii case, the Shaikh ul Islam held that if the second husband knew of the *iddat* the second marriage would be void. There can be no doubt that it stands or falls in the same class with marriage with a married woman; as to which

[1] R. and S. 21, 57; Fagnan, p. 6. [2] Amir Ali, 4th ed., p. 388.
[3] Md. Yusoof, ii. 116. [4] Baillie, *Digest*, p. 37. [5] Q.P. 132.

see *obiter*, *Habibur Rahman* v. *Altaf Ali*, 481 A. 114 (48 C. 856) and *Mohabbat Ali Khan* (56 I.A. 201).

All the above marriages are criminal connexion in Muhammadan law, the parties acquire no rights against one another, nor do the children acquire rights either of inheritance or maintenance from their father, nor in Shia law from their mother. Their maintenance is regulated solely by English or Anglo-Indian criminal law.

(b) A marriage of deception (*gharur*), i.e. in which one party is aware but the other is not aware of an impediment such as described in (a) above.

This is criminal connexion, so far as the party aware is concerned. For the position of the other party and the children, see next paragraph.

(c) A marriage of doubt (*shubha*), i.e. one in which both parties are in *bona fide* ignorance of the bar to their union.

Such ignorance, so long as it continues but no longer, will be a complete answer to a criminal charge, and the children begotten in ignorance will be legitimate. This is unquestionable as regards the Maliki,[1] Shafii,[2] and Shia [3] schools and probable as regards the Ibadi,[4] even in the extreme instance of Oedipus and Iocaste. Ignorance of one's own blood-relatives within the prohibited degrees is obviously very unlikely; and an example in the *Hedaya* (Bk. 7, ch. 2 (1870, p. 184)) is cited to establish that Hanafi law does not recognize it as a possibility. The example,[5] however, is only given to illustrate the rule *ignorantia juris cuique nocet*. A recent convert to Islam, for instance, might suppose such marriage lawful. Even admitting (which seems incorrect) this single exception, in other cases the Hanafi rule is undoubtedly the same as that of other systems. In *Sadakut Husain* v. *Md. Yusoof*, 11 I.A. 31 (10 C. 663) the Privy Council expressly refrained from deciding this point, but the authorities on it are conclusive. Thus in the well-known English case of *R.* v. *Tolson*, 23 Q.B.D. 168, Mrs. Tolson went through the ceremony of marriage with a second man in the *bona fide* but incorrect belief that her first husband was dead: an exactly similar case is given

[1] Perron's *Khalil*, vol. vi, p. 360. See also Fagnan, *Khalil*, pp. 203, 204; *Ibn Asim*, pp. 170–1 footnote, giving Ibn Arfa's definition.

[2] *Minhaj*, 28, 9, 255.

[3] Baillie, *Imameea*, p. 311, at foot.

[4] Cf. Sachau: *Ibad*, Abschnitt 3, sec. 7.

[5] See above, p. 9.

by Qadi Khan, and the children of the second marriage are declared legitimate[1] although, as in England, the second marriage was void.

(d) The simultaneous marriage of, e.g., two sisters or five wives by a single ceremony. The law thus penalizes an attempt at evasion. But if a man, e.g., marries the sister of his existing wife, or takes a fifth wife when he has already four, the validity of the existing marriages is not affected, and the new marriage is merely *fasid*.

### *Fasid Marriages*

The principles on which a marriage is *fasid* are the same everywhere, but their application varies in different schools and even different doctors of the same school.

1. Lack of a formality which may subsequently be made up, e.g.:

| | |
|---|---|
| Secret marriage.<br>Less than the legal number of witnesses. | Subsequent acknowledgement express or implied before sufficient witnesses. |
| Lack of *wali's* consent where necessary. | *Wali* subsequently ratifies. |

2. An impediment which may subsequently be removed, e.g.:

| | |
|---|---|
| Husband has already four wives. | He may divorce one of the four. |
| Already married to one sister, marries another. | He may divorce the first. |
| Husband marries an idolater. | She may be converted. |
| Wife marries her own slave. | She may emancipate him. |

According to the Maliki, Shafii, and Hanbali schools:

| | |
|---|---|
| Husband or wife is *Muhrim*, i.e. has taken the vow but not yet accomplished the pilgrimage. | He or she may accomplish it. |

Although *mahr* is an essential of marriage, failure to stipulate a *mahr* does not even render a marriage *fasid*, still less *batil*. The proper dower will be presumed.

[1] Md. Yusoof, vol. ii, p. 134, sec. 1255. See also Q.P., secs. 341, 342, and *Badal Aurat* v. *Q.E.* (per Ameer Ali J.), 19 C. 79, where, however, legitimacy was not in issue.

It is submitted that the presumption in favour of marriage and in favour of legitimacy extends to presuming that invalid unions are *fasid* rather than *batil*. As to the nature of this presumption, see p. 93 and cases there cited.

Marriages which are *fasid* for lack of formality or for a defect of one party become *sahih*, *ipso facto*, on the formality being supplied or the defect (slavery or idolatry) removed. It seems that those which are *fasid* by reason of a previous marriage do not so enure but require a fresh contract. And except in Shafii law a husband cannot 'exchange one wife in place of another'[1] without waiting till the expiry of the *iddat* of the wife whom he divorces.

### VIII. KHOJA MARRIAGES

A Khoja marriage, it has been long since settled, is an ordinary Shia marriage in all respects except as regards the right of inheritance between spouses; *Kajbye* v. *Sachoo*, 1 Z. 28, the rule is given as a *semble* only but in India is undisputed. The application of Hindu law in *Jaffer Mahomed* v. *Morgabai*, 1 Z. 81, following *Dadaji* v. *Rukhmabai*, 10 B. 301, was, it is submitted, incorrect. Marriage of a Khoja outside the caste is legal, though unusual; and in *Kajbye* v. *Sachoo*, 1 Z. 28, concealment by a Khoja of his prior marriage to a Swahili did not affect the legality of his second marriage. Nor will second marriage of her husband with a deceased brother's widow enable a Khoja wife to claim dissolution of her marriage [apart from any express stipulation in her marriage contract]. But there is an established custom among Khojas, by which on a second marriage a Khoja must set aside a provision for the first wife: *Rambye* v. *Karmali*, 1 Z. 16; see below, p. 71.

### IX. CONCUBINAGE

The only sexual relations recognized by Muhammadan law are marriage and concubinage. Marriage may be:

(a) Between a free man and a free woman.

(b) Between two slaves.

(c) Under certain circumstances between a free person and the slave of another. No man or woman can marry their own

[1] Qoran, 4, 24.

slave, nor is a woman permitted to have sexual relations with her own slave.

Concubinage between free persons is in pure Muhammadan law always unlawful. A man has, however, the right of concubinage with his own female slaves with certain exceptions; and a slave concubine has legal rights against her master. Her children acknowledged by him are free and legitimate.

To the extent that slavery has ceased in Muhammadan countries under British rule or influence, there appears to be a tendency in some quarters to regard concubinage with free women as lawful. Similar provisions in Hindu law regarding *dasis* (slave concubines) are now applied to free concubinage, if exclusive, continuous, and neither adulterous nor incestuous. And the offspring of free concubinage are allowed the rights of *dasiputras*. But the Privy Council and the High Courts (largely under the guidance of Mr. Ameer Ali) have steadily refused to permit any similar reconstruction of Muhammadan law; see below, p. 93 (Acknowledgement) and pp. 97–8 (Maintenance).

CHAPTER V

# IDDAT

'THE term by the completion of which a new marriage is rendered lawful.' *Per* Mahmood J. *in re Din Muhammad*, 5 A. 226.

A period of continence imposed on a woman on the termination of a marriage in the interests of certainty of paternity.

(a) Unnecessary where cohabitation has not taken place.

(b) Where cohabitation has taken place:

(i) In the case of divorce, three menstrual periods, or

(ii) Where the woman does not menstruate for any reason other than gestation, three lunar months,[1]

(iii) Unless the woman is pregnant, when the *iddat* lasts until delivery, irrespective of whether the period is shorter or longer than three months.

(c) In the event of the husband's death:

(i) Four months and ten days (being the period of mourning prescribed for a widow).

(ii) Or until delivery,[2] in the event of the woman being pregnant.

A difference of opinion has arisen in this case as to whether the woman is at liberty to marry before the expiry of four months and ten days in the event of her delivery being accomplished within a shorter period. The Lahore High Court has held[3] that she must observe the full four months and ten days, on the ground that the *iddat* in this case is not only for certainty of paternity but also for mourning, and that mourning is one of the rights of marriage. (*Sed quaere*: can a dead man have rights?) The court appears to have overlooked the tradition of *Subaiah-al-aslamiah*, who was permitted by the Prophet to marry again before the expiry of the period of mourning.[4]

[1] Months in the Muhammadan calendar, and therefore in Muhammadan law, are lunar.

[2] *Iddat*, the legal bar, ceases at delivery; but a woman *should* not remarry till the close of her purification—another forty days.

[3] *Jhandu* v. *Husain Bibi*, 4 Lah. 192.

[4] Bokhari, 68, 39; Md. Yusoof, vol. i, pp. 132, 133, par. 849.

*Wife's rights during iddat*

(a) According to all schools and irrespective of whether the *iddat* arises on divorce or death, the wife is entitled to lodging in the husband's house during *iddat*.[1]

(b) According to all schools, she is not entitled to maintenance in the *iddat* of death, the right to maintenance as her husband's widow being inconsistent with one as her husband's heir; but where, as among Gallas and Somalis and sometimes among Khojas, a wife does not inherit, she has normally a continuing right of[2] maintenance irrespective of the *iddat*.

(c) In the *iddat* of divorce she is entitled to maintenance in all cases by Hanafi law, and by Shafii law if the divorce is revocable (except for her toilet expenses).[3] She is not entitled to maintenance under Shafii law if the divorce is irrevocable.[3] In Maliki law the divorced wife is not entitled to maintenance except in the case where she is pregnant.[4]

Maintenance during *iddat* differs in no respect from maintenance during marriage.[5]

[1] The lawyers are agreed in spite of the fact that the *hadiths* are contradictory. See Md. Yusoof, vol. i, pp. 131, 132, articles 845–7; *Minhaj*, 43, 6, 372.

[2] 2 E.A. App. 1 and 3 E.A. App. *R.* v. *Ferjulla*, 1 E.A. 79; *Jafferali* v. *Standard Bank of South Africa*, 3 Z. 64, P.C.

[3] *Minhaj*, 46, 2, 387.

[4] R. and S., Rule 139.

[5] *Minhaj*, 46, 2, 387.

CHAPTER VI

# MARRIAGE EQUALITY (KIFA'AT) AND MARRIAGE GUARDIANSHIP (WILAYAT[1]-UL-NIKAH)

## A. HISTORY

ISLAM established the legal personality of woman: a free woman is not to be a source of emolument to her kindred. But the Prophet could not, even had he wished, have abolished Arab pride of race; and to protect that pride from the insult involved in a *mésalliance*[2] the outward shell of the extinct property rights of the agnate kindred remained as the heritable right of marriage guardianship. It is, firstly, the kindred, and, secondly, the woman herself, who must be protected from a *mésalliance*; but in no case may a guardian derive any material advantage from arranging a match[3] or consider anything but the best interests of his ward.[4] If he does so—and this applies even to a guardian with the right of compulsion (see below, p. 57)—his action, according to all schools, will be *haram*. Similarly no guardian may exercise his guardianship in his own favour by marrying his ward. He must invoke the next succeeding guardian to protect her interest (*Minhaj* 33, ch. 1, § 5, pp. 287, 288); but a grandfather may arrange the cousin-marriage of his grandchildren. Formerly the guardian had the right not merely to prevent but to insist on the dissolution of a *mésalliance* contracted without his consent, provided he intervened before the woman gave birth to a child; but in *Fazalan* v. *Tehran*, 8 E.A. 200 C.A, this right was held, in Hanafi law at least, to be obsolete.

The *Minhaj* speaks throughout of 'the right to assist a woman at her marriage by acting as her guardian': and all authorities of all schools are unanimous in the same sense. The best way to prevent a *mésalliance* is to secure the woman's marriage to a

[1] For meaning of this word, see below, ch. xiii, p. 106.

[2] *Mekkawi*, pt. ii, pp. 256, 258, 260. The marriage of a man to his social inferior is not so regarded.

[3] Q. 4, 127, cf. 4. 19 and 4. 2. For a similar clash of ideas cf. Magna Carta 1215, Art. 6, and Petitio Baronum 1258, Art. 6.

[4] *Abbas Khan* v. *Nurkhan*, 1 Lah. 574.

suitable husband; and that is also the highest benefit which can be conferred upon her. Guardians are expected to exert themselves in her interest, and, generally speaking, in conformity with her wishes.

Nevertheless the continuance of a barbarous form in a civilized spirit,[1] characteristic though it is of this branch of Moslem law, is always fraught with danger. New converts to the system are liable to recognize what is familiar and to misunderstand what is strange; and even English Courts have occasionally lent themselves to injustice by supposing that marriage guardianship was an unlimited discretion and overlooking the sole purpose for which it exists.

### B. WHAT, THEN, IS EQUALITY IN MARRIAGE?

The *Minhaj* [2] gives a list of five qualifications: (a) freedom from such bodily defects as would render the normal object of marriage impossible, (b) liberty,[3] (c) pedigree, (d) character, (e) profession. Of these the first two are really separate questions: they must be considered by the woman and her guardians, but a marriage with a defective or a slave entered into in ignorance will be no marriage (see above, pp. 40, 42, 50, and below, p. 80). Character—except in the case of a notorious evil liver—is seldom capable of exact estimation or proof. The core of the doctrine lies in equality of race and social rank.

In view of the *hadith*—'all true believers are brothers'—Malik is reported to have held that all Muhammadans were equal. But his followers to-day agree with other schools in holding that a non-Arab is not an equal match for an Arab woman; [4] and the other schools, at any rate, give precedence among Arabs to the Qoraish. All descendants of the Prophet (*saiyyid, sharif*) rank as pure Arabs. All other Muhammadans are equal, except that a slave is no match for a free woman, nor a *libertus* for an *ingenua*; and a free woman is held to be slighted not only by marriage to a slave but even by marriage to a man who already has a slave wife. It was presumably on the analogy of

[1] Cf. the 'giving' of the bride in the English marriage service.

[2] 33, 1, 6, 288.

[3] Ibid., 289.

[4] See *Hamed* v. *Sadha*, 1 Z. 398, at 403–4, a very instructive case. But ignorance of the law, as opposed to ignorance of the facts, will not give the woman a right to dissolve such a marriage: *Hemedi* v. *Riza*, 4 E.A. 71.

this rule that in *Kajbye* v. *Sachoo*, 1889, 1 Z. 28, an unsuccessful attempt was made to invalidate a Khoja marriage on the ground that the husband had concealed his prior marriage with a Swahili, an insult to purity of caste.

Hanafi and Shafii law consider equality in the hierarchy of trade and professional rank,[1] the highest professional rank being that of a learned man or a judge. Maliki and Shia law do not admit this consideration; but it is much regarded in India, even among Shias, owing to the vicinity of Hindu caste ideas.

No school regards equality of fortune as material, though it may affect the marriage in other ways (see ch. vii, Dower, and ch. xii, Maintenance).

### C. WHO ARE MARRIAGE GUARDIANS?

Maliki, Shafii, and Algerian Ibadi law follow a reputed *hadith* to the effect that there can be no marriage without a guardian for the woman. That tradition appears to have been rejected by Bokhari.[2] Hanafi and East African Ibadi law [3] hold that a guardian is superfluous except for a virgin below the age of puberty. But, even where a guardian is superfluous in law, it is considered respectable to have one.

The right of marriage guardianship devolves according to the law of inheritance, as it existed in the Days of the Ignorance, i.e. ignoring the Qoranic sharers, to the male agnate kindred in accordance with Al Jabari's rule,[4] the father's father (h.h.s.) ranking before the brothers. Failing the agnate kindred,[5] the right vests in the head of the state as represented by the Qadi.

Hanafi law differs from the other schools on two questions. In the others, a son (h.l.s.) cannot *as such* be his mother's guardian, though he may be so by some other title, e.g. where, being the offspring of cousin-marriage (see p. 41), he is also her nearest collateral agnate, or where he holds the office of *qadi*. In the other schools cognate relatives as such and women can never be marriage guardians. In Hanafi law it is said that the right devolves upon them in default of agnate kindred; and on

[1] *Minhaj*, ibid. The translation 'Second-hand dealer' for *bazzaz* is misleading.

[2] Judging by rubric to **67**, 37.

[3] *Obiter* in *Athman* v. *Ali*, 6 E.A. 91.

[4] See below, p. 118; see also notification 1 E.A. 145 and a fuller list in *Minhaj*, **33**, 1, 4, 285.

[5] Patronage rights have ceased. See *Rashid* v. *Adm. Gen.*, 3 Z. 31. But perhaps the patron may still have rights in Northern Nigeria.

this ground the courts have refused to interfere with marriages contracted by a mother and a grandmother.[1] In view of the right of the Hanafi woman of full age to give herself in marriage these questions are obviously academic; in the first the authorities go the length of imagining a contract by the son on behalf of an imbecile mother!

In Maliki law the *wasis* of the father and grandfather may exercise the right, if so authorized in the *wasiyat*. Such a *wasi* may be a woman, but she must exercise her marriage guardianship through a male proxy.

Shia law, for reasons given below (ch. xvii), abolished the right of agnation. The only marriage guardians in Shia law are the father and the father's father;[2] and the act of any one else purporting to act as guardian is *fazul*, i.e. of no effect.[3] Consequently a Shia girl below puberty cannot be contracted in marriage at all except by her father or father's father. Nevertheless such marriages are not uncommon and other relatives purport to act as guardians.[4] A woman of full age who can dispose freely of her own hand, as in Hanafi and Shia law, can obviously ask any one she chooses to 'give her away'. In Shafii law it has been held, *Sheriff Abdulla* v. *Zwena*, 3 E.A. 95,[5] that in default of natural *walis* and of a Qadi appointed by Government, any person with sufficient knowledge may act as *wali* with the woman's consent.

D. MARRIAGE GUARDIANSHIP IS OF TWO GRADES:

(a) with, (b) without the right of compulsion (*jabr*,[6] *wilayat-ul-ijbar*).

(a) *Jabr* is the right of a father (whom failing, of the father's father, or in Maliki law perhaps their respective *wasis*) to give in marriage his virgin daughter[7] without her consent and even, within fixed limits, against her wishes. It terminates in Hanafi

[1] *Kaloo*, 10 W.R. 12; *Mahin Bibi*, 13 B.L.R. 160. [2] Baillie, *Imameea*, p. 6.

[3] *Mulka Jehan* v. *Mahomed Ushkurree*, Supp. I.A. 192.

[4] The finding in *Kajbye* v. *Sachoo*, 1 Z. 28 (that by Khoja custom, *semble* also by Shia law, a stepfather could be a guardian) overlooks the fact that the girl being of puberty no guardian was necessary, and is contrary to the first principles of Muhammadan and Hindu law alike. It appears to be based on a misunderstanding of the answer of the *'ama'at*.

[5] See also *eodem sensu*, *Achehnese*, i. 333.

[6] A word sometimes misused of all marriage guardianship; see e.g. *Monian* v. *D. J. Birbhum*, 42 C. 351, otherwise an instructive case.

[7] Or in theory his minor son.

and Shia law at puberty; in Maliki and Shafii law only with loss of virginity.[1] A woman contracted in marriage by a guardian vested with this right can repudiate that marriage before consummation, but only by a judicial proceeding and after good cause shown. Good cause will be a lack of equality on any of the five grounds quoted above (p. 55); or, that the guardian acted from a corrupt motive, at least where the marriage is in any way unsuitable. Thus 'a guardian', it is said, can 'never give a woman in marriage to one who is not her equal without her consent,[2] and if the guardian makes an improper use of his power the woman, whether of age or not, may have recourse to the courts for a remedy.[3] Indeed the *Minhaj* [2] goes so far as to prefer the prevailing opinion that such a marriage is void even without judicial cancellation. Finally, even a father may lose his right altogether by neglect or hostility to his daughter: *Mze* v. *Malindi*, 1 Z. 222—(the case of *Abu Bakr* v. *Mtongweni*, 7 E.A. 43, may be distinguished in that the legal *wali* there was not subject to the duty of *hizanat*).

The bride's own choice has weight. 'If the infant', says the *Hedaya*,[4] 'requires her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply.' 'A guardian', says the *Minhaj*,[5] 'who has the right of *jabr* cannot without good reason decline to perform his duty if he is asked to effect a marriage by the woman; the same obligation rests on other guardians.' If the guardian refuses without good cause to give effect to the woman's wishes she may have recourse to the Qadi: *Athman* v. *Ali*, 6 E.A. 91, C.A.F.B.[6]

But the mere desire of the woman to remain single or her preference for another man, when the one chosen for her by her father is in every way suitable, are not good causes to annul a contract where the guardian has the right of *jabr*. The right of compulsion is given to these *walis* because it is thought that they are better able to understand her interests, and because her maiden shyness has to be overcome.[7]

On this question of *jabr* a strong light is thrown by famous

[1] *Hasan* v. *Jaimabha*, 52 M. 39 is *pro tanto* contrary to all Shafii authority.

[2] *Minhaj*, p. 288.

[3] *Ibn Asim*, Rule 362, and ed. note 279.

[4] 52, 7, p. 699.

[5] p. 287; see also p. 285. And for Maliki law *Ibn Asim*, Rule 361.

[6] See also *Achehnese*, i. 333.

[7] ibid. 331.

traditions which, whether authentic or not, illustrate the efforts of the lawyers to civilize the conditions which they had to accept.

> Bokhari, **67**, 42. *The father has no greater right than another to give in marriage without their consent the virgin or the woman no longer virgin.*
>
> . . . The Prophet said: 'The woman previously married cannot be given in marriage except by her command; the virgin cannot be given without being previously asked her consent.' 'O Messenger of God,' replied the faithful, 'and how shall she give her consent?' 'In keeping silence,' said the Prophet. Abu Amr, freedman of Ayesha, reports that Ayesha said, 'O Messenger of God, a virgin is modest.' 'Her consent,' replied he, 'is shown by her silence.'
>
> *Ibid.* **67**, 43. *When a man gives his daughter in marriage and she refuses the marriage is null.*
>
> . . . the father of Khansa, daughter of Khizam, had given her in marriage, she having previously been married. She refused to accept this and betook herself to the Messenger of God, who annulled the union.

These traditions, it will be observed, do not go the whole length of the rubrics which Bokhari attaches to them, since they do not show the Prophet annulling a marriage contracted for a *virgin* daughter by her father, and they do arm the father with an excuse for overcoming her reluctance. But it is submitted that, understood in the manner above explained, these rubrics would be accepted as correct law by all Moslems; and the later *Mishkat-ul-Masabih*[1] has the following to fill the gap:

> Ibn Abbas said, 'Verily a maiden came to the Prophet and said, "My father has given me in marriage to a man I do not like". Then the Prophet left her to her choice.'

(b) *Guardians without the right of jabr.*

In Malik,[2] Shafii,[3] and Shia[4] law no marriage can validly be contracted for a woman except either (a) in the exercise of the power of *jabr* or (b) by her express command. Except by a father or grandfather no marriage can be contracted for a

[1] Vol. 2, ch. 3, pt. 3, p. 86.
[2] *Ibn Asim*, Rule 364.
[3] *Hedaya*, **2**, 2, 36.
[4] *Imamzea*, p. 7; *Mulka Jehan* v. *Mahomed Uskkurzee*, Supp. I.A. 192.

woman who has not yet reached puberty or is not at least *murahiqa* (*pubertati proxima* and of understanding).

It is believed, however, that in all three systems the marriage of infants by their guardians is for economic and other reasons prevalent. The Privy Council[1] has decided that such a contract will not acquire validity without the express consent of the woman on attaining puberty.

In Hanafi law such a guardian can contract his ward before puberty or without her express command. But on attaining puberty (or on hearing of the contract if she be already *pubes*) she may summarily and without reason refuse the marriage, which is then as if it had never been contracted. This is called the option of puberty *khiyar ul bulugh*. Her silence, however, in accordance with the above traditions, will be interpreted as consent.

In Somaliland, a Shafii country, the action of the guardians is apparently regarded as betrothal only, and the unrestricted right of the woman to repudiate their action is safeguarded by the Natives Betrothal and Marriage Ordinance 1928, sec. 3 of which protects even a virgin daughter contracted by her father.[2]

### E. AGENTS FOR MARRIAGE

The authorities contain copious law about the duties and powers of agents (*vakils*) for marriage. Except as a matter of pomp and ceremonial (see p. 39) the employment of agents to *conclude* marriage is obsolete. They are still sometimes employed in preliminary negotiation.

### F. CONCURRENT GUARDIANS

In cases of collateral guardianship it may happen that two or more relatives of equal degree have equal rights. In such a case Hanafi law lays down rules of priority for the case where they arrange different marriages for their ward. The same rules are to be found in Shafii law (*Minhaj*, Bk. 33, ch. 1, sec. 5 at p. 287); but (ibid., sec. 6, p. 288) in the case of a *mésalliance* the consent of all the guardians is necessary: *Hamed* v. *Sadha*, 1 Z. 398. If one guardian seeks to invalidate the marriage, the court must consider *Kifa'at*. The consent of a guardian capriciously with-

[1] *Imameea*, p. 7; *Mulka Jehan* v. *Mahomed Uskkurree*, Supp. I.A. 192.

[2] The above statement of the law deals only with the right of guardianship and the woman's right to reject a marriage negotiated on her behalf. For rescission of contract on other grounds see below, pp. 79–81, *Fasḵh*.

held may be made good by the next in degree, or in the last resort by the Qadi: *Athman* v. *Ali b. Salim*, 6 E.A. 91. In this case the guardian (brother) was suing to invalidate the marriage on the ground that it had taken place without his consent. The courts found that he was not acting in his sister's interests but unreasonably [such conduct was, of course, *haram*]. On this ground he should have been nonsuited, the court having found that the marriage was a suitable one. Having found the facts and stated the law, correctly but not completely, the Court of Appeal for East Africa then allowed a claim (which it found to be unjust) to succeed and a marriage to be invalidated on a technicality of the Muhammadan Law of Evidence.

*Submitted*, this was inequitable; see pp. 32–3.

### G. DIFFERENCE OF RELIGION

The right of marriage guardianship being a right at Muhammadan law can only be claimed by a person subject to that law, and can only be exercised over a person subject to that law. Normally, therefore, difference of religion will be a bar to its exercise.

In the case of apostasy this is certain (*Hedaya*, **23**, 2, 4 *ad fin.*, p. 392); indeed an apostate has no rights of any sort.

The question, which has been mooted in India, whether the Freedom of Religion Act 21 of 1850 abolished this disqualification does not arise in Africa, where the only corresponding provision appears to be section 4, subsection 4, clause b, of the Tanganyika Deceased Natives Estates Ordinance, no. 21 of 1922, which is in terms confined to a right of succession to property.

But, even where there is a difference of religion between them, a father has a strong natural interest in arranging a suitable marriage for his daughter. Other relatives also may obviously have a similar interest. Submitted that, as in the similar case of *hizanat*, see chapter xii, p. 101, the governing consideration will be the welfare of the person to be married. Thus the courts would probably not invalidate an otherwise suitable marriage merely on the ground that the guardian was an apostate; cf. *Marin Bibi*, 13 B.L.R. 160, with *Shamsing* v. *Santabai*, 25 B. 551. But obviously, where Muhammadan courts function, continuance in Islam will be regarded as the supreme welfare, outweighing all other considerations.

CHAPTER VII

# DOWER (*MAHR*)

## A. HISTORY

IT would be incorrect to describe the Muhammadan dower purely as a bride-price. The word *mahr* was borrowed from the Hebrew, where the idea is one of a settlement on the marriage, and Muhammadan writers insist that the dower is 'a mark of respect' for the woman and is not to be taken as payment of her equivalent or value.[1] The Ibadi definition refers it to her prospective responsibilities rather than to the possession of her person. Dower is 'recompense for the burden of child-bearing and suckling and *hizanat* of children which weigh upon the woman'.[2]

Nevertheless, dower undoubtedly grew out of bride-price, reformed by being made payable to the woman herself and not to her relatives. This origin still colours the whole law of dower. 'Dower may be regarded as consideration for connubial intercourse by way of analogy to the contract of sale'—per Mahmood J. in *Abdul Salima*, 8 A. 149 F.B. 'Dower is analogous to sale-price; that is, dower comprises the same fundamental conditions as those attached to a sale. When a woman marries, she sells a part of her person.'—*Khalil*.[3]

Thus the dower of a slave is still payable to her master; and for other doctrines which are only explicable by reference to the law of sale, see:

(a) the conception of proper dower (below, p. 66).

(b) the wife's right to withhold connubial intercourse till payment of the prompt dower (below, p. 68).

(c) the difference between Maliki and Shafii law regarding dower of specific objects (below, p. 64).

Dower is an inalienable and imprescriptible right. It is inalienable in that it is implied in every marriage, even though not mentioned; and even an express contract that there shall be no dower is of no effect, though a woman may agree to an insignificant dower (see p. 63). She may also after consummation make

[1] *Ibn Arfa* in ed.'s note 240 to *Ibn Asim*, Rule 332.

[2] Zeys, *Marriage*, p. 17.

[3] Ruxton, p. 106.

her husband a present of the dower;[1] and where the Muhammadan Law of Evidence is in force she could fictitiously admit (*iqrar*) receipt. It is imprescriptible in the sense that the wife's right cannot be barred by mere lapse of time alone. Time will not begin to run against the woman until either (a) the termination of the marriage, or (b) a definite demand has been made by her and refused. In any case her claim over any part of her husband's property, of which she is lawfully in possession, is unaffected by lapse of time.

### •B. AMOUNT OF DOWER

Shafii law knows of no minimum dower, following a tradition that the Prophet once permitted a woman to give herself in exchange for a pair of old shoes. In Maliki law the minimum is said to be three and in Hanafi law ten dirhems (i.e. about two shillings, and six shillings and eightpence respectively). The question is unsettled in Ibadi law. But the only importance of this conception is that a stipulation of less than this sum will be treated as a nullity and the proper dower (see below, p. 164) will be exigible.

The Ibadi[2] and Wahabi doctrine, and that of the *ahl ul hadith* of India, is that exaggeration or extravagance in respect of dower is blameworthy (*makruh*), since the dowers given by the Prophet for his wives and stipulated for his daughters were all of them small.[3] In many Shafii countries 'the *mahr*, especially in the lower orders of society, has sunk so low that it is no longer to be regarded as anything but a symbol'.[4]

In Maliki countries the *mahr*, though not excessive, is usually substantial. In India, both among Hanafis and Shias, and, it is believed, in Hanafi countries generally, sentiment is strongly in favour of high dower. The dower of Abu Bakr's granddaughter is said to have been half a million dirhems. Exaggerated sums are quite commonly stated in the marriage contract, either with a view to enhancing the social importance of the parties or as a check on divorce, but extravagant dowers are frequently

[1] *Q.* 4, 3.

[2] Zeys, *Marriage*, p. 17.

[3] The Indian *ahl ul hadith* declare that dower should not exceed that accepted by Fatima—*Fatimi mahr*. In cases where one party only to the marriage holds these primitivist views a *Fatimi mahr* is commonly stated with a tacit understanding of a larger sum: see *Bachun* v. *Hamid Husain*, 14 M.I.A. 377.

[4] Van den Berg, *Principes*, 148.

stated with the *bona fide* intention of payment.[1] For an extreme instance see *Fakhrunissa* v. *Izar us Sadik*, 17 N. 72 P.C., where the larger of two sums, both of them admittedly beyond the means of the husband, was upheld on the question of fact, on the ground that extravagance in the *mahr* was the usual custom. In Oudh and Ajmer, but not elsewhere, statutory provisions exist by which the courts may reduce excessive dower.

### C. QUALITY OF DOWER

Dower may consist of one or more of the following:

(a) Money,

(b) Land and buildings, or a *fundus instructus*,

(c) Payments in kind, e.g. corn or the stock-in-trade of a business,

(d) Specific chattels: these must be such as are capable of sale in Muhammadan law, useful and ritually clean—not, therefore, things which are not subject to private ownership, nor, e.g., pork, wine, or instruments of gambling.

Where the chattel is not particularly specified, e.g. 'one of my camels', the wife may choose.

The Maliki and Shafii schools differ as to the responsibility for such a specific chattel in the event of loss. The Hanafi school appears to agree with the Maliki. The Maliki doctrine adheres closely to the law of sale, in which delivery is not necessary to complete title (see p. 183). Shafii doctrine, as usual, is harder to the woman.

Thus *Khalil*:[2] 'Questions of warranty or responsibility concerning the dower are governed by the same principles as those applying to sales. Depreciation or loss of the dower is to the detriment of that party who had charge of it at the time when the said depreciation or loss occurred; the same principle applies to optional purchases in general.'

*Contra*, in the *Minhaj* (pp. 305, 306): 'If one admits, with the majority of jurists, that a woman's title to a certain object stipulated as dower is not absolute, but merely contractual before possession of it has been taken, one cannot allow her any right to dispose of it by way of sale, until it has been actually delivered to her. From this principle it also follows that in case

[1] Onerous dowers act as a check on polygamy. [2] Ruxton, p. 106.

of accidental loss before taking possession, the husband owes proportional dower; and the wife cannot demand the value of the thing originally promised. Our school also grants a right of option to the wife, if the specified object that forms the dower has been damaged by redhibitory defects before taking possession; but in these circumstances she may only choose between proportional dower and acceptance pure and simple of the defective object. Nor does our school consider a husband obliged to pay any indemnity for the use he may make of the promised object before delivery, e.g. by riding an animal included in the dower, or using it in any other way.'

(e) A benefit stipulated by the wife for some one else, e.g. the enfranchisement of a slave. The wife, not the husband, is in this case patron of the slave.

(f) The payment of a debt. A forgave B a debt which she owed him in consideration of her marrying him, which she would not otherwise have done. Held, a valid *mahr*: *Sheriff Abdulla* v. *Zuena* (1910), 3 E.A. 95.[1]

(g) But dower may not consist of services to be rendered by the husband to the wife, the reason given being that it is contrary to the institution of marriage that the husband, the natural master, should serve and the wife rule. *Khawind*, *malik*, and other words meaning lord are commonly used by Moslem women of their husbands. By exception, an exception based on *hadith*,[2] the dower may consist of service to be rendered by the husband in teaching his wife the Qoran. Such instruction is regarded as of inestimable value, and, further, the relation of teacher to pupil is one of authority. As a matter of custom, however, no matter what the lawyers may say to the contrary, serving for a wife as Jacob did for Leah and Rachel is extremely common in some Muhammadan lands, the benefits accruing, contrary to the law, to her guardian.

### D. STIPULATED AND PROPER DOWER
### (*Mahr ul 'aqd* and *Mahr ul mithl*)

Dower is essential in every contract of marriage. It may either be fixed by agreement between the parties or proper to the circumstances of the bride.

[1] The subsequent case *eodem nomine*, 4 E.A. 86, shows the inadvisability of such a bargain.

[2] Bokhari 67, 15 and 51.

An agreement fixing the dower normally forms part of the marriage contract; but where that has not been done an agreement may be reached after marriage.[1]

Customary, or proper dower—*mahr ul mithl* (the word *mithl* signifies similar or appropriate). In spite of Ibn Arfa's assertion[2] that marriage is a contract in which the husband is under no necessity of paying the value of the woman, proper dower is an attempt to estimate the value of the woman. Among an aristocratically minded people, the family to which she belongs is one of the first considerations, and it is therefore usual to inquire first what dower has usually been paid in her family, e.g. to her sisters or her aunts. But her own beauty, youth, accomplishments, and social condition (e.g. virgin, widow, or divorcee—though no stigma legally attaches to divorce) must also be considered.[3] The husband's position or wealth are irrelevant. Some early Indian decisions to the contrary are now generally admitted to be incorrect. What have the circumstances of a purchaser to do with the intrinsic value of the thing he buys? On the other hand, the husband's position and wealth are the primary considerations in determining maintenance; see below, p. 95.

The proper dower will form the basis of negotiations by the wife's relatives leading to a definite stipulation, and may be fixed by the Qadi in all cases where no expressed dower was stipulated or where the dower stipulated was below the legal minimum, or where the stipulation, e.g. for a dower of wine, was *fasid*. It or, except in Shafii law,[4] the stipulated dower, whichever was less, is due in all *fasid* marriages actually consummated.

The *Minhaj*, **34**, 4, 310, appears to imply that it is due on the consummation of a *batil* marriage; *sed quaere*.

Customary dower is payable in the event of the husband's death before consummation of a valid marriage.[5]

### E. PROMPT AND DEFERRED DOWER

The practice of dividing the dower into two portions, prompt (*mu'ajjal*) and deferred (*muwajjal*), is universal in the Hanafi school, in the Shia school as understood in India, and prevalent

[1] *Kamar-un-nissa*, 3 A. 266.
[2] Quoted above, p. 36.
[3] *Minhaj*, **34**, 4, 310.
[4] Ibid., **34**, 1, 307.
[5] F.Q. 471.

in the Maliki school. But the theory of the Maliki lawyers on this division differs from the Hanafi and Indian Shia theory.

According to the Hanafi theory, a portion of the dower may be made payable only on the termination of the marriage; according to the Maliki theory, adhering more closely to the origin in the law of sale, payment cannot be made to depend on an uncertain future event.[1] But it is usual to allow part of the dower to remain in the husband's hands, to be managed by him on behalf of the wife for a definite period, e.g. ten years;[2] and if death or divorce occurs within that period, the deferred dower will be immediately exigible. The proportion of prompt to deferred dower may be fixed by agreement or by custom.[3] Where no agreement or custom is proved, the Indian Courts usually divide the dower into two equal halves, though in some of the older cases it was presumed to be all prompt.

The deferred dower is in its essence a check on capricious divorce. In India at least, though in theory exigible on the termination of the marriage from any cause, it is not usually exacted on the death of the wife in the absence of special circumstances, e.g. in the original contract; on the death of the husband it may be forgiven, or exacted in whole or in part as provision for widowhood. Its origin is probably the following text:

'And if ye be desirous to exchange one wife in place of another wife and ye have given one of them a talent, then take not away anything therefrom. What! will ye take it away falsely and commit an open sin? And how can ye take it away seeing that one of you hath gone in unto the other, and they have received from you a firm covenant?'[4]

The Ibadis pay homage to this text in a different manner, namely, by making a 'gift on repudiation' obligatory.

In Ibadi and Shafii law the whole dower is regarded as prompt, and there appears to be no reported case on deferred dower from any of the East African courts. There seems to be no reason, however, why the Indian custom, with its obvious advantages, should not in time spread to East Africa.

[1] Payment in full is in all cases due '(a) if one or both parties die, (b) if the marriage has been consummated, (c) where the wife has lived for one year in her husband's house, even though intercourse may not have taken place.' Ruxton, p. 108.

[2] Ruxton, p. 108, at bottom of page.

[3] Q.P., sec. 73.

[4] Q. 4, 24.

### F. RECOVERY OF DOWER

(a) The following rules apply to all dower except deferred, *muwajjal:*

(i) Payable on demand.

(ii) But limitation of time does not run against the wife until a demand has been made and refused or ignored,[1] or until the marriage is dissolved by death or otherwise. Until such event it is regarded as a continuing debt.

(iii) A wife may refuse conjugal rights to the husband until the dower has been paid. If, however, she has once permitted consummation, she can no longer refuse. This curious rule is, like so much else, a survival from the contract of sale. The wife retains, as it were, a vendor's lien on her own person, such a lien expiring by delivery of the goods. If the dower fails, e.g. where the dower was a field and a third party establishes title to that field, the wife's right to refuse intercourse revives. One may compare a similar doctrine of the revival of lien on failure of consideration in English law. This doctrine of vendor's lien is to be found clearly stated in the Hanafi, Maliki, and Ibadi authorities;[2] but for Hanafi doctrine in Egypt and the Sudan contrast Q.P. 104 with Q.P. 213.

In Shafii law the wife's lien on herself is not so clear. She is not obliged to submit herself to her husband until she has taken possession of the dower; but where the dower is promised by a certain date she cannot refuse cohabitation when once that date has expired.

In all schools the right to dower becomes irrevocable by the fact of consummation. Half the dower would be payable in the event of the husband's resiling from his contract before consummation.

(b) The following rules apply to all dower whether prompt or deferred:

(i) On the dissolution of the marriage, whether by divorce or death, all dower becomes immediately payable.

[1] *Mulleeka* v. *Jumula*, Supp. I.A. 135; *Khajooroonissa* v. *Ryeesoonissa*, 2 I.A. 235. The application for leave to sue *in forma pauperis* is not in itself a demand.

[2] Hanafi: Q.P. 104; Ibadi: Zeys, *Marriage*, 17; Maliki: Ruxton, 108; Shafii: *Minhaj*, 306.

(ii) No demand is necessary: limitation of time commences to run against the widow from the date of the husband's death; against the divorcee from the date the divorce becomes irrevocable.

(iii) The dower is normally only an unsecured debt,[1] and has no priority over other debts.

(iv) The husband may, however, if he pleases, lawfully secure it during his lifetime by a mortgage or other charge on specific property.

(v) A death-bed acknowledgement of dower debt by the husband is evidence of such a debt; but being an acknowledgement in favour of an heir it is not conclusive, nor can it be accepted without other evidence.

(vi) Although the debt is not secured, the wife (if after her husband's death she finds herself lawfully and without force or fraud in possession of her deceased husband's property) may retain that property as security for the due discharge of the dower debt.[2] She may enjoy the profits from it, but is accountable. In rendering an account she may charge interest on the dower debt by way of damages as a set-off against the profits received.[3]

(vii) She cannot, however, alienate the property.[4] Her right is merely a right to retain possession and enjoyment until the capital sum of her debt is paid off. If she alienates for value to a *bona fide* purchaser without notice, it is conceivable that he may be able to plead equity. In the Privy Council case, *Maina Bibi* v. *Chandhri Vakil Admad*, 52 I.A. 145, the alienation was gratuitous. It was held that the wife had no proprietary interest in the property and no right to dispose of it. Having parted with possession she had lost her lien, and the donees were ordered to deliver up

[1] *Bazayet Hossein* v. *Dooli Chund*, 5 I.A. 211 (4 C. 402).

[2] *Ameer oon Nissa* v. *Mooradooa Nissa*, 6 M.I.A. 211 (Shia); *Bachun* v. *Hamid Hossein*, 14 M.I.A., 377 (Sunni); *Hamira* v. *Zubaida*, 43 I.A. 294; *Md. Shoaib* v. *Zaib Jahan*, 50 A. 423: per Sulaiman J: 'No matter how else she obtained possession and without specific assertion of claim on her part.'

[3] *Hamira Bibi* v. *Zubaida Bibi*, 43 I.A. 294 (38 A. 581).

[4] Patna rulings to the contrary culminating in *Sogia* v. *Kitabun*, 7 P. 147, are hard to reconcile with *Maina Bibi*.

possession unconditionally to the heirs. This was so, even though, at a date before the widow's alienation, the suit of the heirs for possession had been dismissed for failure to pay the *mahr*. The widow's right being merely a lien, the court had no power to convert it into absolute property. On the other hand, it is possible for the widow's dower to become a valid charge on the husband's property by operation of a civil court decree so as to affect it in the hands of third parties: *Qasim Husain* v. *Habibur Rahman*, 56 I.A. 254 (a Shia case, but the Sunni law is identical).

CHAPTER VIII

# MATRIMONIAL ENDOWMENT OTHER THAN *MAHR*

A NUMBER of other presents are commonly made to a bride on her marriage.[1] They are not part of the marriage contract and will not be implied in it, but they may be the subject of legally enforceable contracts of the nature of *hiba-bashart-ul-'ewaz* collateral to the marriage contract, the *'ewaz* in each case being the marriage itself. The only safe course in respect to them is to insist on strict proof of the contract with reference to prevailing custom; though they are referred to in some of the authorities.

Such gifts may be divided into two classes:

(a) Gifts to wife from husband. These are:

(i) *daf'a*—betrothal gifts before and with a view to marriage.

(ii) *radwa*—which the husband gives to his wife in order to give her satisfaction when he marries another. The husband, says *Mekkawi*, is bound to give it where it is required by custom. This has been judicially recognized in the case of second marriages by Khoja husbands, *Kajbye* v. *Sachoo*, 1 Z. 28: *Rambye* v. *Karmali Bhaloo*, 1 Z. 16, in which case the court ordered the satisfaction to be deposited with the *jama'at*. Hindu law recognizes a similar payment under the name of *adhivedanika*, and the Khoja practice may have both a Muhammadan and a Hindu origin.

(iii) *Subhiya*, or morning gift, called by the Maliki doctors *za'id* or largesse. This, though in theory and origin voluntary, may be a subject of contract.

The Maliki rule[2] is that the husband may be compelled to pay these sums, but that if he has not paid them the liability dies with him, as a gift which has not been delivered.

(b) *Nihalat*, gifts by a third party, usually the bride's father or other guardian, or mother, but sometimes, e.g., the bridegroom's father, to the spouses jointly or one or other of them.[3] The commonest of such gifts, alike in ancient and modern times,

[1] *Mekkawi*, pt. 2, ch. 12, and authorities there cited: *Ibn Asim*, 386 and foll.

[2] *Ibn Asim*, Rules 386, 388.

[3] Ibid., 390 and foll.

is the gift by the bride's father of domestic equipment for the new home.[1]

An exceptional case, and one which well illustrates the customary nature of such gifts, was the subject of decision in *Khwaja Muhammad Khan* v. *Husaini Begum*, 37 I.A. 152; 32 A. 410, where an annual allowance during marriage to the wife promised by the husband's father before marriage was held enforceable by the wife, even though she was separated from her husband. This allowance was described as *Kharch-i-pandan*, a phrase which is not Arabic and therefore not classical law. The decision must be regarded as based on customary law.

[1] *Mekkawi*, pt. 2, ch. 12.

## CHAPTER IX

# DIVORCE

'THE most detestable of all permitted things,' according to a saying of the Prophet. It is nevertheless permitted, and even enjoined in some cases. There are seven kinds of divorce:

| | |
|---|---|
| A. Repudiation | *talaq* |
| B. Redemption | *khula* |
| C. Mutual separation | *mubarat* |
| D. Judicial rescission of contract | *faskh* |
| E. Vow of continence | *ila* |
| F. Injurious assimilation | *zihar* |
| G. Imprecation | *li'an* |

### A. TALAQ

(i) This is a generic name for all divorce, but is specifically applied to repudiation by or on behalf of the husband. Any Muhammadan of sound mind who has attained puberty may at any time divorce his wife at his mere pleasure. On doing so he becomes immediately liable for the payment of all her dower not already paid. As for maintenance, see ch. v, *Iddat*, p. 52.

(ii) The use of the word *talaq* is sufficient evidence of intention. The original authorities (e.g. Qadi Khan in Md. Yusoof, vol. iii *passim*) give innumerable instances, often very far fetched, of the meaning and effect of particular phrases. The supersession of the Moslem law of evidence renders these obsolete. In Hanafi law intention is unnecessary, and the mere use by the husband of a formula of repudiation, even in jest, in drunkenness, or under compulsion, is valid, the reason given for this being that a man must not be allowed to trifle with so serious a formula, and also that he could not be allowed to plead the illegal condition of drunkenness as an excuse for the detestable act of divorce. In Turkey, under the Sultans, by a well-understood convention, a wife who wished to be rid of a dissolute husband would go before the Qadi with two irreproachable witnesses and depose that he had divorced her when drunk, an allegation which he would not be in a position to deny.[1]

[1] Ostrorog, p. 82.

In Shafii[1] and Maliki law a *talaq* without intention is void: cf. Bokhari, **68**, 11 (Of repudiation under restraint, drunkenness, &c): cf. also Q. **2**, 286: 'Lord, punish us not if we forget or make mistake,' and Bokhari, **1**, 1: 'Actions are judged by purposes.'

In Hanafi law it is not necessary that the repudiation should reach the wife, provided the husband has done all he can to bring it to her ears: *aliter* Maliki and Shafii law.[2]

REPUDIATION IS OF THREE KINDS:

(i) Revocable, *raja'i*.

(ii) Irrevocable, *bai'n*, but not triple.

(iii) Irrevocable-triple.

(i) Revocable repudiation is any repudiation uttered less than three times and under such circumstances or in such form that an intention to make it immediately irrevocable is not a necessary inference.

The wife is immediately placed in *iddat* (see ch. v), but the repudiation has no other effect till the *iddat* expires. The husband can at any time revoke the sentence by resuming conjugal relations at his own option;[3] and if either spouse dies during the *iddat* the other inherits as a spouse.[4] On the expiry of the *iddat* without resumption of conjugal relations the divorce becomes irrevocable.

(ii) Irrevocable repudiation may also be made at any moment during the marriage by any unequivocal words showing an immediate and unalterable intention: thus a repudiation solemnly uttered as 'one *bain* (irrevocable) *talaq*' before the Qadi and witnesses. In India a repudiation in writing, *a fortiori* a repudiation published in the newspapers, has been held to have this effect.[4] But under the Shafii law, as interpreted in Zanzibar, a repudiation by letter was held to amount only to a single revocable *talaq*. The words used were, 'You may consider yourself divorced; you are no longer my wife from to-day'.[5]

[1] Ali b. Mwaraku, 1 Z. 582.

[2] *Zuena* v. *Saleh*, 3 Z. 29.

[3] *Minhaj*, **38**, 1, 345.

[4] For the English evidentiary distinction, foreign to Moslem ideas, between writing as an instrument of divorce and writing as evidence of a verbal divorce, see *Ma Mi* v. *Kalandar Ammal* (II), 54 I.A. 61. But as there was no proof of utterance the result by Moslem ideas of evidence would have been the same.

[5] *Zuena* v. *Saleh*, 3 Z. 29.

A revocable divorce may at any time be converted into an irrevocable one.

The effect of irrevocable divorce is (1) that the husband's rights over the wife cease at once and cannot be resumed without remarriage; (2) that her *iddat*, if not already commenced, commences; (3) that mutual rights of inheritance immediately cease, except that if the repudiation were uttered during the husband's death-illness, *talaq ul mariz* (*ul-maut*) (see below, p. 179), and his death occur before the expiry of the *iddat*, the wife would inherit as a wife and not otherwise. This is unquestionable in other schools than the Shafii, but the *Minhaj*, Bk. 37, sec. iv, p. 322, appears to deny the right of a wife to inheritance in this case if the divorce was irrevocable.

(iii) *Triple repudiation.* When a husband, having twice previously (whether in the same breath or on previous occasions at any time during the marriage) pronounced repudiation, for the third time repudiates his wife, such third sentence of repudiation is irrevocable, with the added penalty that the husband cannot remarry that wife until after the genuine consummation of her marriage to an intervening husband (who either divorces her or dies). In Shia law he may never remarry her.

The possibility of remarriage of a triply divorced wife led, at any rate in the minds of writers of imaginative fiction,[1] to the idea of a *mari complaisant*, hired for the express purpose of divorcing the wife and so again rendering her lawful to her first husband. But the wife could not be compelled to accept such a husband, a fact which in itself must have rendered this disgusting procedure uncommon. The Prophet's legislation must be read in historical perspective; it at any rate prevented a husband keeping his wife in a state of uncertainty by pronouncing *talaq* on every trifling occasion and revoking it as lightly. That it was a real check on a definite abuse Bokhari's story of Ibn Omar [2] bears out. Ibn Omar's friends were surprised on being told that every utterance of *talaq*, even though it did not comply with the Sunna, would be counted against

[1] But the idea, although not the particular application, may be a survival of the power which before the Prophet the husband undoubtedly possessed of lending, hiring, or giving his wife to strangers; cf. a story in Bokhari, **67**, 68, of a *nasir* who divided everything he had, including his wives, with his *muhajir* guest.

[2] Bokhari, **68**, 2.

him. Their astonishment may be compared with that of Christ's disciples on a similar occasion.[1]

The above is a complete statement of the Sunni law of the requisites of a valid divorce from a lawyer's point of view. Recommendations as to menstrual purity and the like do not concern the courts, since the legal effect of a divorce pronounced in defiance of all such directions is exactly the same as when they are meticulously observed.[2] True, in *Ghulam Mohiyuddin* v. *Khizar Husain*, 10 Lah. 470, the difference between *talaq hasan* and *talaq bid'at* was important, but only as a matter of evidence whether the husband had carried out his expressed intention of divorce or not. If the divorce was of the former character he must have remained of the same mind for three months continuously, which, with reference to his known character, was unlikely.

In Shia law a repudiation is of no effect unless it is pronounced (1) strictly in accordance with the *Sunna*; (2) in the Arabic tongue; (3) in the presence of at least two sufficient (*'udul*) male witnesses; (4) with the intention to divorce.

For these reasons it seems necessary to subjoin definitions of the principal terms used in casuistical discussion.

(a) *Talaq us sunnat*: divorce according to the *sunna*, divided into:

(1) *Talaq ahsan*: a single pronouncement of divorce made during a period of menstrual purity, no intercourse having taken place during that period.

(2) *Talaq hasan*: the same, followed by two further pronouncements in the succeeding periods, no intercourse taking place at any time during the three periods. Such divorce becomes irrevocable on the third pronouncement.

(b) *Talaq bid'at*: any divorce, whether revocable or irrevocable, which does not comply with the above requirements. Of no effect in Shia law.

For the legal consequences of repudiation, see ch. v, *Iddat*, ch. vii, Dower, sec. E, Prompt and Deferred, and ch. xii, Maintenance.

*Delegated and Conditional Repudiation*

These may be either revocable, irrevocable, or irrevocable and triple, according to the intention expressed by the husband when creating the agency or condition.

[1] St. Matt. xix. 10.

[2] Bokhari, 68, 2.

(a) Delegated divorce, *talaq-i-tafwiz*. This is a curious survival of the old property rights of the husband over his wife. He may appoint an attorney to divorce her on his behalf just as he might appoint an attorney to deal with his property. At a date sufficiently early for the practice to be common to all schools this fact was seized upon by the lawyers as a means of protecting the wife. The husband on marriage was induced to constitute the wife or some one who would protect her interests (e.g. her father or brother) his irrevocable[1] attorney to exercise the marital right of repudiation in certain events, e.g. on his entering into a second marriage or keeping a concubine. *Khalil*[2] even gives an instance where the wife is given the right on her husband's second marriage to repudiate at her option herself or the second wife.

But it is settled that, although the wife may thus be vested with the husband's powers in certain contingencies, she cannot be given an unfettered right (such as the husband possesses) to repudiate entirely at her own discretion; and similarly the husband, though his discretion may be hedged about and rendered prohibitively expensive (see ch. vii, sec. B), cannot be altogether deprived of it.

(b) Conditional or suspended divorce (*talaq-i-ta'liq*).

A husband may say 'my wife is divorced', or 'irrevocably divorced', or 'triply divorced', and in the same sentence may make the effect of this dependent on a future condition, e.g. 'If thou goest to that house thou art my cousin, the daughter of my uncle'. The court found that the words were meant to threaten the end of more intimate relations.[3] The form is also used, though reprobated, as an emphatic form of oath: 'If I lie in this, my wives are divorced.'

By contrast with *talaq-i-tafwiz*, *talaq-i-ta'liq* is one of the points where the law of marriage and divorce definitely parts company with the law of transfer of property. Neither sale nor any other transfer of property can be made dependent on a condition of uncertain future date. But though different in origin, conditional divorce is equally seized upon by the lawyers as a means of protecting the wife. 'If I marry a second wife: if I take a con-

[1] It is doubtful if any one except the wife can be irrevocably vested.

[2] Ruxton, p. 111.

[3] *Hamid Ali* v. *Imtiazan*, 2 A. 71.

cubine, if I thrash my wife,' the husband is made to say, 'she is [*perfect tense*] irrevocably divorced.' From the very moment of fulfilment of the condition the divorce *immediately* takes effect, not merely from the date of the Qadi's decree declaring that the condition has been fulfilled.[1] Distinguish the Qadi's decree in cases of *faskh* (see next page).

*Talaq-i-tafwiz* is good in all systems; *talaq-i-taʿliq* in Sunni and Ibadi but not in Shia law.[2] The latter is the common method in the Shafii,[2] the former in the Hanafi and Maliki systems. It is important to notice that they both operate as divorce by the husband, i.e. he is liable for all unpaid dower and for maintenance of the wife during *iddat*, so far as recognized by the particular school governing the marriage; and there is no question of redemption money.

### B. REDEMPTION (KHULAʿ)

Just as the doctrine of marriage originates in the doctrine of sale, so also *khulaʿ*, which is a repurchase of herself by the wife for a consideration. The husband is free to accept or refuse any offer for repurchase.

### C. MUBARAT

This is divorce by mutual consent in cases which do not come within the description of *talaq-i-tafwiz* or *talaq-i-taʿliq* and without the wife paying for her redemption as in *khulaʿ*. It is extremely rare, for financial arrangements have naturally to be made at the dissolution of almost any marriage; and the husband, in that he may give or refuse his consent, is in a position to cast the burden of these upon the wife as the price of her redemption —*khulaʿ*.

Essentials of *khulaʿ* divorce are :

(i) Mutual consent of the parties.

(ii) An *ʿewaz* or equivalent (commonly translated consideration) passing from the wife to the husband for her redemption.

The divorce is valid at once on the agreement of the parties, and the *ʿewaz*, if not immediately paid, is a simple money due. It was implied in *Lalli* v. *Asha*, 5 E.A. 165, that the divorce was not operative till the release money had been paid, but this was not a necessary finding in the case; and the view taken in

[1] *Mwapili* v. *Khamis*, 3 Z. 42. [2] *Ali* v. *Mkubwa*, 1 Z. 582; cf. *Achehnese*, i. 349.

*Suddan* v. *Faiz Baksh*, 1 Lah. 402, and *Buzul-ul-Raheem* v. *Luteefut oon nissa*, 8 M.I.A. 396, seems preferable.

Such *'ewaz* may be, and usually is, the release by the wife of the unpaid portion of the dower, and sometimes also the repayment by her of dower actually received. But this is not essential. The consideration may be anything which the parties agree upon, e.g. the wife paying the husband's debts or rendering herself liable for the suckling or legal expenses of the upbringing of the children. In *Nasor* v. *Awena*, 1 Z. 542, it was said, *semble*, that the divorce might not be good unless (1) both parties knew the amount of the *mahr* released, and (2) it was not subject to *zakat*. This is based on the doctrine of sale, where the amount of the price must always be certain and known to both parties.

### D. FASKH

The dissolution or rescission of the contract of marriage by judicial decree.

A very common form of litigation in Northern Nigeria, Mesopotamia, and other Moslem countries, *faskh* is almost extinct in those countries where, the Qadi having been deprived of his judicial functions, such a suit might involve bringing domestic matters before a non-Moslem judge. In the whole Indian Law Reports there appears to be only one case of dissolution on account of cruelty and few of nullity. In Uganda, where the Qadi does not sit as such (though he may be a member of a native court), the District Courts as in India have jurisdiction.[1] In Kenya the District Courts have concurrent jurisdiction with the Qadis.[2] The High Court has held[3] that it had no power to dissolve Muhammadan marriage, not being a marriage within the terms of the Marriage Ordinance 1902. *Submitted*, that that ordinance does not deprive the courts of the power to dissolve a Muhammadan marriage according to Muhammadan law.

*Procedure.* The Qadi is an excellent tribunal for cases of this sort, for his first duty is to endeavour to reconcile the parties. Almighty God, whose rights the Qadi is first and foremost to protect, has said: 'If ye fear a split between two spouses call in

[1] *Sefu* v. *Maliamu*, 2 U. 264; see sec. 19 Marriage and Divorce Ordinance, 1906.

[2] See p. 31.

[3] *Fatuma* v. *Ali Baka*, 7 E.A. 171.

an umpire from the family of the husband and an umpire from the family of the wife; for reconciliation is better than separation,' or, (another translation), 'for the friendly settlement of disputes is of great merit.'[1] Thus, though it is not incumbent upon either husband or wife to ask for the appointment of an *amin* to supervise their conduct, the Qadi should make such an appointment.[2] Until final settlement, it was held in the same case that the wife, unless in fault, is entitled to maintenance.

*Grounds.* Marriage being purely a contract there is no essential distinction between judicial divorce and declaration of nullity; and judicial separation, the device of maintaining the legal existence of marriage solely as a bar to remarriage but for no other purpose, is of course unknown. *Faskh* may be demanded:

(a) *On any ground which would invalidate any other contract*, e.g. vital defect, lack of *consensus ad idem*, misrepresentation by the defendant on a vital point, breach of warranty.

Thus impotence or malformation rendering the sexual act impossible are grounds for dissolution,[3] but not where the marriage has been *expressly* entered into for companionship only. An opportunity to the party affected to cure the defect, if curable, must be allowed. *Mekkawi* says that misrepresentation on the question of equality will give the wife a right to dissolution even if she does not discover the correct facts till after consummation; a slave representing himself to be free, or, according to *Mekkawi*, a foundling laying claim to illustrious descent. The limits of this doctrine are doubtful, as is also the legal position of a husband to whom his bride has been falsely warranted a virgin.

(b) For a cause arising subsequent to the marriage. Leprosy and elephantiasis are grounds for dissolution whenever they occur; other diseases are not grounds when they commence only after marriage, though perhaps the application of the English doctrine, that communication of disease is cruelty, might be considered. Outcasteing, in communities recognizing caste, will justify a wife's refusal to live with her husband until restored

[1] Q. 4, 39. The text is also applied to non-matrimonial disputes (see above, p. 32).

[2] *Ali* v. *Mwana*, 2 Z. 2; *Minhaj*, 35, 2, p. 318.

[3] *Salama* v. *Issa*, 1 Z. 357. The application of Hindu law to Khojas in a similar case, *Jaffer* v. *Morgabai*, 1 Z. 81, is contrary to all Indian precedent and (submitted) incorrect.

to caste: *semble*, his persistence in his errors would be ground for divorce.[1]

*Cruelty*. Sexual infidelity on the part of the husband is not relevant in a wife's suit for divorce; and although the wife has the right to an equal share of her husband's time with other wives she has no enforceable right to sexual intercourse, even although that is the substance of the contract. On the other hand, she can claim divorce on the ground of cruelty. The following have been held to be cruelty:

(i) Insulting allegations of her infidelity; see p. 83.

(ii) Physical cruelty. The Zanzibar court[2] has followed English decisions and also *Buzloor Ruheem*, 11 M.I.A. 551, in classifying cruelty as persistent or gross. Persistent cruelty is any course of conduct which is likely to endanger health or life. Gross cruelty may be a single act, e.g. kicking a pregnant wife.[2]

(iii) Persistent failure to maintain would, it is submitted, also be cruelty.[2] Inability to maintain is a ground of divorce only in the Shafii school; see p. 95.

### *Restitution of Conjugal Rights*

Ameer Ali states that in Muhammadan law a Qadi has power to cause a wife to be delivered personally to her husband. This seems open to question, and in any case no English court would enforce or allow the enforcement of such a procedure. The English suit for restitution of conjugal rights has become both in England and in India[3] merely a clumsy preliminary in questions of maintenance and, until recently, divorce. It is much to be regretted that the Indian courts have allowed this cause of action to be considered in other than English marriages. The East African courts have steadily refused to do so,[4] and to Muhammadan marriage it is entirely inappropriate.

### E. ILA

Or vow of continence. If a husband makes a vow of continence for four months (except as a concomitant of *ihram*, the state of purity necessary for the *hajj* or pilgrimage), and keeps it, the

[1] *Nanji* v. *Jesuda*, 1 Z. 351.
[2] *Jooma* v. *Noorbai*, 1 Z. 201.
[3] *Parwati* v. *Ghanchi*, 44 B. 972.
[4] *Gulam Mahomed* v. *Fatima*, 6 E.A. 119; *Fatuma* v. *Ali Baka*, 7 E.A. 171; see also *Sheriff Abdulla* v. *Zuena*, 4 E.A. 86.

wife is entitled to a dissolution of the marriage. If he makes such a vow and does not keep it, he is liable to a penalty—not so much for breach of his vow as for unlawful swearing.

### F. ZIHAR

Injurious assimilation. The husband compares his wife to a relative within the prohibited degrees, e.g. his mother. Such a comparison is forbidden in the Qoran, and the husband is liable to penance. If, however, he persists in his wrongdoing the wife is entitled to a dissolution.

*Ila* and *zihar* are of only antiquarian interest to-day.

### G. LIʿAN

Anathema.[1] The only form of the crime of defamation specifically treated in the *sheria* is imputation on a woman's chastity (see e.g. Minhaj, Bk. 53). This was punished severely. But a husband did not incur punishment if he made oath before the Qadi and in the mosque that his wife's child, newborn or *en ventre sa mère*, was not his own. The wife could make counter-oath. This ordeal by oath and counter-oath was repeated five times. No evidence was taken. One or other party might be liable to severe punishment for perjury or *zina*, or both, but in any case the marriage was at an end; and if the husband established his case the child was definitely bastardized and could not inherit from him. Whether he establishes his case or not, he can never, having made so serious an accusation, inherit from the child anathematized.

Bokhari [2] has a *hadith* to the effect that the Prophet encouraged this procedure as superseding private vengeance by the husband for infidelity. The so-called 'unwritten law' is strictly discountenanced by the lawyers of Islam. Before the Prophet a procedure for bastardizing unwanted children would have been superfluous, since a father incurred no liability apart from acknowledgement. Thus what is to our eyes an archaic procedure was at its inception a step towards reform.

*Liʿan* is apparently still a reality in Egypt. The procedure is impossible in courts whose judges are not necessarily Moslems and must decide by English ideas of procedure and evidence.

[1] Bokhari 68, 33 (2) above, p. 26. [2] 68, 4.

Consequently the Indian rulings[1] amount to no more than this, that an accusation of adultery by the husband does not of itself terminate the marriage, but may, if persisted in, be cruelty, giving the wife a right to obtain dissolution of marriage. This is called *li'an*, but is a very different matter from the original procedure, in which the plaintiff was the husband.[2]

There seems to be no reason why the husband should not still institute proceedings by *li'an*; but the *hadith* (Bokhari **68**, 33, 1) shows that he would not thereby obtain restitution of dower already paid (being consideration for connubial intercourse already enjoyed). But he escapes liability for maintenance of the child; and as regards unpaid dower, the position is not clear. The *Minhaj* speaks of advantages resulting to the husband and of a formal decree by the Qadi specifying those advantages, but does not enumerate them.[3]

[1] *Zafar Husain*, 41 A. 278; *Khatijabi*, 52 B. 295; *Rahima Bibi*, 48 A. 834; *Fakhre Jehan*, 4 Luck. 168; cf. *Sheriff Abdulla* v. *Zuena*, 4 E.A. 86.

[2] Bokhari, **68**, 28.

[3] Bk. **40**, sec. 4, p. 363.

## CHAPTER X

# CHANGE OF RELIGION AND CONFLICT OF LAWS[1]

### A. CHANGE OF RELIGION FROM ISLAM

ISLAM is of the essence of the contract, and consequently the apostasy of either husband or wife or both from Islam (or the apostasy of a Kitabia wife to a non-Kitabia religion) involves of necessity the termination of the contract. Consequently even where husband and wife are converted to Christianity together they must, if they wish lawfully to continue the marital relation, be remarried. Whether or no Christianity would recognize the Muhammadan marriage is disputed.

### B. CHANGE OF RELIGION TO ISLAM

A husband converted to Islam keeps his wives if

(a) *kitabia*, or

(b) their conversion follows within a period of *iddat* commencing from his conversion, and

(c) the marriage is *sahih* by Muhammadan law; e.g. a wife within the prohibited degrees must be put away, and a polygamous convert must separate himself from all his wives except four.

A wife converted to Islam is by Muhammadan law released from her marriage unless the conversion of her husband (whether *kitabi* or not) follows within the period of *iddat*, which commences on her conversion. Muhammadan law being the *lex loci*, this rule has actually been enforced in Cyprus as effecting the dissolution of a Christian marriage.[2] In India it has been held that by Hanafi law Islam must actually be offered to the husband and refused by him before the woman can be at liberty to contract a fresh marriage.[3] This appears to be a purely local view.

[1] *Minhaj*, **33**, 2, 3, and 3, pp. 294–9.

[2] *R.* v. *Christodoulo*, 2 Cyp. 126.

[3] *Ram Kumari*, 18 C. 264; *Nandi urf Zainab*, 1 Lah. 440; Ameer Ali, ii. 437.

### C. PERSONAL RIGHTS BETWEEN SPOUSES AS AFFECTED BY CHANGE OF RELIGION

In *Skinner* v. *Skinner*,[1] the query was raised but not decided whether a change of religious creed made honestly after marriage with the assent of both spouses would effect any change in their rights, e.g. whether in the event of Christian husband and wife together embracing Islam the wife could still insist on her Christian right of monogamy or the husband exercise his Muhammadan right of repudiation. This has never been decided. As regards conversion of a single spouse, in India it is held that the profession of Islam does not relieve from obligations incurred while subject to some other personal law.[2] Thus a Christian husband would not by conversion to Islam obtain the right to take additional wives or to repudiate by *talaq*; but where pure Muhammadan law is the *lex loci* he would, in accordance with the principle of *R.* v. *Christodoulo* above cited, obtain both these rights. Where pure Muhammadan law is the *lex loci*, the marriage in which one party has become Moslem will be judged according to that law and no other—whether the other spouse was converted or not. But as regards single conversion it is submitted that British courts will, where possible, incline to the view taken in India, namely, that a person cannot merely by professing himself a convert to Islam release himself from obligations incurred while he was subject to some other personal law.[3]

### D. PROPERTY RIGHTS AS BETWEEN SPOUSES

The chief right in all systems is a mutual right of inheritance which varies greatly in different systems. It is settled law [4] that the estate is to be distributed according to the law of the deceased at the date of his death. It follows that where difference of religion is a bar to inheritance, a change of religion bars the inheritance rights of the non-changing spouse—*a fortiori*, where

[1] 25 I.A. 34.

[2] *Ram Kumari*, 18 C. 264; and *obiter* in *Skinner* v. *Orde*, 14 M.I.A. 309, where the issue was of guardianship of a child.

[3] Cf. Wilson, Art. II (C), with *Khayat* v. *Khayat*, quoted in Goadby, p. 167, in which conversion was from one Christian sect to another. Goadby's interesting remarks on p. 166 should not be read as suggesting that a Christian or pagan marriage is dissolved by conversion of the husband to Islam.

[4] *Skinner* v. *Skinner*, above cited, and see below, p. 155, and cases there cited.

change of religion effects a dissolution of the marriage. In equity a convert ought surely not to be able to retain his right to inherit where he thus defeats the reciprocal right. By the application of the Indian Freedom of Religion Act 21 of 1850, or the Tanganyika Deceased Natives Estates Ordinance 21 of 1922, however, he unquestionably does so; but not, it is submitted, where the effect of conversion is to dissolve the marriage tie on which a claim to inherit might be founded.

### E. LEX LOCI CELEBRATIONIS. VALIDITY OF A MARRIAGE

The citation of *Simonin* v. *Mallac*[1] and *Ogden* v. *Ogden*[2] in *Fazalan* v. *Tehran*[3] was strictly irrelevant, the decision being, quite correctly, that Panjabi Moslems in East Africa continued to be governed by their personal law and not by the local Shafii or Ibadi rite. But in *Nahas* v. *Cassab*[4] marriage of Christians before a Muhammadan Qadi in Egypt was held to be valid, Muhammadan law being the *lex loci*. In *Jerome* v. *Angweda*[5] it was held that the validity of a marriage celebrated in the Roman Catholic cathedral at Zanzibar must be judged according to Muhammadan law. So far the decision is unquestionable, as it is also if it means that Muhammadan courts would not recognize a marriage between a Christian and an idolater. The facts are not clear from the judgement, but if the Qadi who advised meant to suggest that Muhammadan courts would not recognize a Christian religious marriage between two Christian *dhimmis* (subjects of a Muhammadan power), his advice was certainly wrong.

### F. LEX LOCI CELEBRATIONIS. EFFECT OF MARRIAGE

The marriage in *Nahas* v. *Cassab*, though celebrated in Muhammadan form, was presumably regarded as Christian, not Muhammadan, in its incidents. *E converso*, in the case of *R.* v. *Superintendent Registrar for Hammersmith, ex parte Mir Anwaruddin* (1917), 1 K.B. 634, the incidents of the contract were held to be determined by the rite followed and the *lex loci celebrationis*.

[1] 2 Sw. and Tr. 67. [2] (1908), P. 46. [3] 8 E.A. 200.
[4] Goadby, *International and Inter-religious law in Palestine*, p. 147. [5] 2 E.A. 41.

Anwaruddin married an English woman at an English registry office. The marriage could not be dissolved

(i) in England, the husband's and therefore, it was held, the wife's domicile being in India, nor

(ii) under the Indian Divorce Act, because that Act does not apply to Muhammadans, nor

(iii) by Muhammadan law of *talaq*, since that law cannot dissolve a Christian marriage, such as this, by reason of its *lex loci celebrationis* and rite, was held to be.

*Submitted*, therefore, that where, as in England, only Christian marriage is recognized, a marriage by Moslem forms confers neither rights nor duties on the alleged husband and wife.[1] The children, however, are legitimate by Muhammadan law. They cannot be regarded as illegitimate for purposes of guardianship by English law; [2] and, if Muhammadans, they can inherit by Muhammadan law.

### G. EFFECT OF MUHAMMADAN MARRIAGE ON NATIONALITY AND DOMICILE

There appears to be no decided case, since Anwaruddin's marriage was held to be governed by English law. The following submissions are offered:

(i) Marriage being a purely contractual relation in Muhammadan law, and one which does not affect the wife's legal personality; and, further, nationality being a conception foreign to Muhammadan law; Muhammadan marriage has no effect on a woman's nationality.[3]

(ii) But, being in intention a contract for life, and the wife's duty being to reside with the husband, it would, where the husband's domicile was different, effect a change of her domicile.

(iii) But desertion by the husband or separation by mutual consent may again revive the wife's separate domicile, since her personality is unimpaired. The grounds of the decision in *A.G. of Alberta* v. *Cook*, 1926 A.C. 444, are foreign to the conception of marriage in Muhammadan law.

[1] *Belshah* v. *Majid* (*The Times*, Dec. 16–18, 1926; Jan. 14 and 18, 1927) is no authority to the contrary, having been settled out of court.

[2] *In re Ullee, the Nawab Nazim of Bengal's Infants*, Ameer Ali, ii. 207.

[3] See *Ferris* v. *Emp.*, 53 B. 149, decided, however, on a different point.

### H. MONOGAMY—LOCAL LEGISLATION

Marriage in English law is 'the voluntary union for life of one man and one woman to the exclusion of all others',[1] and, so far at least as territories under British dominion or protection are concerned, this phrase has, rightly or wrongly, been taken to imply a union not dissolvable save by judicial decree. Marriage in this sense is protected in the East African territories by the enactments noted below,[2] which provide that such marriage shall not be contracted by any one who is already married, whether in a monogamous or polygamous form, and that during its continuance it shall bar any additional marriage.

Unfortunately, the application of these enactments to Muhammadans varies in the different territories. In Tanganyika and Uganda a Moslem marriage cannot be rendered legally monogamous,[3] though (by contrast) that condition may in the latter territory be imposed by the parties on a pagan marriage.[4] In Kenya the words 'in accordance with Muhammadan law' occur only in section 50 of the ordinance.[5] A marriage rendered punishable by that section is not declared void.

Although Islam permits polygamy, it does not discourage monogamy. The ideal marriages of Moslem sacred history were monogamous, e.g. those of the Prophet and Khadija, of Ali and Fatima. A general law for the Empire permitting Moslems (and members of other polygamous religions) to enter at their own option into legally binding monogamy is a *desideratum*, and would contravene no tenet of any school of Islam, while it would meet the wishes of a large section. Perhaps the insistence on the criterion of intent in the latest case, *Nachimson* v. *Nachimson*,[6] together with the safeguards for monogamy already known to Moslem law, may go some way in the right direction.

[1] *Hyde* v. *Hyde*, L.R.1 P. & D. 130; see also *Brinkley* v. *A.G.* (1890), 15 P.D. 76.

[2] Kenya Laws, cap. 167; Uganda Laws, cap. 51; Somaliland Marriage Regulation 1902; Zanzibar Laws, cap. 46; Tanganyika Ordinance 12 of 1921.

[3] T, loc. cit., sec. 3, U, cap. 52, sec. 10, and cap. 53, sec. 2.

[4] U, cap. 51, sec. 29 a.

[5] K, loc. cit., sec. 50.

[6] (1930) P.D. 277 C.A.

CHAPTER XI

# PATERNITY—LEGITIMACY AND ACKNOWLEDGEMENT

## A. LEGITIMACY: THE CRUCIAL DATE

LEGITIMACY is determined by the date of conception, not by the date of birth. A child born during a marriage of its parents will be illegitimate if its begetting was prior to that marriage and also punishable by the Muhammadan law of crimes. English law, on the other hand, regards the date of birth as more important, and determines legitimacy by the existence of lawful wedlock rather than by the absence of criminal intent. A child will be legitimate if it was born in lawful wedlock even though the parents were only married an hour before; it will equally be legitimate, no matter when begotten, if born within a period after the termination of the marriage. Each system has certain presumptions of evidence, more or less artificial, and varying in the weight which attaches to them.

The question has been much discussed how far the English law (as embodied in sections 112 and 114 of the Indian Evidence Act and in the enactments which in East Africa and elsewhere have been based thereon) supersedes Muhammadan law. That it supersedes the Muhammadan Law of Evidence there is no doubt; but it has reasonably been argued that section 1 Evidence Act itself saves the substantive law. In *Sibt Muhammad* v. *Muhammad*, 48 A. 625, it was held that the Muhammadan law was completely abrogated; unfortunately the court misstated that law (see below, p. 91, as to acknowledgement). In *Kaniz* v. *Hasan*, 1 Luck. 71, it was held that section 112 Indian Evidence Act does not apply to a *fasid*, nor, *semble*, to a *sahih* marriage.

The difference between the two systems, however, is not so great as is commonly supposed:

(a) A child born during the first six *Hijri* months (29 days each) of the marriage is illegitimate by Muhammadan law unless the father acknowledges it (p. 91, note 1). It is legitimate by the English law, unless the parents had no access to one another at any time at which it could have been begotten.

Here the only real issue between the two systems is whether

a husband must be saddled with paternity which he does not admit. Whether English or Moslem law is to decide this question has never been judicially settled. But the *Poulett Peerage*[1] brings the English nearer to the Moslem rule than the view embodied in the Evidence Act.

(b) A child born after six lunar months from the date of marriage, but within 280 days of the termination of the marriage, is conclusively legitimate by either system, subject to *li'an*[2] in the one, or proof of non-access in the other.

(c) After 280 days the question is entirely one of evidence. Muhammadan law, with a less advanced knowledge of embryology, has established presumptions in favour of the child for periods lasting according to different doctors from ten *Hijri* months to four years. But all these presumptions depend upon the conditions: (i) that the woman has not menstruated during that time, (ii) that she has not acknowledged the termination of her *iddat*, (iii) that there is no conclusive proof that the child is the offspring of some other father. The circumstances necessary for the establishment of a presumption more extravagant than English law allows are not likely to arise. English courts have admitted the legitimacy of a child born 330 days after the last possible access of the husband.

### B. LEGITIMACY, ITS NATURE

As remarked, legitimacy results from the absence of criminal intent on the part of the parents. Indeed, in Sunni law, even the child of criminal intercourse (*walad uz zina*) has a full right of inheritance to its mother though not to its father (in Shia law it is *proles nullius*). The statement in *Della* v. *Haji Michaeli*, 6 Cyp. 23, that the right of a child to inherit to its father depends upon proof of the mere fact of paternity goes too far. A better statement is:[3] 'Where there exists between a man and woman the relation of husband and wife, or of master and slave, or such semblance of either of these states of relation as the Muhammadan law recognizes, their children are either admittedly the lawful children of the man, or capable of being made so by his acknowledgement.'

The semblance of lawful marriage for this purpose includes

[1] (1903) A.C. 393. See also above, p. 82.

[2] *Sheriff Abdulla* v. *Zuena*, 4 E.A. 86.

[3] *Happaz* v. *Parapano*, 2 Cyp. 33.

*fasid* marriage, and even *batil* marriage where it subsisted in *bona fide* ignorance of the bar (see above, pp. 48–9); and an acknowledgement which establishes a presumption of any of these states will establish the legitimacy of the child. Thus a man may acknowledge the legitimacy of a child born to his wife before or during the first six months of their marriage, and a child so acknowledged will be legitimate though it clearly cannot have been begotten in *sahih* wedlock. This has been denied by inference from *obiter dicta* of the Privy Council in cases considered on p. 93; but the point did not arise in those cases, and the original authorities are conclusive.[1] Mr. Ameer Ali, upon whose *dicta* this inference has been built, himself rejects it.

### C. ACKNOWLEDGEMENT (IQRAR)

For the importance of acknowledgement in the Muhammadan Law of Evidence see ch. iii, sec. C; and for other instances of it see ch. vii, Dower, p. 63, and ch. xxi, *Mard-ul-maut*. Its greatest importance is in the law of paternity, where, however, acknowledgement has a substantive basis outside the Law of Evidence. Before the Prophet a father was under no liability even to the legitimate children of his freeborn wife, unless and until he acknowledged them; and traces of that state remain embedded even in later law.[2] This law, though repealed by the Prophet as regards the children of free women, remained in force as regards the children of slave concubines, to legitimize whom some form of acknowledgement, whether of paternity or of the *firash* (bed-right) of the mother, was always necessary.

The leading case is *Md. Allahdad* v. *Md. Ismail*,[3] *per* Mahmood J. at very great length, a ruling which has been followed by the Privy Council on several occasions and by courts throughout India and in the East African territories.[4] This establishes acknowledgement as substantive law not affected by the Evidence Act; but recent Privy Council decisions have restricted the rule.

[1] *Fatawa Alamgiri* in Baillie's *Digest*, Bk. I, ch. 1, sec. 2, end of para. 3, p. 391; Q.P. Arts. 333 (proviso) and 334. 'If a man should commit *zina* with a woman and she should become pregnant, and he should marry her and she be delivered of a child within six months of the marriage, its paternity from him would not be established *unless he should claim it without saying "It is of zina"*'; cf. Ameer Ali, ii. 229.

[2] Cf. Ruxton, p. 207, Rule 749.

[3] 10 A. 289.

[4] *Juma* v. *Mwenye*, 1 E.A. 95. *Premji* v. *Habib*, 1 Z. 378.

The following propositions may be taken as settled:

1. (a) Where it is not known that any specific person other than the acknowledger is the father;

(b) nor definitely and irrefutably proved that the person to be acknowledged is the offspring of intercourse which would be punishable at Muhammadan criminal law (*zina*);

(c) and where the circumstances do not conclusively rebut paternity, as they would, e.g., if it were shown that there was insufficient difference of age between acknowledger and acknowledgee;[1]

any man may acknowledge any human being, male or female, to be his child; and the latter will accordingly be his legitimate child for all purposes whatsoever. This is not a legitimation, still less an adoption (though it may serve as a substitute for adoption), but a declaration of legitimacy: *Habib-ur-rahman* (cited below). The child acknowledged can if he wishes repudiate the relation on attaining majority.

2. Such acknowledgement may be expressed in words or implied from the conduct of the acknowledger (e.g. the style in which he pays for a boy's circumcision festival or for his education).

3. But it must be intended to have legal effect. It is not every casual admission of paternity which will suffice, and the circumstances may show quite clearly that the father did not intend to acknowledge the son as legitimate: see especially *Abdur Razak* v. *Aga Mahomed*, 21 I.A. 56; 21 C. 666, *per* Lord Macnaghten.

Slave concubinage is impossible under British rule, save, e.g., in Northern Nigeria, in the case of slaves who have elected to remain so though the legal status has been abolished; and accordingly, in *Imambandi* v. *Mutsaddi*[2] and *Habibur Rahman* v. *Altaf Ali*,[3] the Privy Council (*per* Mr. Ameer Ali) have held (*obiter*) that the acknowledgement can be taken advantage of by the mother of the child as establishing in her the rights of a

[1] Mere residence in different countries would not formerly have been regarded as disproof. This is expressly laid down in some law books, for who is to measure the might of a *jinni* or the possibilities of magic? For a literary instance of the acknowledgement of a foundling, see *Arabian Nights*, 22nd and 23rd nights.

[2] 45 I.A. 73; 45 C. 878.

[3] 48 I.A. 114; 48 C. 856.

wife.[1] *E converso*, the Privy Council and the Indian High Courts have steadily refused to permit free concubinage to be recognized by analogy to the slave concubinage no longer possible, and have applied the test of possible marriage with the mother even in those cases where she filled such a position in the house as would formerly have been held by a slave, e.g. *Mohabbat Ali* v. *Ibrahim*, 56 I.A. 201, and *Agha Mohamed* v. *Zoha*, 3 Luck. 199. Accordingly it has been held that there could be no acknowledgement where the conduct of the parties was inconsistent with the relation of husband and wife. *Abdul Razak* v. *Aga Mahomed* (above cited) (bar of religion, no conversion of the woman);[2] *Ghazanfar Ali*, 37 I.A. 105; 32 A. 345; and *Firoz Din* v. *Nawab Khan*, 9 Lah. 224, where the woman was, both before and after the date of the child's conception, a common prostitute. Lengthened cohabitation and repute, whether there be acknowledgement or not, affords presumptive proof of marriage in the Muhammadan as in other systems: but the presumption is not conclusive and does not override the legitimate inferences from the evidence, *Ashrufood dowlah*, 11 M.I.A. 94. [But under the pure Muhammadan system, as noted in ch. iii C, evidence would only be given on one side of the issue.]

### D. OTHER ACKNOWLEDGEMENT OF KINDRED

In some parts of Northern Africa a custom exists called *ta'abbi*, by which an orphan at his natural father's funeral can invoke the quasi-parental protection of any senior member of the family by addressing him as *Ab* (father).[3] This creates an honourable but (unless by custom) not a legal obligation.

Acknowledgement of other relationship is purely a matter of evidence, not substantive law: see *Mirza Himmut* v. *Sahebzada*, 1 I.A. 23 (a proceeding in court but no estoppel); *Sadik Husain* v. *Hashim Ali*, 43 I.A. 212 (38 A. 627) (family repute); *Baker Ali* v. *Anjuman Ara Begam*, 30 I.A. 94 (25 A. 236) (Indian

[1] But see above, p. 90 (semblance).

[2] No ceremonies are involved in conversion to Islam, which is a question of intention. In order to bar acknowledgement of the child of a pagan woman, it must be definitely shown that the mother remained pagan, i.e. that she did not abandon pagan practices; and even then, according to those who hold that marriage with a pagan woman is merely *fasid* not *batil*, acknowledgement might in a suitable case establish the child's legitimacy, *Ihsan Hasan* v. *Pannalal*, 7 P. 6.

[3] St. Paul seems to have had something similar in mind, Rom. viii. 15.

Evidence Act, section 32, cl. 5; statement as to relationship made *ante litem motam* by a person since deceased). The establishment of relationship without acknowledgement, or in the face of two conflicting acknowledgements, has sometimes been before the East African courts. In *Abdulla b. Hanul*, 4 E.A. 75, it was held that a suit may be brought in the lifetime of a lunatic to establish relationship to that lunatic (in this case by a woman claiming to be his daughter). In *Abdur Rahman b. Khamis* v. *Khamis*, 7 E.A., 110 C.A., it was held that where no impediment exists in law or in common sense to the possibility of a child being the child of either of two parties claiming to be the father, and where neither party can completely establish his claim, the child on coming of age has the right to elect his parent. In *Aisha b. Vali* v. *Fatuma b. Shaabek*, 1 E.A. 44–5, it was held by the Shaikh ul Islam that a dispute between two possible fathers might be decided by evidence as to likeness from those expert in such matters, or, failing such evidence, by the election by the child on coming of age. In *Mahomed* v. *Kassim*, 6 E.A. 99, a claim of sonship thirty years after the alleged father's death was barred by the Zanzibar law of limitation.

Acknowledgement of other relation than paternity may bind the acknowledger in a question of inheritance but can affect no one who does not claim through him, e.g. *A* acknowledges that *B* is the son of *A*'s father *C*. He may be compelled to share *C*'s inheritance with *B* without prejudice to the rights of *C*'s other heirs. Such an acknowledged kinsman also succeeds to *A* according to Hanafi law after exhaustion of all other heirs except the *Bait-ul-Mal*, but not in other systems.

CHAPTER XII

# MAINTENANCE AND GUARDIANSHIP OF PERSON

## A. MAINTENANCE (NAFAQAT)

(a) *Of a wife.*

THE only absolute right of maintenance is that of an adult wife who is *apta viro*. The husband is bound according to all schools to provide for her maintenance irrespective of her private means.[1] Even where she is a rich woman and he a poor man she is absolutely entitled, if she chooses, to be provided at his expense, on a scale suitable to his means, with food, clothing, housing, toilet necessaries, medicine, doctors' and surgeons' fees, and baths, and also the necessary servants, at least where the wife is of a social position which does not permit her to dispense with these, or in sickness.[2] The wife need not spend a penny of her own money on these objects. According at least to Shafi and Malik, arrears of unpaid maintenance are a debt for which the wife can sue, and continued inability or failure to pay maintenance is a ground for dissolution of marriage.[3] In Hanafi law inability to pay is not such a ground.

A wife who for any reason is not subject to marital authority is not entitled to maintenance. Accordingly, a minor wife who has not yet gone to her husband's house has no such right. In *Sakinabai* v. *Allarakhia*, 1 Z. 44, it was held that a wife who left her husband's house with his consent was entitled to maintenance, but not if she stayed away after he had requested her to return.

A husband has no legal right to be maintained by a wife, though in Maliki law he has a right to live in her house. The husband's right of divorce, however, in practice clogs very heavily the wife's legal independence in matters of property.

For right of maintenance during *iddat* see above under *Iddat*, ch. v. The widow has no right of maintenance as such, *Aga Md. Jaffer* v. *Koolsom*, 24 I.A. 196. This was a Shia case, but the

[1] Before the Prophet this rule would have been regarded as a branch of the duty of an owner to pay for the upkeep of his property. [2] *Minhaj*, **46**, 1, 384.
[3] Ibid., 3, 385–6.

principle is the same in all schools, namely, that maintenance is inconsistent with her position as an heir. But where, as e.g. among Sudanese (*R.* v. *Ferjulla Desur*, 1 E.A. 79), and in some cases among those Muhammadans who follow the Hindu law of inheritance (*Jafferali Bhaloo* v. *Standard Bank of South Africa*, 3 Z. 64 P.C.), she is lawfully excluded from inheritance, she has the right of maintenance in lieu thereof. *Submitted*, that the principles of Hindu law as to the standard of maintenance will apply. A woman's scale of comfort is not to be reduced merely because she is a widow, but may be so with reference to other rights in the estate. The right would cease on remarriage, and (*submitted*) would not revive on second widowhood or divorce. The right is not a charge on the estate (*Jafferali Bhaloo* v. *Standard Bank of South Africa*, 3 Z. 64 P.C.), but subject to the *bona fide* dealings with the estate by those managing it. On divorce a maintenance allowance may be fixed by mutual consent or by a court's decree, such that it will not expire by expiry of the *iddat*, but may be made to continue, e.g. till remarriage or death; Q.P., sec. 330.

(b) *Children.*

A father is absolutely bound to maintain (i) his infant children of both sexes irrespective of whether the *hizanat* of such children is with him or with the mother. The mother may agree to maintain them and to relieve him of that duty as *'ewaz* for her *khula'* (divorce). But it is submitted that such an agreement between the parents would not prejudice the rights of the children in the event of the mother not fulfilling her part of the contract.

(ii) His son's infant children of both sexes, if the son is unable to maintain them. In Shafii and Hanafi law this liability arises by relationship, but in Maliki law only by special contract. The possibility is common in tropical countries where the marriages of young people are frequently arranged before they are themselves old enough to earn a livelihood for a whole family, and where married sons, not unfrequently, remain under the paternal roof, and even in the Maliki system under the *patria potestas* after maturity.

(iii) His sick, or otherwise disabled, or student son. As regards

the student, this is obviously a matter of the father's choice, but as long as he allows his son to study, he must support him.

(iv) His unmarried daughter of whatever age.

(v) Probably his widowed or divorced daughter if sick or infirm. This has been denied in a Shafii case[1] on grounds which appear not sufficiently to distinguish between general law and local custom.

The right of maintenance of all the above is inferior to that of a wife, in that they are primarily liable to maintain themselves, i.e. costs of maintenance may be recovered out of their property, if they have any,[2] and the father may set them to work suitable to their age, sex, and rank in life.[3]

If the father is indigent, he may be compelled to work on behalf of minor sons or any unmarried daughters, but not apparently on behalf of adult children. If he is unable to earn enough to support his children, maintenance devolves on the mother. Opinions differ as to how far she will have a claim against the father for arrears of maintenance in the event of his subsequently becoming wealthy, but apparently she will, and the Qadi can order her to borrow in his name.

If the father and mother are unable to maintain the children, the duty devolves on other legitimate ancestors, including the 'false' (*fasid*) grandfathers and grandmothers (see Law of Inheritance). The *Minhaj*, 46, 4, p. 390, leaves it open to doubt whether all the ancestors of equal degree are to be regarded as equally liable, or precedence to attach to the right of succession (in which case, of course, the paternal line are primarily liable), or to the right of *hizanat* (in which case, for infants, the maternal line would normally be the first).

(vi) *Illegitimate children.* The *walad uz zina* has no rights against a father in Muhammadan law, nor has the *walad mal'un* (child bastardized by the *li'an* procedure). The rule of modern Hindu law, by which the terms *dasi*, *dasiputra* (slave concubine and her child) have been applied to the permanent concubinage of free women if neither adulterine nor incestuous,

[1] *Pakrichi* v. *Kunhacha*, 36 M. 385.

[2] But in Shafii law at least a father may not sell his children's immovables for their maintenance (*Mekkawi*, p. 200).

[3] e.g. a girl of the classes whose women do not usually appear in public cannot be compelled to serve in a shop, but may be compelled e.g. to do embroidery in her own home.

has no counterpart in Muhammadan law (the Privy Council under Mr. Ameer Ali's guidance having definitely rejected it; see above, p. 52). Consequently such persons have no rights of maintenance. But a father may be ordered under English criminal law[1] to provide for the maintenance of his illegitimate children, no matter what the circumstances of their conception.

(c) *Ancestors.*

(i) Adult children are bound to maintain their parents, but not their step-parents, and according to Hanafi and Shafii law they are bound to maintain their grandparents, including the 'false'. But the Maliki school[2] expressly denies the right of the grandparents.

(ii) These obligations are without distinction of sex or religion, and are on the conditions only that the person to be maintained is unable to support himself without assistance, and that the person chargeable possesses more than is necessary for the maintenance of himself and his household. Even if he does not, he should admit to his house and table those who are indigent and cannot work. The duty to ancestors is considered stronger than the duty towards adult descendants.[3]

(iii) All jurists agree that the duty falls on the nearer in degree to the exclusion of the more remote. But there is a difference of opinion even within the Shafii school as to whether the right of succession or the nearness of blood relationship is the basis of the law, and also whether the heirs are liable jointly or severally for the whole amount or only *pro rata* for their respective shares.

(d) *Collaterals.*

Neither Maliki nor Shafii law recognizes any right or duty of maintenance between collaterals; Hanafi and Shia law do recognize that right, and extremely complicated discussions are to be found in the authorities of these schools of the order in which the duty falls.[4]

(e) *Slaves.*

'Feed your slaves', said the Prophet, 'with food of that which

[1] 35, 36 Vict. cap. 65 (The Bastardy Act), and Indian Criminal Procedure Code, ch. 36, secs. 488–90.

[2] Ruxton, p. 153.

[3] A curious by-path of the law, not of course enforceable in the courts, is the doctrine of *ifaf* (*Minhaj*, 33, 4, 2, 302), i.e. the duty to provide one's male ancestry with female companionship if they are too poor to do so for themselves.

[4] The simplest rule is stated in Q.P. 4, 5, 415–19.

ye eat and clothe them with such clothing as ye wear, and command them not to do that which they are unable.' And again: 'A man who behaves ill to his slave will not enter into Paradise.' The liberal spirit in which these and similar injunctions were observed in Northern Nigeria has resulted in large numbers of persons electing to remain slaves long after the legal status of slavery was abolished.

(f) In default of all else, the maintenance of a necessitous Mussulman rests on the *Bait-ul-Mal*—the public treasury, which is in theory at any rate, and in a few countries in fact, the public poor box.

In spite of the fullness of the rules, the strength of family feeling is such that cases of maintenance do not trouble the courts. Cases which are introduced under that rubric are usually cases of *hizanat*—the care and custody of children; and in the whole of the Indian Law Reports there appears to be only the one Madras case above cited directly dealing with the right or liability to maintenance, though it has been referred to *obiter* in a few more.

### B. GUARDIANSHIP OF PERSON (HIZANAT)

*Hizanat* is the custody and upbringing of the child. The books contain much on the duties of both father and mother, commencing with the duty of the father to whisper the call to prayer (*azān*) in the ears of a new-born babe as the first words it is to hear. All this, however, is religion rather than law, and is only of importance to the lawyer as showing, first, that the interests of the child are the supreme consideration, and, secondly, that neither parent has the right altogether to exclude the other from the performance of duties to the child.

The mother is entitled to the custody of her infant child of either sex, according to all schools. This custody continues in the case of daughters until puberty, and in the case of sons until seven years, according to the Hanafi school, or puberty according to the Maliki school. In the Shafii school, a boy of seven years has the right to elect whether he will live with his father or mother.[1] In the Shia law, the custody of a female child is

[1] In *Re Abdul Gafoor*, 1 Z. 575 at 578, the *Tohfat* of *Ibn Hajar*, a Shafii authority, was relied on in a Hanafi case. On the actual facts of the case the result was the same whether Shafii or Hanafi law was applied. The Shia law was, *obiter* in the same case, misstated.

with the mother until seven years, but of a male child only until weaning. The female child in Shia law has apparently an option of remaining with the mother until puberty, *Kasam* v. *Khatija*, 1 Z. 98, followed in *Suleman* v. *Sheroo*, 1 Z. 251, where, however, the continued custody of the girl was made to depend on her own welfare, not on her wishes. This option appears to have been overlooked in *Lardli Begum* v. *Md. Amir Kham*, 14 C. 615. The Hanafi rule was upheld in *Fakir Adam* v. *Suleman*, 1 Z. 282, subject to the welfare of the child; and *obiter* Shafii and Shia law were said to agree with the *Hedaya* as regards the custody of daughters. The welfare of the child is the governing consideration; this rule was affirmed in *Kasim* v. *Khatija* (above cited), and therefore *semble* that an agreement by the mother at the time of divorce to forgo her *hizanat* is illegal, as contrary to public policy (cf. *Humphrys* v. *Polak* (1901), 2 K.B. 385). In support of this an Algerian case was quoted, also quoted by Ameer Ali, 4th ed., vol. ii, p. 297.

The opinion of the Sheikh ul Islam followed by the court in *Sidik* v. *Ima*, 6 E.A. 43, which gave the custody of an infant daughter aged five to the father's brother rather than the mother on the ground that the brother wished to leave the country (Mombasa) to return to Pemba, cited no authority, did not consider the interests of the minor, and appears to be mistaken.

In default of the mother, the mother's right of *hizanat* goes in Shia law to the father. In all Sunni schools (and in Shia after the father) it goes to the maternal relatives in preference to the paternal, and to women in preference to men, subject to the general rule that no man may have the *hizanat* of a female child unless he is within the prohibited degrees. Contrast the succession to marriage guardianship.

The right of *hizanat* is, of course, forfeited by misconduct, e.g. immorality or cruelty. The mother's right of *hizanat* is not destroyed by her divorce, nor is the right of the mother or any other legal *hazina* destroyed by her marriage within the prohibited degrees, e.g. to her former husband's brother. But the right is normally destroyed by the marriage of the *hazina* to any one outside those degrees, though in *Fazalan* v. *Tehran*, 8 E.A. 200 C.A.F.B., the court on grounds of humanity refused to follow this rule as regards an infant. The *hizanat* of a child

by a remarried woman might in an exceptional case be continued by the court, where it is manifestly for the benefit of the child. In *Salem* v. *Nuru*, 3 Z. 49, a mother on remarriage outside the prohibited degrees abandoned her rights in favour of her sister (similarly married). It was held, partly following and partly distinguishing Ameer Ali, 4th ed., vol. ii, p. 301, that the father, who had in no way abandoned his right, was entitled to the custody.

Ameer Ali would interpret the rule that *hizanat* is to be determined by the personal welfare of the child as 'its general welfare as a Moslem child'. That is undoubtedly Muhammadan law. And further, the custody of the child by the mother does not absolve the father from his duty to see that the child is fully instructed in its religion. Indeed, the mother would forfeit the *hizanat* by any conduct which prevented the father from performing this duty.[1]

*Change of Religion*

Cases of acute difficulty arise. Thus in *Skinner* v. *Orde*[2] a widowed mother made profession of Islam. The father's friends intervened, and the mother was deprived of the custody in order that the child might be brought up in her father's religion (Christianity). This was contrary to Muhammadan law; *Hedaya I*, bk. i, ch. i, p. 25. The change of religion, however, was not the sole ground of the order, the mother's conduct being also disreputable. In *R.* v. *Niskett* (Perry's *Oriental Cases* 103) a Hindu father became Christian, and was held to be still entitled to the custody of his child. See also *Muchoo* v. *Arzoon*, 5 W.R. 235. Thus the principle of the welfare of the child as interpreted in the light of the English principle of equality of religion appears to mean that the religion of the father, whether by birth or conversion, will be presumed *prima facie* to be best for the child until the child is of an age to make an intelligent choice. In other cases children professedly converted to Christianity have been delivered up to their Hindu or Muhammadan parents.

[1] Ameer Ali, 4th ed., vol. ii, p. 301.

[2] 14 M.I.A. 309.

CHAPTER XIII

# INTERDICTION, MINORITY, AND GUARDIANSHIP OF PROPERTY

## A. INTERDICTION; (HAJR) ITS GENERAL CHARACTER

INTERDICTION is defined by *Ibn Arfa*,[1] as 'any legal impediment to the exercise of the full rights of property'.

Interdiction concerns only property and has nothing to do with personal rights, which are dealt with under entirely separate rubrics (see ch. vi, Marriage Guardianship, and ch. xii B. *Hizanat*). Slavery is no exception, for the *corpus* of a slave is in theory property.

Interdiction is either total or partial; it is enforced in all cases by the fact that the acts of the person interdicted are *pro tanto* null and void unless assented to by some one else having authority; and in some cases by the appointment of a definite guardian clothed with that authority.

Instances of partial interdiction are:

(a) The case of the person sick unto death (*mariz-ul-maut*), see below, ch. xxi. His incapacity extends to two-thirds of his property, which he may not dispose of without the consent of his heirs. It may be remedied by that consent, but only after his death, for *nemo est haeres viventis*.

(b) The case of the married woman in Maliki law. She may not dispose of more than one-third of her property without the consent of her husband. This may be remedied by his consent.

Instances of total interdiction are:

(a) The slave. Such total interdiction is, of course, not recognized under British rule or protection, such slavery as remains being on a voluntary basis, see above, pp. 98–9.

(b) The madman, the lunatic, and the imbecile. Their incapacity is complete, but must be established by judicial decree. Guardianship of the person may also be necessary for these: but that is an entirely separate question.

(c) The spendthrift and the undeveloped (i.e. the person who has reached puberty without reaching years of discretion).

[1] Ruxton, p. 183.

Imam Abu Hanifa would not admit interdiction on either of these grounds; his Two Disciples, however, agree with the Imams of the other schools in admitting them.

(d) The bankrupt, *muflis* (bankruptcy, *falas*). The Muhammadan law of bankruptcy has been repealed in Zanzibar by the Insolvency Decree, cap. 63, and in the rest of East Africa was probably never enforced.

(e) The minor. Abu Hanifa continued minority for control of property in all cases until the completion of the twenty-fifth year. The Two Disciples, agreeing with the Imams of the other schools, place its normal termination at puberty. See next section.

### B. THE AGE OF MAJORITY

The age at which a child attains majority is a question of importance in three branches of the law which it is important to keep entirely separate:

(i) Marriage; see chh. iv and vi.

(ii) *Hizanat* and Maintenance; see ch. xii. A child's legal rights normally terminate at majority, and except perhaps under the *patria potestas* of Maliki law the child becomes master of its own destinies and need no longer live under the parental roof.

(iii) Capacity in respect of property and obligations; release from the interdiction of minority.

For all these purposes the age of majority according to all schools is normally puberty. Puberty is conclusively presumed at the end of the fifteenth year, and may occur as early as the twelfth year in a boy or the ninth year in a girl.[1] Tradition asserts that Ayesha attained puberty and consummated her marriage with the Prophet at nine years; and credits the stern Caliph Omar (like King Charles II) with fatherhood in his twelfth year.

The question whether a child not yet fifteen but over the age at which puberty is possible has reached that physical state and is entitled to its legal consequences is one of evidence. The affirmative oath of the child concerned, that it has experienced the signs, is conclusive: the negative oath is not. A committee of matrons may be appointed by the Qadi to inspect a girl,

[1] *Mejelle*, 989.

regard for decency rendering male evidence impossible (see above, p. 31). So far all schools are agreed.

*Qualifications to the rule*

It is only in respect of capacity to deal with property and incur obligations that physical puberty does not always confer full rights or that there is any difference of opinion. All schools are at issue on this, and even the doctors of any single school are not agreed. The dispute is over the interpretation of the following text: [1]

'Give not over to fools their property which God has made you to protect; but maintain them from it and clothe them and speak to them with a reasonable speech. Prove orphans until they reach puberty; and if ye perceive in them right management then hand over to them their property.'

SHAFII LAW. The rule as stated in the *Minhaj*[2] distinguishes two cases and prefers the following solutions, though noticing that some jurists have held opposite views:

(a) *Development of intelligence.*

Incapacity continues of its own force and without the necessity for judicial declaration where the minor who has attained the age of puberty has an intelligence insufficiently developed to be entrusted with management of property: otherwise it ceases *ipso facto* on puberty.

(b) *Spendthrift tendencies.*

A child on attaining puberty has been placed in possession of his property and shows himself a spendthrift. Here a judicial decree is necessary.[3]

But for subjects of the Sultan of Zanzibar see the African and Arab Guardianship Decree 1927, which establishes twenty-five completed years as the age of majority for all purposes of property and contracts. Other Zanzibar Moslem residents are governed by the Majority Decree (cap. 57) based on the Indian Majority Act IX of 1875. That Act is also applied in Somaliland, but apparently not elsewhere in East Africa. By it minority terminates with the eighteenth year, or with the twenty-first

[1] Q. 4, 4, 5. [2] 12, 2, 1, 167–8. [3] *Issa* v. *Suleman*, 1 Z. 595.

year for a ward of court. It is uncertain whether this Act should be regarded as part of the personal law of Indian Moslems in territories where it has not been applied. The Indian Guardians and Wards Act VIII of 1890 does not appear to have been adopted in Africa.

HANAFI LAW. The *Hedaya*[1] records a difference of opinion between Abu Hanifa and his Two Disciples. All three agree that guardianship of property normally terminates at puberty, but they differ on the questions: (a) whether in the exceptional cases of the prodigal, the weak-minded, and the undeveloped (i) minority continued *ipso facto*, or (ii) a new interdiction must be imposed by judicial decree; (b) of the effect of such continued incapacity; (c) of its termination; Abu Hanifa alone holding that it terminated in every case with the twenty-fifth year.

In modern Hanafi law the first view finds favour in Egypt,[2] where a judicial decree is in all cases necessary to determine the guardianship of property; and in Tunis, where the final limit of twenty-five years is recognized.[3] In the remainder of the Ottoman Empire the rule laid down in the *Mejelle*[4] following the *Durr-ul-Mukhtar* and other authorities is that a person attaining puberty cannot be kept from full property rights save by a judicial decree for some proved lack of discretion. This has been very recently followed in Cyprus: *Georghios Anastassi* v. *Suleyman Hussein*, 12 Cyp. 16.

MALIKI LAW. Equally wide differences of opinion prevail. According to what is perhaps the prevailing opinion no person acquires full legal capacity without a definite act of emancipation. But Ibn Asim (verse 1321) requires a notarial act by the father only in the event of his deciding to *continue* the incapacity after puberty; and in the preceding verse lays down the general rule that incapacity terminates at puberty. Such emancipation may be testamentary; and the fact that the father (and if the father predeceased him, the father's father also) died without appointing a *wasi*, or without charging the *wasi* with the administration of the affairs of the son or daughter, would amount to emancipation. The consummation of marriage

[1] 35, 11, p. 527.
[2] Q.P. 496.
[3] Morand, *Études*, p. 135. The whole article will repay study.
[4] Art. 989, cf. Gazette of India Suppt., April 25, 1874, p. 670.

appears to be generally regarded as tantamount to emancipation in the case of a girl in this as in other schools, though there is authority for requiring a further period of probation after that event:[1] and in Maliki law the married woman, as above noted (p. 102), is still subject to a partial guardianship of her husband.

There is no question in Maliki law of an absolute right to manage one's own affairs at twenty-five or any other age. The father *ought* to hand over the management of his affairs to any child who has attained puberty and shows himself capable, but the incapacity of the prodigal or the feeble-minded may be continued 'to fifty years of age and even later.'[1] The minor or ward may apply to the Qadi for emancipation.

### C. GUARDIANSHIP OF PROPERTY (WILAYAT-UL-MAL)

We have already dealt with guardianship for marriage (*wilayat-ul-nikah*: ch. vi) and guardianship of the person (*hizanat*: ch. xii). It remains to note (i) that[2] 'The word *wilāyat* is used to signify all those relations in which one man is vested with administration in the name of another or empowered to exercise the rights of a person subject to incapacity or a corporation or moral entity. Thus to govern a province [and indeed we may say to exercise any office of government from the Caliphate downwards] to administer a *waqf*, to be guardian of a minor or curator of a lunatic are *wilāyat*. The judge, who as part of his duty to administer justice exercises a general power of surveillance over the affairs of minors and incapables, is also discharging a *wilāyat*.'

(ii) that each of these three guardianships will normally be held by a different guardian. *A* an orphan may be in the *hizanat* of her mother, the marriage guardianship of her nearest male agnate, perhaps a cousin, and the property guardianship of the *wasi* appointed by her father or by the court. But the ultimate guardian of all minors for all purposes is the head of the state through his representative, the Qadi.

Guardianship of property is exercised as of right by the father,

[1] Charani, pp. 314, 315.

[2] Notes by translators of the authorized French version of the *Mejelle*, Art. 1688. The words, *wāli* a guardian and *wāli* a refuge, both being used of provincial governors, are naturally confused.

or if the father have died without appointing a *wasi*, by the father's father; secondly it is exercised by the administrator or executor-guardian (*wasi*) appointed by either of these two; thirdly by the *wasi* appointed (*qa'im*) by the court. For other duties of *wasiyat* see below, pp. 164, 168.

The *Minhaj* [1] prefers the father's father to the father's *wasi*. In Ibadi law on the death of the father the guardian of property is appointed and controlled by a family council (*'ashirat*) consisting of not less than three agnates.[2]

Excepting the father and father's father, nobody can be a lawful guardian of property without appointment: *Imambandi* v. *Mutsaddi*.[3] The mother, provided she is in every way suitable (including business capacity) has a preferential claim to be appointed, whether by the father or by the court. But in default of such appointment she is not a legal guardian (ibid.), and in *Adamji Abdulla*, 7 E.A. 206, it was held that the appointment of a trustee for the estate of an infant was entirely discretionary with the court. Accordingly, any reliable person may be appointed a guardian of property. The appointment of a court official or of a public trustee who may even be a Hindu or a pagan is not uncommon, and (submitted) its validity at the present day would not be open to question.

### D. POWERS OF GUARDIAN

A guardian should manage the affairs of a minor like a good father.[4] In the following cases a *de jure* guardian has power to sell even the immovable property of the minor, and to do so (except in the case of a *qa'im wasi*) without the sanction of the court:

(a) according to the *Minhaj*,[4] where it is absolutely necessary or the advantage is obvious.

(b) according to a Hanafi author translated in Macnaghten's *Principles*, ch. viii, Rule 14, in the following seven cases:

(i) Where double its value may be obtained.

(ii) Where the minor has no other property and the sale of it is absolutely necessary to his maintenance.

(iii) Where the debts of the deceased owner cannot otherwise be liquidated.

[1] **12**, 2, 2, 169.
[2] Morand, *Études*, p. 173, note 4.
[3] 45 I.A. 73, 45 C. 878, per Mr. Ameer Ali.
[4] *Minhaj*, **12**, 2, 2, 169.

(iv) where there are general provisions in the will which cannot otherwise be carried into effect.

(v) Where the produce of the property is not sufficient to defray the expenses of keeping it.

(vi) Where 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 fair restitution.[1]

The statement in Macnaghten, followed in *Re Abdul Gafoor*, 1 Z. 575, is obviously an elaboration of the simpler rule in the Minhaj and does not indicate any difference between schools: but see above, p. 97 (Maintenance). A full exposition of the powers of a guardian was given in *Imambandi* v. *Mutsaddi*, 45 I.A. 73, above cited. The distinction (between the power of a *de jure* guardian to alienate immovables and that of a *de facto* guardian over movables only in case of necessity) is vital in both schools. In *Kali Dutt Jha* v. *Abdool Ali*, 16 I.A. 96; 16 C. 627, a deed of sale of immovable property by the guardian (father) as part of a compromise of litigation beneficial to the minor was upheld.

A *de jure* guardian according to the *Minhaj* (loc. cit.) may alienate movable property 'even by exchange or on credit if his ward's interest requires it', as when, to give a simple instance, he is carrying on a business for an infant proprietor.

In *Mata Din* v. *Ahmad Ali*, 39 I.A. 49 (34 A. 213) three brothers without lawful appointment as guardians either by will or by court purported to act as guardians of the property of their minor brother and to mortgage his immovable property in addition to their own: in *Imambandi* v. *Mutsaddi*, a mother, also without lawful appointment, acted as guardian of property. In the latter case it was held that such a *de facto* guardian may incur debts or may even alienate a minor's movables (*mata'*) for imperative necessity, but may not intermeddle in any way with the immovables (*'aqar*). The acts of such a guardian with regard to the immovable property are a complete nullity. They do not need to be set aside, and a purchaser or other transferee can only acquire title as a squatter. In *Mata Din*, however, the minor on coming of age elected to treat the mortgage as valid; and this was allowed, the effect being to give him a longer

[1] Exception to the rule stated, pp. 183, 190, as to possession in the law of sale.

period in which to make his claim than he would have had against a mere squatter.

### E. POSSESSION AS BETWEEN GUARDIAN AND WARD

As the guardian has possession of the ward's property on behalf of the ward, a gift from guardian to ward is complete without delivery, there being a constructive delivery (see p. 192. Possession in the Law of Gifts). The converse does not hold true. A ward may accept an advantage for himself, e.g. a gift, but he cannot incur a liability or transfer property with the guardian's consent.

### F. GUARDIAN'S PERSONAL ADVANTAGE IN TRANSACTIONS WITH WARD'S PROPERTY

As in English law, no guardian, agent, or other person exercising an office of trust may take any advantage to himself unless expressly authorized.[1] If he wishes to purchase from the property he must get an *ad hoc* guardian appointed to defend its interests in the bargain. But in *Re Abdul Gafoor*, 1 Z. 575, it was held that in an auction the guardian might bid at the risk of having to prove that he had purchased at the full value. This was under the Probate and Administration Decree 1917, sec. 91.

In general, however, the English principle that a person in a position of active confidence may be called upon to prove his own good faith was not recognized: see *Khamis* v. *Said*, 1 Z. 608, and *British Resident* v. *Hafiz*, 1 Z. 526, both cases of transactions *prima facie* open to suspicion. But see also *Minhaj*, **12**, 2, 2, *ad fin.*, 169. The *Minhaj*, apparently, would call upon any guardian of property except a father or father's father to prove his own good faith. In the statutory introduction of English principles of evidence, the rule of active confidence is included. Maliki law casts the burden of proof on the guardian,[2] but shifts it if his affirmation is supported by probabilities.

### G. REMUNERATION OF GUARDIAN

'Let him who is rich abstain entirely from the orphans' estates; and let him who is poor take thereof according to what shall be reasonable.' [3]

On the authority of this text the law recognizes the right of a

[1] e.g. *Minhaj*, **14**, 2, 183. Also p. 288: as to *mutawali* of a *waqf*, O. H. Arts. 216, 303. [2] R. and S., rules 213–15. [3] Q. **4**, 5, 6.

guardian to be allotted a reasonable remuneration: though it is commendable for him not to ask it where he can afford to do without it.

### H. LAESIO ENORMIS (GHABN FAHISH)

According to the *Mejelle* [1] any transaction of sale or lease may be set aside, no matter who the other contracting party may be, if it be shown that a minor or a *waqf*, whether as vendor, lessor, purchaser, or lessee has suffered loss by that transaction exceeding twenty per cent. in case of immovables, or even smaller percentages for movables. No authority other than the *Mejelle* is known to the present writer.

### I. POWERS OF THE QADI

It is the religious duty (*fard*) of every man who knows of a destitute or unprotected orphan to inform the Qadi in order that proper arrangements may be made for the orphan's benefit. It is equally the duty, in theory, of every one who knows of misconduct by a guardian to inform the Qadi. The Qadi may inspect and control a guardian appointed by his court; he may remove any guardian for misconduct and appoint a new one; or, without removing, he may appoint either a deputy guardian (*naib wali*) to assist a guardian who, though not guilty of misconduct, is no longer capable of doing without help: he may appoint an overseer (*nazir*), or, where his warrant of appointment permits it, may delegate his powers of supervision to a deputy (*muqaddam*).

[1] Arts. 165, 356, 441.

CHAPTER XIV

# INHERITANCE: GENERAL OUTLINE

## A. HISTORY: THE TIME OF IGNORANCE

INHERITANCE, like every other topic in Muhammadan law, must be approached historically. The law of Arabia before the Prophet was similar to that of pagan East Africa at the present day, the following being the root ideas of the law of inheritance.

'1. That individual members of the family form the wealth and strength of the united family:

'2. That females cannot inherit and cannot dispose of property: [1]

'3. That females themselves are property to be bought and sold in marriage, to be assigned in payment of debt and to be owned and inherited by their male relations.' [2]

All this is natural where property is founded on naked force. The law of Arabia was patriarchal despotism [3] unqualified. There was no distinction between ancestral and self-acquired property: the system, variously known as the joint family or as the system of birthrights, by which sons acquire a vested interest at birth in their father's property, though it exists from time immemorial in some Moslem countries (e.g. certain varieties of *masha'* custom in Palestine) is contrary to the individualist spirit of Islam (see pp. 1 and 8) and has never been recognized.

There were, therefore, five principal rules, all traceable to the reign of force.[4]

(a) Inheritance descended exlusively to males tracing kindred

[1] In Mecca at least, though not in Medina, social custom in this respect seems to have been in advance of the law: Khadija, for instance, owned considerable property.

[2] Verbatim from 1 E.A., appendix I, on Native Laws and Customs.

[3] Robertson Smith (*Kinship and Marriage in Early Arabia*) has brought immense scholarship to the support *inter alia* of a theory that a matriarchal state in Arabia had only recently been outgrown. The subject is too large for casual discussion, but it is perhaps to be regretted that Robertson Smith, whose authority all must reverence, wrote under the influence of J. F. McLennan, whose fallacies on this topic have since been exposed.

[4] Cf. Moyle, *Justinian*, excursus X.

entirely through males. This is still true of the *dia* or payment for blood and of patronage rights in countries where they exist.

Women being property, their children belonged to the owners of the mothers, and were not thought of as kin to their maternal relatives.

(b) The nearer in degree 'excluded the more remote': he was a closer ally in time of trouble: see below, Al Jabari's rule, p. 118.

(c) Succession was (and is) *per capita*, not *per stirpes*. Dead men wield no swords; and every living man stands on his own feet.

(d) Fictitious relationships in the nature of military alliances were common:

(i) Adoption.

(ii) The oath of brotherhood.

(iii) Patron and client, particularly for the protection of strangers.

(e) Boys below the age of puberty not being strong enough to defend their inheritance, could not inherit (puberty was regarded not merely as the age of marriage, but as the age at which pugnacity develops and a man becomes a soldier).

### B. THE PROPHET'S REFORMS

(a) *Minor changes.*

(i) He abolished the disqualification of infants.

(ii) He deprived adoption and oath brotherhood of all legal effect, both in this law and in that of prohibited degrees (see above, p. 40). It is commonly said that he abolished these relationships, but that is an overstatement. He had himself adopted Ali and Zaid b. Haritha and had made Abu Bakr his oath brother.

(iii) According to schools other than the Hanafi and the Shia, he also abolished the tie of inheritance on account of patronage in all cases except that of freedman and emancipator.

(iv) Rules (a), (b), and (c) above he left untouched in their application to the original scheme of inheritance, although he himself had been a sufferer by rule (b), having been excluded from a share in his grandfather's inheritance by the predecease of his father.

The effect of these rules, however, he mitigated by the introduction of:

(b) *The New Heirs.*

Definite commandments in the Qoran with an explicit divine sanction[1] created a new class of heirs, hence called *zu'l fard* (pl. *zawi'l furud*) as 'having a commandment'.[2] This class consists of the following:

(i) *the widower, widows, or widow*, as the case may be: in the primitive law the relation between spouses had been such that inheritance between them was impossible. This command, accordingly, was part of the reform in the law of marriage.

(ii) *the father*—in competition with the deceased's son he had not previously inherited, perhaps because under the rule of force an old man comes off badly in competition with a young one: or perhaps because the law, already obsolescent, dated from a time when a man had no property in his father's lifetime and there was consequently nothing for the latter to inherit.

(iii) *the daughters and the mother.*

(iv) *the agnate sisters, the uterine brother and sister;*
to which list the Sunni and Ibadi lawyers have by analogy (*qiyas*) unanimously (*ijma'a*) added

(v) *the father's father, the son's daughter, and the grandmothers.*
These are not mentioned in the Qoran.

Of these five categories the first three rank together and can never fail to partake in the inheritance. The fifth are excluded respectively by those persons into whose shoes they step, namely the father, the son or daughter, and the mother. The fourth are excluded by sons or sons' sons h.l.s. or by the father: their position in competition with other descendants or ascendants is too complicated to be summed up in a single principle, but is given at length in this and the next chapter.

These commandment holders normally take a definite frac-

[1] Q. 4, 11–14 and 117.

[2] The word *fara'id* from the same root has come to mean the law of inheritance and particularly the fractional subdivision which, by reason of these commands, is its most prominent characteristic.

tion in the inheritance; hence their English name 'sharers': and the method of dividing the inheritance is consecrated by the *hadith*, 'Give the shares to those to whom they belong and the residue to the agnate man [*lit.* male man] nearest of kin to the deceased'. But the preference of sharers over residuaries is merely a matter of arithmetical division of the inheritance. They have no advantage against outside creditors, prior charges, or debtors: both classes are heirs together on an exactly equal footing. Moreover the father, if there are no sons or son's sons h.l.s., takes both as a sharer and residuary: and daughters[1] and agnate sisters according to the express text of the Qoran in competition respectively with sons or brothers equal in blood do not take definite fractions but share in the residue, each daughter (or sister) getting half the quota allotted to each son (or brother of equal blood).

(c) *The completed scheme.*

We have thus to consider:

(a) the sharers; i.e. the commandment holders, where taking a definite fraction.

(b) the residuaries *'asib*, pl. *'asabah*, or *'asbah*, pl. *'asabāt*.

(i) originally only the male agnates, members of the *'akila* or *gens*; such male agnates are called *asabah ba nafsihi* residuaries in their own person;

to which must be added in appropriate cases:

(ii) by express command, *asabah ba ghairihi* residuaries by another, i.e. daughters,[1] and agnate sisters in competition with male heirs of equal degree and blood, and

(iii) by a very early precedent, *asabah ma ghairihi* residuaries with another; i.e. agnate sisters in competition with daughters.[2]

All other heirs than the above are in the Sunni and Ibadi scheme a mere afterthought or postscript, and are not considered till the blood kindred in these two classes are exhausted.

[1] The text is applied by analogy to son h.l.s.'s daughters.

[2] The form *'asib* seems to be confined to western sources; *'asabah* or *'asbah* may be the broken plural of this, and is equally a collective or abstract noun sometimes used in a singular and concrete sense and capable itself of a plural.

### C. CROSS-CLASSIFICATION

These two classes may with advantage be cross-classified as follows:

(a) *Primary heirs*—whom no heir can exclude—six in number:

| | |
|---|---|
| Son | Daughter |
| Father | Mother |
| Husband | Wife |

(b) *Secondary heirs.*

(i) substitute for the son,—*son h.l.s.*

(ii) substitute for or supplement to the daughter,—*son (h.l.s.'s) daughter—not daughter's daughter.*

(iii) substitute for father. *True* grandfather h.h.s. (but see below, p. 127, as to Maliki and Shafii law).

(iv) substitute for mother. *True* grandmother h.h.s.

But it is a mistake to regard these secondary heirs as 'representing' the primary heirs into whose shoes they step. They inherit in their own right *per capita*, and their legal position is in no case quite as good as that of the primary heirs; see under the various heirs *seriatim* in the next chapter.

(c) *Collaterals.*

These are:

(i) *Totally excluded*, according to all five schools, by any descendant male agnate or by the father of the *de cujus.*

(ii) *Totally excluded*, according to Hanafi, Hanbali, and Ibadi schools, by the father's father h.h.s.

In Maliki, Shafii, and Zaidi law the true grandfather does not exclude agnate brothers and sisters. He does exclude the uterine brothers and sisters and all more distant collaterals.

(iii) As for the competition of collaterals with female descendants or ascendants, see next chapter.

### D. TABLE OF SHARERS

The following table has been reduced to the simplest form in order that it may not be a tax on the memory. For details see next chapter.

| | | *Sharer.* | *Minimum.* | *Maximum.* | *Two or more take* |
|---|---|---|---|---|---|
| Spouses | 1. | WIFE | $\frac{1}{8}$ | $\frac{1}{4}$ | Same as one |
| | 2. | HUSBAND | $\frac{1}{4}$ | $\frac{1}{2}$ | |
| Descendants | 3. | DAUGHTER | R– | $\frac{1}{2}$ | $\frac{2}{3}$ |
| | 4. | Son h.l.s.'s daughter | substitute or complement to daughter | | |
| Ascendants | 5. | MOTHER | $\frac{1}{6}$ | $\frac{1}{3}$ | |
| | 6. | True grandmother h.h.s. | substitute for mother | $\frac{1}{6}$ | $\frac{1}{6}$ |
| | 7. | FATHER | $\frac{1}{6}$ | +R | |
| | 8. | True grandfather h.h.s. | substitute for father—but, in Maliki and Shafii law, with restrictions. | | |
| Agnate sisters | 9. | FULL SISTER | R– | $\frac{1}{2}$ | $\frac{2}{3}$ |
| | 10. | Consanguine sister | substitute or complement to full sister | | |
| Uterine brother and sister | 11. | Uterine brother and sister | $\frac{1}{6}$ | $\frac{1}{6}$ | $\frac{1}{3}$ |

The symbol R– indicates that in this case the position of residuary is less favourable than that of sharer; the symbol +R that it is never assumed except when it is more favourable. Nos. 4, 6, and 8 in the above table are not mentioned in the Qoran and were introduced by way of analogy, *qiyas*, by the Sunni and Ibadi lawyers. Their position in the Shia scheme is different and they do not properly figure in the Shia table of sharers. Otherwise the Shia table is the same.

### E. GENERAL RULES GOVERNING THE SHARERS

Two opposite difficulties may arise:

(a) The total of the shares may add up to more than unity.

(b) The total may fall short of unity; what is to be done with it when there are no residuaries?

(a) *More than unity*: e.g.

$$\left.\begin{array}{ll} 2 \text{ sisters} & \frac{2}{3} = \frac{4}{6} \\ 1 \text{ widower} & \frac{1}{2} = \frac{3}{6} \end{array}\right\} \frac{7}{6}$$

The Arabs call this *increase*, *'aul*, and we call it *reduction*. The difficulty is solved by *increasing* the common denominator

to the sum of the numerators and thus *reducing* the fractions, thus:

| | |
|---|---|
| sisters | $\frac{2}{7}$ each $= \frac{4}{7}$ |
| widower | $\frac{3}{7}$ |

This state of affairs cannot arise when there is a son of the deceased. But it is possible for any other residuary (except the father who is also a sharer) to be totally excluded by the shares adding up to unity.

This doctrine of *'aul* is attributed by the Sunnis to a decision of Ali in the pulpit *al mimbariya*; but is rejected by the Shias, since in one form at least of the tradition Ali appears as merely the lieutenant and mouthpiece of Omar. See below, p. 146.

(b) *Less than Unity.*

(i) In Maliki law (and originally in Shafii and Ibadi *but no longer so*), the excess will go in the case of a freed slave to the patron and in all other cases to the *Bait-ul-Mal.*

(ii) In all other systems (Hanafi, Hanbali, Zaidi, and modern Shafii and Ibadi), the excess will go by return, *radd*, in augmentation *pro rata* of the shares of the sharers.

But note that though the shares of husband or wife have to suffer reduction in the first case, *'aul*, the husband or wife *never* takes part in the *radd.* Thus in the converse to the case just given

| | |
|---|---|
| 1 widow | $\frac{1}{4}$ |
| 2 sisters | $\frac{2}{3}$ |
| remainder | $\frac{1}{12}$ |

This will be divided by *radd* between the two sisters $\frac{1}{24}$ each: *the widow will not share in it.*

If it were not for this exclusion of the spouse relict, the rules of *'aul* and *radd* taken together would be simply the arithmetical rule of proportionate parts; but it is only in cases where there is no spouse relict that *radd* can be effected by reducing the denominator.

### F. THE RESIDUARIES

The doctrine by which some residuaries are preferred to others bears the name *hajab*, exclusion: the rule for determining this, on which with slight differences all Sunni schools, as well as the

Ibadis and Zaidis proceed, is known as Al Jabari's rule.[1] The same rule is also in a different form the basis of the Shia law of inheritance, see below, ch. xviii.

But in no system is the rule capable of being applied to sharers, *zawi'l furud*; the principles on which one sharer is excluded by another or sometimes by residuaries, though similar, must be kept distinct.

### G. AL JABARI'S RULE.

Preference is given

(a) **first to the order;**

(b) **next to the degree;**

(c) **lastly, to the strength of the blood tie.**

(a) '*first to the order*': for instance, a son and a father are both removed in the first degree from *P*; but as the son is in a superior order, the descendants, he excludes the father from the residue, though not from a *fard* share. Owing to a great controversy about the position of the grandfather (see below, p. 127), the orders are differently reckoned in different schools as follows:

| 1. Hanafi, Hanbali, Ibadi | 2. Maliki, Shafii, Zaidi | 3. *Compare* Ithna Asharia Shia (see chapter xviii). |
|---|---|---|
| 1. Descendants | 1. Descendants | 1st class |
| 2. Ascendants | 2. Father only | 1st class |
| | 3. Grandfather h.h.s. and brothers | 2nd class |
| 3. Descendants of Father | 4. Descendants of brothers | 2nd class |
| 4. | 5. | 3rd class |

Descendants of remoter ancestors by houses, the nearer line or stock of descent always excluding the more remote.

In the above table columns 1 and 2 must be read as referring strictly to agnates only; column 3, which is given for the purpose

[1] Al Jabari, the inventor of the mnemonic couplet in which it is embodied, appears to have been a Shafii: the statement of the same rule in the *Sirajiyyah* (sec. 5, Rumsey, p. 13) is more diffuse.

of elucidating the evolution of the Shia law (see below, ch. xvii) includes both cognates and women.

(b) '*next to the degree*': this means that there is no right of representation in the ordinary system of Muhammadan law. *A* dies leaving one son and the son of a predeceased son: the former gets everything, the latter nothing.[1] (Muhammad himself suffered by this rule.) See *Moolla Cassim* v. *Moolla Abdul*, 32 I.A. 177; 33 C. 173.

(c) '*lastly, to the strength of the blood-tie*': the strength of the blood-tie is only a deciding factor where the order and degree are equal. A full brother will exclude a consanguine brother, but a full brother's son will be excluded by the consanguine brother.

Where a woman sharer has been agnatized (see above, p. 114; below pp. 122–3, 132–3) she is a residuary for all purposes and excludes more distant residuaries: thus a full sister agnatized by a daughter excludes a consanguine brother, and a consanguine sister similarly agnatized excludes a full brother's son.

[1] In Maliki practice, however, a father is recognized as having the right to direct that the children of a predeceased son shall succeed in the place of (*ba manzilat*) that son. See an example in Zeys and Sidi Said, no. 34. The learned authors go on to say that *Le droit de représentation n'existe pas chez les musulmans en vertu de la loi. Mais un parent peut toujours conférer ce droit à qui bon lui semble, même à un parent qui chez nous ne l'exercerait pas.* This is called *inzal*, the word being, of course, the same as *tanzil* (ch. xvii), and has been compared to adoption. The practice is founded in custom and may perhaps be local to Algeria and Morocco. Wansharisi maintains that it must be treated as a form of will, and that where the effect is to dispose of more than one-third of the property the consent of the other heirs will be necessary.

## CHAPTER XV

# INHERITANCE: THE LEGAL HEIRS

IN all systems of law the doctrine of succession is, it has been said, the touchstone of the lawyer: the legal mind delights in its inevitable intricacies, the layman is repelled: and it is this truth of legal education, rather than any calculation of material advantage, which is enshrined in the *hadith*, 'Learn the laws of inheritance and teach them to the people, for they are one half of useful knowledge'. To Moslems the *sharia* law of inheritance is ideally perfect: founded on the sure rock of divine revelation and worked out in the utmost detail by that mental ingenuity which God gave man for the purpose of understanding revelation. The logical strength of the system is beyond question: and that the results are sometimes impracticable does not in Moslem eyes detract from their divine character. Human ingenuity admittedly cannot always carry out the fine distinctions of divine justice: and the system is reverenced as a matter of theological dogma even by those Moslems who as a matter of custom do not follow it. To the beginner the difficulties are enhanced by the traditional method of treatment which classifies the heirs under the fractions they take. A better method, both for understanding the system and for the solution of any particular problem, is to take the individual claimants in the order of their nearness to the *propositus* and to observe their rights in relation to one another. This is done in the succeeding catalogue.

Most of the cases to which *sharia* lawyers give special names are merely logical applications of the rules given in the preceding chapter. The following are to some extent anomalous and require special notice:

### A. THE SPOUSES

1. *Husband.* ½ if *P* died childless, ¼ if any child of *P* surviving.

2. *Wife, or all wives together.* ¼ if *P* died childless, ⅛ if child of *P* surviving.

The man double the woman, or in this case double all the women. No other inheritance *qua* spouse in any case.

Spouses suffer reduction by *'aul* in competition with other legal heirs, but not in competition with extraordinary heirs (see next chapter).

Spouses take no part in the return, and do not exclude the extraordinary heirs, except that according to very early English judicial authority, they will in Hanafi law exclude the *bait-ul-mal*. A similar rule has been applied to the case of the husband in Shia law, and Mr. Ameer Ali considers that it would be applied to the case of the wife. Probably the point would be similarly dealt with should it arise in Shafii or Ibadi law.[1] But apart from the English courts the point is not clear.

Where husband and wife are blood relatives (see p. 41), their mutual rights of succession in this capacity are not affected by their marriage (see p. 158).

The wife's claim to her unpaid dower and her right to live in the house of her deceased husband during *iddat* take precedence over inheritance rights (see above, pp. 53, 68, and below, p. 166).

### B. DESCENDANTS

3. *Son.* Though only a residuary, *'asib*, he is ordinarily the principal heir, because all shares are either totally excluded or reduced to the minimum by him.

(i) he excludes all collaterals and all descendants more distant than himself.

(ii) he excludes father or grandfather from being *'asib*, but not from taking *minimum* share, i.e. one-sixth in each case.

(iii) neither mother nor grandmother can get more than one-sixth.

(iv) the spouse relict can only get his or her minimum share, one-quarter (husband) or one-eighth (wife).

[1] See also Tanganyika Ordinances, vol. i, p. 13, sec. 3, a notice under martial law continued in force by the Tanganyika Order in Council, 1920, sec. 31.

(v) reduces daughters of *P* (his own sisters) to residuaries by reason of himself (*asabah ba ghairihi*).

N.B.—1. In Maliki, Shafii, and all Shia laws, the eldest son gets his father's Qoran, sword, saddle, and robes as a prior charge before even legatees.

N.B.—2. Illegitimate child?

*matris filius*—Sunni law
*nullius filius*—Shia law

(see also under Maintenance, p. 96, and under *Li'an*, p. 82).

4. *Son's son h.l.s.*

Similar to son, except as regards daughter or son's daughter nearer than himself whom he does not reduce to residuary, e.g. *P* leaves two daughters and a son's son.

| | |
|---|---|
| 2 daughters | $\frac{2}{3}$ as sharers |
| son's son | $\frac{1}{3}$ as residuary (*'asib*) |

Thus he may be excluded altogether, which the son can never be, e.g.:

| | |
|---|---|
| 2 daughters | $\frac{2}{3}$ |
| mother | $\frac{1}{6}$ |
| father | $\frac{1}{6}$ |
| son's son | *nil* |

5. *Daughter.* Qoran 4, 12. 'God instructs you concerning your children: for a male the like of the portion of two females; and if there be women above two then let them have two-thirds of what the deceased leaves; and if there be but one then let her have a half.' Nobody, except the son, can prevent her getting her Qoranic share.

(i) One daughter, no sons—$\frac{1}{2}$ share.

(ii) Two or more daughters, no sons—$\frac{2}{3}$ shares.

(iii) With a son or sons? Half male share as residuary by another (*asabah ba ghairihi*).

(iv) Daughters do not affect the rights of father or grandfather, but

(v) Even one daughter will prevent husband or wife and mother from getting anything more than their minimum share: a grandmother never gets more in any case.

(vi) One daughter does not altogether exclude the son's daughter from a share, but takes her half, leaving, out of the

daughter's possible $\frac{2}{3}$, one-sixth available for the son's daughter. Two or more exclude the son's daughter *from a share*, but see below.

(vii) Totally excludes uterine brother and sister: and reduces sisters germane or consanguine to residuaries *with* another *asabah ma ghairihi* (see below under Sisters).

6. *Son h.l.s.'s daughter.*

= a daughter (i.e. $\frac{1}{2}$ or $\frac{2}{3}$ or residuary by another) except that

(i) she is totally excluded by a nearer son—e.g. *P* leaves a son and a son's daughter—the latter gets nothing.

(ii) if *one* nearer daughter, the son's daughter gets a *share* $\frac{1}{6}$, i.e. the remainder of the $\frac{2}{3}$ commanded for daughters.

She equals a daughter even against more distant sharers. Thus in an early case before two of the 'companions', who solved it as follows:

| | *Abu Musa* | *Ibn Masud* |
|---|---|---|
| 1 sister | $\frac{1}{2}$ | $\frac{1}{3}$ |
| 1 daughter | $\frac{1}{2}$ | $\frac{1}{2}$ |
| 1 son's daughter | *nil* | $\frac{1}{6}$ |

Ibn Masud's view prevailed, though it involved reading the word daughter in two successive sentences of the same verse (Qoran 4, 12) in two different senses. This is accepted by all Sunni and Ibadi schools: in the Shia system the daughter would get everything.

(iii) If two nearer daughters: *no share.*

(iv) With son's sons of lower degree, she gets her commanded share *if the two-thirds has not been exhausted*; thus *P* leaves a daughter, a son's daughter, and a son's son's son: the division will be $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{3}$.

(v) With sons of equal degree (her own brothers or cousins) she becomes a residuary by another, *even though nearer daughters have exhausted the daughters' commanded two-thirds.* E.g. *P* dies leaving:

| | |
|---|---|
| 2 daughters | $\frac{2}{3}$ |
| 1 son's daughter | $\frac{1}{9}$ |
| 1 son's son | $\frac{2}{9}$ |

and the same rule is applied in her favour where the commanded two-thirds have been exhausted and there is an agnate male

descendant even more remote than herself. Suppose, e.g., two daughters, a son's daughter, and a son's son's son, the division will be $\frac{2}{3}$, $\frac{1}{9}$, $\frac{2}{9}$.

(vi) A son's son *of equal degree* always agnatizes her; and, since he may himself be excluded, may also cause her exclusion, though in his absence she would get a $\frac{1}{6}$ share. E.g.:

| | | |
|---|---|---|
| daughter | $\frac{1}{2}$ | *'aul* |
| husband | $\frac{1}{4}$ | |
| mother | $\frac{1}{6}$ | |
| father | $\frac{1}{6}$ | |
| son's son | | *nil* |
| son's daughter | | |

though but for the son's son, the son's daughter would get her share and rank in the general reduction. A son's son *of lower degree* only agnatizes her in cases where she profits by such agnatization.

These rules (v) and (vi) are universally accepted (except of course by Shias) and are known as the cases of the propitious or lucky and the unpropitious or unlucky kinsman, *al qarib al mubarik* and *al mash'um* respectively. Similar cases occur in competition between the full and consanguine sister (see below, pp. 133–4).

(vii) Some authorities imply, though they do not expressly state, that she can only be agnatized by a male descendant. This is true in the sense that nobody but a descendant can agnatize a descendant *so as to deprive her of a share*; but it is not clear whether an ascendant or collateral will be allowed to take the residue without agnatizing a son (h.l.s.)'s daughter who would otherwise get nothing. Thus: two daughters, father, and son's daughter. Shares:

| | |
|---|---|
| 2 daughters | $\frac{2}{3}$ |
| father | $\frac{1}{6}$ |
| residue | $\frac{1}{6}$ |

Is this to be taken entirely by the father or to be divided between the father and the son's daughter as agnatized by him?

Or again, two daughters, a brother, and a son's daughter. Will the brother take the one-third which the two daughters leave or must he agnatize the son's daughter?

Sautayra and Cherbonneau, sec. 645, appear to imply that such an ascendant or collateral will agnatize her where it is to

her advantage. They contrast her position with that of the consanguine sister. But their statement is not clear: and there is authority to the contrary. The point is one of the very few in the law of Inheritance where there is scope for a judicial ruling.

### C. ASCENDANTS

7. *Father.*

Is both sharer and residuary, i.e. there can never be return, *radd*, while the father is alive. With male agnate descendants, *sharer only* $\frac{1}{6}$. With female agnate descendants, sharer *and residuary*. Excludes all ascendants *de parte paterna*, but does not exclude the mother or true grandmother *de parte materna* (nor, in Ibadi law, even his own mother). Excludes *all* collaterals, brothers, sisters, and nephews. Sharing with mother, takes his share along with hers, and is liable to *'aul*. But see below under *Mother* (p. 126) for two famous decisions of the Caliph Omar universally followed by Sunnis and Ibadis. See also under *Li'an*, p. 82.

8. *Mother.*

*Cannot* be excluded.

*Excludes* all grandmothers, but no other legal heirs, Q. 4, 12. 'The mother shall have a sixth part of the patrimony if *deceased* left issue: if not and his ascendants succeed, the mother shall have a third: if he leave brothers she shall have a sixth.'

This contradicts the 'double share to the male', a rule which the Prophet only laid down in words as to sons and daughters, brothers and sisters other than uterine; and it is a striking instance of the special honour paid to a mother among Arabs that the lawyers made no attempt to rectify this except in two cases where the mother would actually get *more* than the father. Thus:

(i) Where the father takes as sharer and residuary, it will be found that his residue will always give him double the share of the mother.

(ii) Where he is excluded from the residue either by sons or son's sons h.l.s. or by the shares adding up to unity, he will share *equally* with the mother; and with her will be liable to *'aul*. *'Aul* cannot occur in any case where the mother would get a $\frac{1}{3}$ share.

(iii) In two cases the strict letter of the Qoran would give the

mother more than the father, namely where *P* left a spouse relict (widow or widower) and two parents.

The Caliph Omar's solution was to deduct the spouse's share first, then calculate mother's share on the remainder: by this means we get father : mother :: 2 : 1. This is *accepted by all* except the Shias, who reject it as they reject everything which professes to emanate from the Caliph Omar. But if in the above case for father we read grandfather, Omar's rule does not apply; the mother's share will be calculated on the whole inheritance.

(iv) Suppose that *P* also left a daughter or two daughters, would Omar's rule be applied? (Even by applying it, we do not give the father 2 : 1).

*Answer.* No: we only apply it to her $\frac{1}{3}$ share, not to her $\frac{1}{6}$, which cannot be reduced except by *'aul.*

(v) 'If he leave brothers, she shall have a sixth.' Two or more brothers and/or sisters surviving may restrict the mother's share in accordance with this precept of the Qoran. But if there is a father (or true grandfather—Hanafi only) they do so in his favour, not their own. Uterine brothers or sisters, her own children, will similarly restrict her share, though they can in no case take the residue themselves. Thus:

father $\frac{1}{6}$ share plus $\frac{4}{6}$ residue.
mother $\frac{1}{6}$ share.
2 brothers *nil*, excluded by the father, but restricting the share of the mother.

The mother will get only $\frac{1}{6}$ as sharer and the father $\frac{1}{6}$ as sharer plus $\frac{4}{6}$ as residuary $= \frac{5}{6}$. Similarly:

| | |
|---|---|
| mother . . . . | $\frac{1}{6}$ |
| 2 uterine brothers . . | $\frac{1}{3}$ |
| 1 consanguine brother's son . | $\frac{1}{2}$ |

The consanguine brother's son does not affect the mother's share (only brothers or sisters can do that), but he scores by the uterine brothers doing so. The word used in the Qoran for brothers is in the plural; it was disputed in the early days of Islam whether this included the dual and finally decided by the Caliph Othman that it did. This is accepted by the Ibadis, although they profess to reject the authority of Othman.[1] For Shia doctrine see p. 147.

[1] Sachau, *Ibad*, 175.

9 and 10. *Grandfather and grandmother*, afford opportunities for endless but futile refinement. The cases where they come into the succession at all are in practice few; but the imagination of the arithmeticians has run riot.

9. *Father's father h.h.s.*[1] is not mentioned in the Qoran and the controversy between the schools is as to how far he is to be allowed to step into the father's shoes.

I. According to all schools.

(i) excluded altogether by the father but (except among Shias) by no one else.

(ii) sharing with descendants:

1, with sons or son's sons h.l.s. he gets a one-sixth share only;

2, in competition with daughters or son h.l.s.'s daughters, a one-sixth share and the residue if any.

(iii) with ascendants:

1. In Omar's two cases cited above the mother's third as against him will be calculated on the whole estate and not merely after deducting that of the spouse relict.

2, he does not exclude any grandmother except those connected with the deceased through himself (according to Hanbalis and Ibadis not even them).

(iv) with collaterals:

1, he excludes altogether the uterine brother and sister;

2, he also excludes all collaterals more remote than brothers, i.e. nephews, uncles, or cousins.

II. The difference between the schools, therefore, arises only as regards the competition between the grandfather and the germane and consanguine brothers and sisters.

(i) In Hanafi,[2] Hanbali, and Ibadi law, 'the father's father is as the father', a traditional judgement ascribed to Abu Bakr—further, 'Adam is called the father of all men', and on that analogy, *qiyas*, paternal ancestors rank as fathers. Therefore the father's father h.h.s. is placed in a higher class or order than

[1] Only *true grandfathers* count, i.e. those between whom and the deceased no female intervenes. Even the mother's father is a 'false' grandfather (*ghair-sahih* or *fasid*, an ancestor in essence, *asl*, but not in attributes, *wasfan*—also called *saqit* or excluded).

[2] The Two Disciples are said to have agreed with Malik and Shafi. But Abu Hanifa's view is universally followed by his school to-day.

the brothers and sisters germane or consanguine, all of whom he absolutely excludes.

(ii) But the Maliki, Shafii, and Zaidi schools [1] hesitated between assigning the grandfather a superiority of order in competition with the brother germane and consanguine, or dealing with him on the footing of his being equally with them in the second degree of remove from *P*. They finally adopted an illogical compromise, *al muqasama*, by which he may choose between three alternatives:

1. A one-sixth as sharer;
2. To rank as a residuary with the agnate brothers and sisters. But sisters in competition with a grandfather only get their Qoranic shares.[2]
3. To take one-third of the residue after deducting the shares or of the whole estate if there are no shares.

Obviously, it will need some skill in arithmetic on the grandfather's part to decide which alternative will pay him best: but there are further complications:

1. *Al Akdariya*: a woman leaves

| | *1st stage* | *2nd stage* | *3rd stage* |
|---|---|---|---|
| Husband . . . | $\frac{1}{2}$ | $\frac{3}{9}$ | $\frac{9}{27}$ |
| Mother . . . | $\frac{1}{3}$ | $\frac{2}{9}$ | $\frac{6}{27}$ |
| Sister . . . | $\frac{1}{2}$ | $\frac{3}{9}$ | $\frac{4}{27}$ |
| Grandfather . . | $\frac{1}{6}$ | $\frac{1}{9}$ | $\frac{8}{27}$ |

i.e. in order to secure a larger portion than he could have under any of the three alternatives just given, the grandfather is allowed to treat the sister *first as a sharer and then as a residuary*; i.e. her *fard* share and his are added together and divided between them in the proportion 2 : 1.

2. *Al Malikia*: so called because attributed to Malik himself. *P* leaves:

| | |
|---|---|
| husband . . . . . | $\frac{1}{2}$ |
| mother . . . . . | $\frac{1}{6}$ |
| grandfather . . . . | $\frac{1}{6}$ fard $+\frac{2}{6}$ residue |
| 1 or more brothers consanguine . | *nil* |
| 2 brothers uterine . . . | *nil* |

[1] For affiliation of Shia doctrine see chapter xvii.

[2] Luciani, Rules 454–9. Zaid, Corpus Juris, no. 891. See p. 129 for conjunction of this rule with another.

The grandfather as an ascendant excluded the uterines, and the germanes were not allowed to take advantage of this; against them he could rely on his *fard*, and also take the residue from which he, not they, had excluded the uterines. Shafii law, however, allows the consanguine brothers to share in the portion from which the grandfather has excluded the uterines.

3. When sharing as a brother, both germane and consanguine brothers and sisters count as *against him*: but the consanguines have no rights *against the germanes*. Thus, suppose a grandfather, one brother germane, and one brother consanguine:

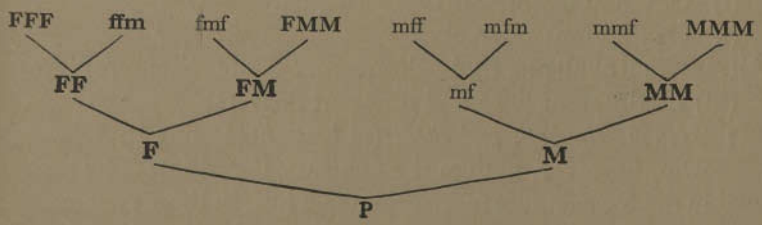
| | | *But*:— | |
|---|---|---|---|
| grandfather . . . | $\frac{1}{3}$ | *grandfather* . . . | $\frac{2}{5}$ |
| brother germane . . | $\frac{2}{3}$ | *sister germane* . . . | $\frac{1}{2}$ |
| brother consanguine . | *nil* | *brother consanguine* . . | $\frac{1}{10}$ |

But if the effect were to reduce the grandfather to less than $\frac{1}{3}$ of the residue, he could still rely on his $\frac{1}{3}$. This is not a fiction, as one English writer has maintained, but a logical deduction from an illogical premise, viz. the reduction of the grandfather to the rank of a brother. Referring to Al Jabari's rule, the grandfather and the consanguine brother are in identically the same position *quoad* strength of the blood tie: the blood tie of the brother germane is stronger. But the grandfather should rank before the brothers because he should belong to a superior order, viz. ascendants.

Both Omar and Ali are credited with having said that the man who thought he understood *al muqasama* was in danger of hell-fire for his arrogance.

10. *The grandmother.*

I. What grandmothers can inherit?




Since the nearer in degree excludes the more remote (but see below) the inheritance of any ancestors more remote than a great-grandmother need not be considered, nor need we con-

sider conflicting theories which prolong the lines for the sake of argument back into infinity. In the above diagram (i) heavy type capitals show ancestors capable of inheriting according to all schools, being the Maliki or earliest doctrine, (ii) heavy type small, the addition made by Hanafis, Hanbalis, and Shafiis, because 'the father's father is as the father' and therefore his mother should rank as the father's mother. In Ibadi law apparently there is no such thing as a false grandmother. *Elbesewi*[1] clearly says that all four great-grandmothers inherit, even the mother's father's mother, and he expressly dissents from all other schools who would exclude her.

II. How much?

One-sixth only, neither more nor less (except for *'aul* or *radd*), no matter how many grandmothers there be. One writer even contemplates thirty-five, an instance of the absurd lengths to which scholastic discussion can be carried, since step-relatives never count.

III. When?

(i) The grandmother is not excluded by descendants or collaterals.

(ii) Whether paternal or maternal, grandmothers are *always*, in all schools including Ibadis, excluded by the mother. The reason is that grandmothers only take by analogy to the mother.

(iii) The father does not exclude the *maternal* grandmother. But he and, except in the Hanbali and Ibadi schools, any true grandfather exclude all their own mothers and grandmothers.

IV. Competition between grandmothers?

(i) Of equal degree—divide *per capita*.

(ii) Of different degree?

All maternal or all paternal—the nearer excludes the more remote.

(iii) Of different lines and different degrees:

1. *Hanafi, Hanbali, and Ibadi* (at least according to *Elbesewi*,[1] who, however, notices the contrary doctrine). The nearer in degree excludes more remote. Thus, in these systems, the father's mother, though herself excluded by the father if living, may exclude the mother's mother's mother.

[1] Sachau, *Ibad.* 179.

2. *Maliki and Shafii.* A nearer maternal ancestress will exclude a more distant paternal. But if the more remote is the maternal, she will none the less partake, because she is connected with deceased by the most important of the female ancestors.

### D. COLLATERALS

11–16. *Brothers and sisters.*

Q. 4, 15 and 175.

15. If the inheritance goes to collateral succession (*Kalala*)[1] and if the deceased had a brother and sister, each shall receive a sixth. If several brothers and sisters, they shall be partners in one-third.

175. 'They will consult thee. Tell them, God directs you about collateral succession (*Kalala*).'

(i) If a man die without leaving children but having a sister she shall take the half of the whole inheritance.

(ii) He also shall be her heir if she have no children.

(iii) But if there be two sisters let them together have two-thirds of what he leaves.

(iv) If he leave both brothers and sisters, the brother will get as much as two sisters.

A *prima facie* contradiction; but all schools agree that verse 15 refers to uterines and verse 175 to germanes and consanguines.

11. *Brother germane, i.e. of the full blood.*

(i) excluded absolutely by *son h.l.s. or father*;

(ii) *but not by daughters or son h.l.s.'s daughters*—in spite of what appears to us the express language of verse 175. 'Daughters were only beginning to be accounted among true descendants.' (Marçais.) But in Shia law (see below) the daughters or any descendants will exclude.

(iii) *with ascendants other than father*: where there are two or more brothers or sisters, full consanguine or uterine, the mother cannot take more than one-sixth: the true grandmother's share, never being more than one-sixth, is not affected.

The true grandfather will absolutely exclude all brothers in Hanafi, Hanbali, and Ibadi law: he will share with them

[1] The common rendering is 'distant relative'—which is no translation, besides being easily confused with the equally inappropriate 'distant kindred' for *zawi'l arham*. The exact meaning of the word is uncertain, but the sense is clear.

according to the principles already explained in Maliki, Shafii, and Zaidi law; see above, p. 128.

(iv) *with other brothers and sisters?*

*Sisters germane?* reduces them to residuaries by himself, i.e. divides with them in the ratio one male = two females.

*Brothers and sisters consanguine? excludes them altogether*, by the greater strength of the blood tie.

*Brothers and sisters uterine?* Their Qoranic share is not affected, but see below for *al himariya*, 'the case of the donkey'.

12. *Sister germane.*

(i) Excluded absolutely by the son or father or, in Hanafi, Hanbali, and Ibadi law, by the true grandfather.

(ii) Qoranic share one-half if only one, two-thirds if two or more; but is reduced to a residuary in two cases:

1, residuary by another, *asabah ba ghairihi*, by the full brother in accordance with Qoran 4, 175 and with the interpretation of the similar text regarding sons and daughters. For competition with the true grandfather in Maliki, Shafii, and Zaidi law see pp. 128–9.

2, residuary with another, *asabah ma ghairihi*, when in competition with daughters or son h.l.s.'s daughters, but with no male descendant or ascendant, nor with a full brother.

This doctrine was evolved by the early companions out of the text, Qoran 4, 175, above quoted (p. 131), to prevent a mere collateral reducing the share of a descendant, and at the same time to give her as nearly as possible the privileged position as against more distant heirs which the Qoran obviously means her to have.

Rule: In competition with daughters or son h.l.s.'s daughters however few, sisters however numerous have no share: but agnate sisters get the residue.

This is the only case where a woman can be the sole residuary. A full or consanguine sister who becomes a residuary in this fashion will totally exclude a more distant residuary; e.g. suppose *P* leaves: a daughter, full sister, and consanguine brother, or a daughter, full sister, and full brother's son. The consanguine brother or the full brother's son is excluded by the nearer residuary, the sister. But suppose there were no daughter

or son h.l.s.'s daughter, the sister would get her share (which cannot be less and may be more than she gets as residuary), and the consanguine brother or nephew in the above instances would get the residue.

(iii) in competition with a consanguine sister?

A full sister who takes as residuary will totally exclude the consanguine sister.

But where she takes as a sharer, one full sister will take a half, leaving, as in the parallel case of the daughter and son h.l.s.'s daughter, one-sixth over out of two-thirds for the consanguine sister.

Two or more sisters germane exclude the consanguine sisters altogether; but see no. 14, vi, on p. 134.

(iv) in competition with uterine brother and sister? The full sister does not affect their Qoranic share, but for her possible participation in it, see below, *al himariya*.

13. *Consanguine brother, i.e. of the paternal half-blood.*

Same as brother germane except:

(i) excluded altogether by brother germane whose blood tie is stronger (but not by brother germane's son, for degree is preferred to strength of blood tie);

(ii) does not reduce the sister germane to residuary: and is altogether excluded by her where she takes as residuary with another (see above);

(iii) does not affect the share of the uterine brother and sister, and can never participate in it.

14. *Consanguine sister*—as sister germane but

(i) *excluded* by brother germane altogether;

(ii) with one sister germane? takes one-sixth Qoranic share, the remainder of the two-thirds for two or more sisters after giving the sister germane her full moiety;

(iii) with two sisters germane? the Qoranic two-thirds being exhausted, none left for the consanguine sister;

(iv) with daughter or son h.l.s.'s daughter and sister germane —the sister germane is *residuary with* the daughter, and the sister consanguine is totally excluded.

(v) The case of the unlucky kinsman, see above under *son h.l.s.'s daughter*, no. 6.

After a single sister germane has taken her half, there would ordinarily remain one-sixth for the sister consanguine. But she is deprived of this and excluded altogether from the inheritance when:

1, the Qoranic shares, not counting hers, add up to unity or more, and

2, there is a consanguine brother who reduces her to a residuary.

Thus suppose the following:

| | | |
|---|---|---|
| wife | $\frac{1}{4}$ | 'aul |
| mother | $\frac{1}{6}$ | |
| full sister | $\frac{1}{2}$ | |
| uterine brother and sister | $\frac{1}{3}$ | |
| consanguine brother | *nil* | |
| therefore consanguine sister | *nil* | |

But in the absence of the consanguine brother, she would have ranked for a sixth and taken part in the resulting reduction of shares.

(vi) The case of the lucky kinsman. Although, like the son h.l.s.'s daughter, she may be agnatized and participate even though the Qoranic share for sisters has been exhausted by sisters germane, yet in contrast with the parallel case of the son h.l.s.'s daughter (see above) this can only be done by a brother of equal rank with herself. Thus:

| | | |
|---|---|---|
| 2 sisters germane | $\frac{2}{3}$ | fard |
| 1 sister consanguine | $\frac{1}{9}$ | residue |
| 1 brother consanguine | $\frac{2}{9}$ | |

but

| | |
|---|---|
| 2 sisters germane | $\frac{2}{3}$ |
| 1 sister consanguine *excluded by* | |
| 1 brother consanguine's son | $\frac{1}{3}$ |

This is illogical, but it is the *sunna* (Sautayra and Cherbonneau, sec. 645).

On the other hand suppose

| | |
|---|---|
| 2 daughters | $\frac{2}{3}$ |
| 1 sister consanguine | $\frac{1}{3}$ |
| 1 brother's son, consanguine or germane, excluded by the sister consanguine. | *nil* |

In this case the sister consanguine takes as residuary *with the daughter*, a higher title than the nephew can show and one independent of him.

15 and 16. *Uterine brother and sister.*

(i) *No privilege of the male.* Each alone will get $\frac{1}{6}$: if two or more, they are partners (= *equal* sharers) in $\frac{1}{3}$.

(ii) In Ibadi law a uterine *sister when not in competition with germanes or consanguines* will get $\frac{1}{2}$; two or more $\frac{2}{3}$, i.e. she steps into the shoes of the agnate sister.

(iii) The uterine brother and sister are excluded absolutely:

1, by descendants of either sex;

2, by father and true grandfather.

This according to *all schools*; contrast, as regards the grandfather, the position in Maliki, Shafii, and Zaidi law of the agnate brothers and sisters, nos. 11–14.

(iv) *Never excluded by brother or sister germane or consanguine*, but in one case may actually exclude the consanguine, or even, according to one school of Hanafi lawyers, the germane brothers. This is the famous 'case of the donkey', *al himariya*.

A woman dies leaving:

| | |
|---|---|
| husband . . . . . | $\frac{1}{2}$ |
| mother . . . . . | $\frac{1}{6}$ = the whole |
| uterines . . . . . | $\frac{1}{3}$ |
| brothers germane or consanguine | *nil* |

This was the Caliph Omar's original decision. But when a similar case came before him again, the brothers germane argued: 'Let our father have been even a donkey or a stone, we are as much sons of our mother as those by a different father'; so Omar overruled his previous decision and allowed them to share with the uterines, on the basis of their uterine brotherhood, ignoring the other half of their full brotherhood. This is followed by Malikis, Shafiis, and Ibadis.

In Hanafi law there are two opinions, but the prevailing opinion holds by Omar's earlier decision. Qadri Pasha, however, does not mention the case, and there appears to be no definite decision in India. It is submitted that equity is in favour of the second decision. The brothers consanguine are excluded by every school. The following cases, however,

appear to be still uncertain, and together with that quoted above (pp. 124–5) may rank as among the very few problems of the Muhammadan law of inheritance where there is room for judicial precedent.

(i) A woman dies leaving:

| | |
|---|---|
| husband | $\frac{1}{2}$ |
| mother | $\frac{1}{6}$ |
| uterines | $\frac{1}{3}$ |
| 2 consanguine sisters | $\frac{2}{3}$ |

a case for *'aul*.

but

| | | |
|---|---|---|
| husband | $\frac{1}{2}$ | = unity |
| mother | $\frac{1}{6}$ | |
| uterines | $\frac{1}{3}$ | |
| consanguine brother | *nil* | |
| 2 consanguine sisters | ? | |

will the latter be reduced to residuaries by a brother who cannot take?

The prevailing opinion in Maliki law is that they will.

(ii) But suppose a woman dies leaving:

| | | |
|---|---|---|
| husband | $\frac{1}{2}$ | unity |
| mother | $\frac{1}{6}$ | |
| uterines | $\frac{1}{3}$ | |
| 1 brother germane | ? | |
| 2 sisters germane | ? | |

Where the rule is to exclude the brother germane altogether, the sisters germane will also be excluded. But with those who follow the doctrine of *al himariya* and allow him to rank as a uterine brother, what will be the position of the sisters germane? Can they be reduced to residuaries by a brother who has expressly disclaimed that position for himself? And if they take, as they presumably do, as sharers, what can prevent their ranking for their full Qoranic two-thirds and participating in the reduction accordingly?

17—*n*. All other male relatives connected with the deceased entirely through males, i.e. clansmen and clansmen only. Nieces and aunts can never succeed except under the provisions of the

next chapter. There is no representation, and clansmen inherit by source (*parentela*), degree, and strength of the blood tie, e.g. a great-great-nephew being of a nearer *parentela* will exclude an uncle: so also will a cousin exclude a great-uncle. It used to be supposed that in Maliki law a limit was placed to the tracing of agnatic kindred at the eighth degree, but it is now recognized that this was a misapprehension of early European scholars.

CHAPTER XVI

## THE EXTRA-ORDINARY HEIRS

A. In Maliki law, the doctrine of return, *radd*, as above noticed, is not recognized; women and cognate relatives other than those having Qoranic shares have no rights; and on failure of the sharers and residuaries the property passes:

(a) On the death of an emancipated slave to his patron, or, the patron being already dead, to the patron's male residuaries.

(b) In all other cases to the *Bait-ul-Mal*, as *ultimus heres* not by escheat: i.e. the *Bait-ul-Mal* takes subject to encumbrances if any lawfully created by the deceased, but its right up to two-thirds of the estate cannot be defeated by will or death-bed gift.

(c) But for *inzal*, the power of the head of a family to appoint substituted heirs, see above, note on p. 119, and cf. below, the doctrine of substitution, *tanzil*.

B. In the following systems the return (*radd*) is allowed; and the remaining relatives (*zu'l rahm*, pl. *zavi'l arham*)[1] succeed on failure of the sharers and residuaries according to the following doctrines:

(a) In Hanbali,[2] Zaidi,[2] and, at least where the *Bait-ul-Mal* is not properly administered, Shafii[2] law, the doctrine of substitution, *tanzil*.

(b) In Hanafi and eastern Ibadi law,[3] the doctrine of kindred or proximity, *qarabat*.

(a) THE DOCTRINE OF SUBSTITUTION, *mazhab ahl i tanzil*.

(i) Each distant kinsman represents the ordinary heir whether sharer or residuary, through whom he or she is connected with the deceased; thus the daughter's son steps into the shoes of the daughter, and the mother's father into the shoes of the mother.

(ii) But uncles and aunts h.h.s. take the rank of their brother or sister who was an ancestor of the deceased, not the slightly more remote rank of their father or mother: thus, for example, the mother's brothers and sisters, full, consanguine, or uterine,

[1] The only attempt at a definition of this phrase in the Arabic authorities is 'all the kindred other than those already enumerated' (*Moharrar* and *Minhaj*); it includes all women and cognates other than those who receive *fard* shares.

[2] See Appendix B.

[3] The western Ibadi doctrine is silent, probably resembling the Maliki: the eastern Ibadis state both doctrines but appear to prefer the Hanafi; Sachau, *Ibad.* 181.

together with the mother's father, all rank together in the shoes of the mother.

(iii) Where one ordinary heir is represented by two or more *zavi'l arham* of equal degree, male and female share the representation in the proportion 2 : 1. This does not, however, apply to those connected with the deceased through his mother only, the direct Qoranic injunction by which uterine brothers and sisters share equally being extended to all maternal kindred. This analogy is reproduced in Shia law, see p. 150.

(iv) In applying the rule that the nearer in degree excludes the more remote, we have to calculate from the ordinary heir represented, not from the deceased. This applies whether they trace connexion through the same or different ordinary heirs.

(v) If it is necessary to apply the doctrine of Increase, *'aul*, this will not affect the shares of husband or wife. (Any other ordinary heir would of course exclude the distant kindred altogether.)

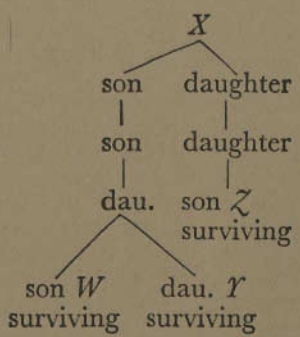
## EXAMPLES

(i) *A* dies leaving:

| | |
|---|---|
| a mother's father who represents the mother . . . | $\frac{1}{6}$ |
| a daughter's son „ „ „ daughter . . . | $\frac{1}{2}$ |
| a son's daughter's son who „ „ son's daughter . | $\frac{1}{6}$ |
| the full sister of the true grandfather | $\frac{1}{18}$ |
| the uterine brother of the true grandfather } who represent the grandfather . | $\frac{2}{18}$ |

(ii) In the above case if *A* had also left a husband or wife, the share of such husband or wife would be taken first without reduction and the above fractions would have been calculated on the balance.

(iii)



In this the great-great-grandchildren being only one degree from an ordinary heir, the son h.l.s.'s daughter, will totally exclude the grandson $Z$ who is two degrees from an ordinary heir, the daughter. $W$ will get $\frac{2}{3}$ and $Y$ $\frac{1}{3}$ of the inheritance.

The succession of *zavi'l arham* was only introduced in the Shafii school, as the *Moharrar* points out, for default of proper administration (*tanzimat*) of the *Bait-ul-Mal*: 'we despair', says another writer, 'of seeing the *Bait-ul-Mal* properly administered till the second coming of the Messiah.' But it is submitted that relatives whose right to succeed has now been recognized for many centuries have acquired, as it were, a vested interest, and that section 13, Kenya Wakf Commissioners Act (Kenya Laws Cap. 28),[1] must not be read to the prejudice of the *zavi'l-arham*.

(b) THE DOCTRINE OF PROXIMITY, *mazhab ahl i qarābat*.[2]

Al Jabari's rule (see above, page 118) is carried on to this new class of heirs, with certain additions.

(i) There are four classes or orders:

1. Descendants other than those already enumerated.
2. Ascendants other than those already enumerated.
3. Descendants of the parents other than those already enumerated.
4. Descendants of the grandparents other than those already enumerated.

Even a single member, man or woman, in each class will entirely exclude the succeeding classes.

(ii) Subject to (i), the nearer in degree excludes the more remote. Thus the mother's father excludes the father's mother's father.

(iii) The immediate *issue* (even though female) of an ordinary heir will entirely exclude all other *zavi'l arham* of equal degree (even though of stronger blood tie) who are not immediate

[1] To the effect that all property of deceased Muhammadan natives to which no claim can be established shall vest in the commissioners to be applied (sec. 11), with the sanction of the court, for such good or charitable purposes on behalf of Muhammadans as may appear desirable.

[2] Q.P., Bk. 6, ch. 9, has been followed in the main as probably based on a wider reading of the authorities than Indian expositions which are derived from the *Sirajiyyah* and *Sharifiyyah* only.

issue of ordinary heirs. This rule applies to the descending lines only. There is no counterpart to it in class 2. Example: a consanguine brother's son's daughter will exclude a full brother's daughter's daughter.

(iv) Subject to (ii) and (iii) preference will be given in classes 3 and 4 to the strength of the blood tie, e.g. the descendants of brothers and sisters of the whole blood will exclude descendants of consanguine or uterine brothers or sisters. But between consanguine and uterine blood there is no preference.

(v) Where the claimants are equal in degree and also (a point which, of course, only arises as regards collaterals) in strength of the blood, and where no claimant has a preference as being the immediate issue of a sharer or residuary, the inheritance will be divided among them in the proportion of two shares to each male for one share to each female.

So far Abu Yusuf: Imam Muhammad, who is followed in India and, though less completely, in Egypt, is said to have formulated the following two further complications.

(vi) the division between male and female in the ratio 2 : 1 must be made at each ascending and the first descending step in the connexion between *P* and claimants; this is called in the *Sirajiyyah* 'having regard to the sex of the roots'.

(vii) in the descending lines, at the first step where the sex of the roots differs, each root will be credited[1]

1, if a female, with as many shares as she has descendants, irrespective of sex, among the claimants;

2, if a male, with twice as many shares as he has descendants, irrespective of sex, among the claimants; and the total share of each ancestor will be divided among that ancestor's descendants in the ratio one male = two females.

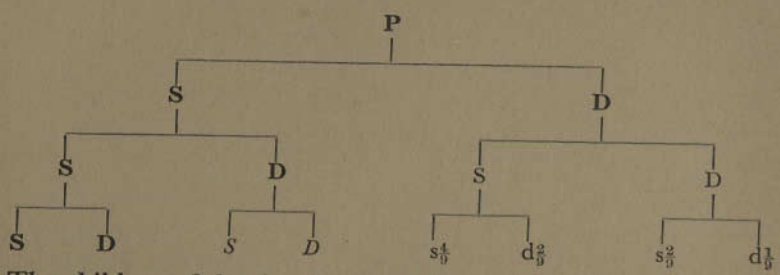
3, in competition between whole and half-blood, Imam Muhammad would first assign to each brother or sister the inheritance he or she would have taken if alive. He would then divide the shares of the uterines equally among their descendants and those of the agnates among their descendants according to his own rules. (His partial adoption of *tanzil* shows the antiquity of that system.)

The two following tables give all the *zavi'l-arham* of the first

[1] This complication is not to be found in Q.P.

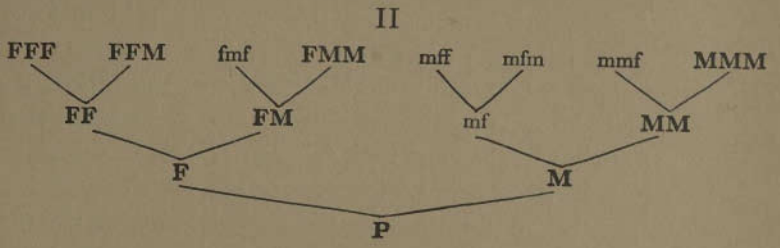
two classes who may be regarded (in view of rules ii, iii, iv above) as within reasonable anticipation:

I




The children of the daughter are first preferred (rule ii above) then those of the son's daughter (rule iii); the daughter's grandchildren rank after these. The fractions are given by way of illustration on the supposition of one of each kind.

II




Thus, there is only one *zu'l rahm* in the second degree of ascent, and only four in the third degree of ascent. Suppose the inheritance falls to these four.

According to Abu Yusuf, the three great-grandfathers will each get two-sevenths, and the great-grandmother one-seventh.

According to Imam Muhammad FMF gets two-thirds (being the only ancestor on the father's side)

$$\left.\begin{array}{ll} \text{MFF gets} & \frac{2}{3}\times\frac{2}{3}\times\frac{1}{3}=\frac{4}{27} \\ \text{MFM} \quad ,, & \frac{1}{3}\times\frac{2}{3}\times\frac{1}{3}=\frac{2}{27} \\ \text{MMF} \quad ,, & 1\times\frac{1}{3}\times\frac{1}{3}=\frac{1}{9} \end{array}\right\}\frac{1}{3}$$

Similar tables for the third class down to great-nephews and for the fourth class down to first cousins twice removed are too complicated to print: but any one who cares to work them out will easily satisfy himself that the complications considered in the books are beyond the bounds of reasonable anticipation.

C. In default of *zawi'l arham* the remaining heirs in all the above systems, except the Hanafi, are the same as in Maliki law, viz.:

(a) the patron of the emancipated slave, whom failing, the patron's residuaries;

(b) the *Bait-ul-Mal*,

But in *Rashid* v. *Adm. Gen*, 3 Z. 31,[1] it has recently been held that the effect of the Abolition of Slavery Decree has been to abolish *inter alia* the patron's right of succession.

In Hanafi law the *Bait-ul-Mal* succeeds not as *ultimus heres*, but by a title more nearly resembling escheat, though presumably subject to encumbrances. This means that the succession of the *Bait-ul-Mal* can be barred in favour of:

(i) the successor by contract;

(ii) the acknowledged kinsman;

(iii) the universal legatee;

and it is possible that custom may recognize these three even in East Africa, though they are unknown to strict Shafii law. The successor by contract, as he existed in Somaliland in 1856, is thus described by Burton, *First Footsteps*, ed. 1856, p. 89: 'Broker, escort, agent, interpreter, . . . bound to arrange the differences and even to fight the battles of his client against his fellow tribesmen . . . master of the life and property of his client.'[2] The author also mentions a similar tie between Bedouin and townsman. The acknowledged kinsman is the oath-brother of many primitive communities. Muhammad himself was bound by such a tie with Abu Bakr, though by his marriage with Ayesha he showed that in his view it had no legal effect.[3] Compare for *ansar* and *muhajirin*, Q. 8, 72 and 75.

Finally, the *Bait-ul-Mal* inherits as representing the brotherhood of all true believers. It is understood that some attempt is made to give effect to this ideal in Northern Nigeria (where *inter alia* the *Bait-ul-Mal* assists homeward poor Nigerian pilgrims in the Hejjaz), and in Kenya under the Wakf Commissioners ordinance above quoted, sections 11 and 13.

[1] *eodem sensu*, *Sayad Mir* v. *Zia-ul-Nissa*, 6 I.A. 137.

[2] Similar arrangements are familiar to students of classical antiquity and of the middle ages: and were the origin of the capitulatory system of the late Turkish Empire.

[3] Bokhari, 67, 11.

The Eastern Ibadis recognize a form of community succession. The estate of a member of any of the following communities dying without other heirs is to belong to that community; Negroes, Indians, Abyssinians, Nubians. But this appears to be merely a recommendation to the *Bait-ul-Mal* or Waqf Commissioners for the application of the estate and its enforceability seems doubtful.

In Tanganyika by Martial law notice 6 November 1918 continued in force by Order in Council 1920, section 31, a District Political officer may order the whole or any part of an estate which falls to the *Bait-ul-Mal* up to a sum of Rs. 500 to be distributed in such portions as he may think fit, among the husband, wife or wives, slaves, and other dependants of the deceased.

The whole law of the extraordinary heirs is elaborated by *qiyas* in which those staunch opponents of *qiyas*, the Hanbalis, are said to have taken a leading hand. The phrase *zavi'l arham* does not occur in the Qoran in a technical sense, the word *arham* there meaning all relationship; and the only tradition extant is of more value to anthropologists than to lawyers. 'The mother's brother', the Prophet is reported to have said, 'is the heir of him who hath no heirs.'

CHAPTER XVII

# THE SHIA LAW OF INHERITANCE

## A. ITHNA ASHARIA

### 1. *History.*

WIDELY though the Shia doctrine of inheritance appears at first sight to differ from the Sunni, it is built up of the same materials (principally those of the Shafii school) and of no others. The Shia lawyers strove to keep as close, not only to the Qoran[1] but also to the traditional interpretations of the *sunna*, as the nature of their own political doctrines regarding the leadership of Islam allowed. Bearing in mind those doctrines and the personal antipathies to which the dispute between Sunni and Shia gave rise, there is not a Shia doctrine on this topic which cannot be explained from the traditional sources or can even be rightly understood on any other basis. In particular the Shia doctrine of representation is merely the *mazhab ahl-i-tanzil* lifted from the position of a postscript to the centre of the scheme.

At the death of the Prophet the following members of his kindred were surviving:

(a) his daughter Fatima, who died not long after;

(b) her husband Ali, the Prophet's first cousin, being the son of his uncle of the full blood, Abu Talib;

(c) their children, Hasan and Husain (both under age);

(d) the Prophet's uncle of the half blood, Abbas, and Abbas's son, Abdullah.

The Shias maintain that the Prophet's authority descended to Ali and after Ali to Hasan and Husain, not merely as children of Ali (in which case their claim would not have been much stronger than that of the house of Abbas), but *as the grandchildren and lineal heirs of the Prophet.*

The claim made on behalf of Hasan and Husain is not easily reconcilable with the claim made for Ali, more especially since it involves an assertion that Fatima was the sole legal heir of her father at his death.[2] But the whole history of

[1] The Shias fairly claim that their law of inheritance is closer to the Qoran than the Sunni.

[2] The channel by which the Prophet's authority descends to Hasan and Husain.

their sect forced the Shia lawyers to maintain both these conflicting claims at once. Ali had been their leader and their ideal long before the theory was articulate. We shall see below how they got over this difficulty.

Finally, since the Shias deny the authority of Abu Bakr, Omar, and Othman, they deny doctrines based on decisions by those Caliphs, as also doctrines which vouch Ali as merely their subordinate or successor, and in general they naturally minimize the authority of their principal opponents. They reject, in theory, the Sunni doctrines of consensus (*ijma'a*) and analogy (*qiyas*) replacing them by the authority of the Imam.

*In detail.*

2. *The spouses.*

The rule, as is Sunni law, is based on express command. It differs from the Sunni law in two respects:

(a) the childless widow's share is calculable only on movables (including buildings and crops), never on land. Although the Sunnis deny that the Prophet left any private inheritance, yet the circumstance that Ayesha and Hafsa were prominent among the opponents of Ali and the universal feeling which connects landowning with sovereignty may have some bearing on this. The title *umm-ul-muminin* given by the Sunnis to Ayesha is offensive to the Shias.

(b) *radd* is never allowed in favour of the widow even where the sole competing heir is the Imam (see below). The original Sunni rule was similar and, as in Sunni law, Mr. Ameer Ali holds that the harshness of this rule is, at any rate in British dominions, not to be enforced.

3. *Other Sharers.*

(a) The rule of return (*radd*) is recognized. To have refused, as the Malikis do, to recognize it would seriously impair the position of Fatima.

(b) Collateral sharers (as indeed all collaterals) are absolutely excluded by any descendants, agnate or cognate, of either sex as by father or mother.

(c) The rule of *'aul* is rejected since the authority vouched for it by the Sunnis is Ali speaking according to one form of the tradition as the lieutenant of Omar. There are only two cases in Shia law in which the shares can add up to more than unity;

in one the loss falls on the daughters, in the other on the agnate sisters.

(d) The 'true' grandparents and the son's daughter, introduced into the table of sharers by Sunni *ijma'a* and *qiyas*, are removed from it, but inherit in a different capacity (see below). In the case of the true grandfather, there was the further ground for removing him that his position was based on a reported decision of Abu Bakr.

(e) The two decisions attributed to the Caliph Omar in the cases of spouse relict, father, and mother (above, p. 126) are rejected; if for no other reason because they are a device of Omar. The mother's one-third in these cases is calculated on the whole inheritance.

(f) 'If he have brethren his mother shall have a sixth', Q. 4, 12. Brethren can never take anything for themselves if the mother is living; but as in Sunni law where the *de cujus* leaves father, mother, and two brothers, the father takes five-sixths and the mother one-sixth (though in absence of the brothers she would have taken one-third). Since the right of *asbat* is not recognized, the Shia lawyers explain this by saying that the mother is excluded from the return (*radd*); and carry it on to the further case where the father shares the return with a single daughter. Although the mother would share the return with the father and daughter by themselves or with either of them alone, she is precluded from doing so by the brothers.

But in view of the doctrine of *tanzil* (see below, p. 150) a mother's right is not affected by the uterine brothers or sisters who are only connected with deceased through herself: and in computing the two or more agnate brothers to bar her, a sister only counts as half a brother.

4. *The heirs by nearness of blood* (*zawi'l qarabat*).

'As for the asabah,' a picturesque *responsum* of Imam Ja'far as Sadiq runs, 'dust in their jaws.'[1] So long as the agnate male kindred, however remote, are to be preferred to women and cognates it would obviously be hopeless to argue either that Fatima was the sole heir of the Prophet or that her children

[1] The use of the word *walad* implying both sons and daughters in Q. 4, 11 and 177 may be cited in support of Ja'far as Sadiq's decision; also that the *asabah* are nowhere mentioned in the Qoran.

could in any way inherit his authority. Sharers, accordingly, take their Qoranic share, and the residue goes to the nearest heir in blood, sharer or non-sharer, male or female, agnate or cognate, without distinction according to the doctrine of *tanzil* and Al Jabari's rule (first to the order, next to the degree, thirdly to the strength of the blood tie), the application of which is now enlarged to include this more comprehensive test of heirs.

5. *The Shia equivalent of Al Jabari's rule.*

(a) There are three orders of heirs made up from the five classes of Shafii law in the manner indicated in the third column on p. 118, and in view of the doctrine of *qarabat*, just given, even a single heir in any class (e.g. Fatima herself) completely bars the whole of the next class. These classes are:

1. All descendants soever together with father and mother.
2. All other ancestors soever together with brothers and sisters and their descendants.
3. Remoter collaterals, the nearer stock of descent excluding the more remote; uncles and aunts or their descendants exclude great-uncles, great-aunts, and their descendants.

(b) *Next to the degree.* Within each class the nearer in degree excludes the more remote. Thus a single daughter will exclude a son's son (male descent having no preference), and after taking her commanded one-half will take the remainder by return (*radd*) and by the rule of *qarabat*.

Nevertheless (so conservative were the Shia lawyers) partial and indirect traces of the Sunni rules remain.

(i) Neither parent can be regarded as nearer than, nor consequently exclude, descendants however remote. This appears to be a relic of the Sunni form of Al Jabari's rule by which the father belonged to an order postponed (except *quoad* sharer) to the descendants.

(ii) Where a single daughter or her offspring is in competition with parents there is no preference on the ground of *qarabat*, since all three are equally near: there will be a residue which in Sunni law the father would take as *asib*, but in Shia law this is divided among the sharers by return (*radd*). For the circumstances under which the mother is barred from sharing in that return see above, p. 147.

*The second order*: grandparents h.h.s., brothers and sisters and their descendants. The Hanafi and Hanbali arrangement of the orders was barred from a Shia point of view by the fact that it rests on a *dictum* of Abu Bakr, whose authority the Shias reject. Further, the Shafii arrangement fitted better with the Shia extension of the doctrine of *tanzil*. Accordingly the second Shia order is based on the third and fourth orders of Shafii law.

Although it is the rule that the nearer in degree excludes the more remote, yet ancestors are only excluded by nearer ancestors, and collaterals only by nearer collaterals. A brother or sister never excludes a great-grandparent, nor a grandparent a nephew or niece.

'*Thirdly to the strength of the blood tie*' (*Second and third orders*).

In all cases of collaterals the strength of the blood tie is a possible ground of preference: and, since agnation is no longer considered, even a single full sister absolutely bars consanguine brothers. In view, however, of the Qoranic command,[1] universally interpreted as giving the uterine kindred a share, they cannot be completely barred in this way, but will be barred, by the full blood *only*, from sharing the return.

As in Sunni law, the strength of the blood tie is only a test where the claimants are of the same degree. Among heirs of the third order, this rule adversely affects the claim of Ali, who would normally be postponed to Abbas (see above, pp. 119 and 145).

There could be no clearer proof of the purely Islamic character of the Shia law than the handling of this difficulty. The Shias adhered as closely as they could to the Sunni doctrines and did not import materials from elsewhere.[2] They enforce the preference of nearness of degree over strength of blood tie in all its strictness; and make the case where a man leaves *one* uncle of the consanguine half blood, no other uncles even maternal, and *one* full uncle's son, a solitary and entirely illogical exception. They strengthen Ali's position, however, by making use of the honorific primacy of the eldest son known in Maliki and Shafii law,[3] and allege that the Prophet in his lifetime instituted Ali his vicar by giving him his signet ring, sword, and

[1] Q. 4, 12.

[2] e. g. from Roman law, Novel 118, which would have suited their book much better.

[3] See above, p. 122.

mantle.[1] The title *Al Wasi* which they use of Ali also implies appointment by the Prophet to administer the state after him.

6. *The doctrine of representation, tanzil.*

As before remarked, this is the keynote of the whole system, and is merely an extension to all classes of heirs of the principle on which Hanbali, Shafii, and Zaidi law deal with the *zawi'l arham* (see above, p. 138).

Subject to the division into orders, and also to the rule that the nearer in degree excludes the more remote, each more distant heir steps into the shoes of the nearer heir through whom he or she is connected with the deceased. Succession is accordingly *per stirpes*. Thus:

*A* leaves a son's daughter and a daughter's son. The son's daughter takes two-thirds in the place of her father, and the daughter's son one-third in the place of his mother.

Members of a single family, e.g. the children of one son or daughter, divide the share of that family in the ratio one male: two females.

But the phrase 'partners in the third' used in the Qoran,[2] and held both by Sunni and Shia to imply equality of interest of the commanded shares of uterine brothers and sisters, is held to apply to all kindred traced only through the mother: in such cases equal division prevails without regard to sex (see p. 139).

The problem with the second order is to distribute among them the shares which the father and mother would have taken, had they survived alone.[3] A single claimant through either parent gets the share of that parent: in competition grandparents *ex parte paterna* rank as full or consanguine brother and sister respectively, those *ex parte materna* as uterine brother and sister, and each, together with the brothers and sisters equal to themselves, step into the place of the father or mother respectively, the paternal kindred taking as the father would have done two-thirds and the maternal one-third. Among the pater-

[1] Cf. 2 Kings ii. 9 and 13–14. Elisha asks for the double portion, the right of a first-born son, in the spiritual inheritance of Elijah and receives his mantle as a symbol of inherited authority. But to have insisted on primogeniture as such would have been fatal to the Shia case, since it would have excluded Husain.

[2] Q. 4, 12.

[3] But not so as to override the Qoran itself. One uterine brother or sister gets $\frac{1}{6}$ only; for *radd* see above, p. 149.

nal kindred sisters take their Qoranic shares unless reduced by the competition of a brother equal in blood to themselves or a paternal grandfather. The paternal grandparents do not exclude the consanguine half blood.

7. *Heirs not by kindred or marriage.*

Shia law recognizes a right of inheritance by contract of patronage (see above, p. 143). But as during the formative period the *Bait-ul-Mal*, or public treasury, was always in the hands of the Sunnis, its claims are not considered. In Shia theory the *ultimus heres* is the *de jure* head of the commonwealth, the Imam. But his representative, the *mujtahid*, will dispose of the property for the benefit of the Shia poor. In India, and elsewhere, unless there is any permanent organization for Shia charities the rights of the Imam vest in the Crown and are not regarded as subject to any specific trust: see *Mst. Khursaidi* v. *Secretary of State*, 5 P. 539.

### B. THE ISMAILIA KHOJA LAW OF SUCCESSION

The general rule is that Ismailia Khojas,[1] but not Ithna Asharia Khojas,[2] are governed by the Hindu law of succession as understood in the province of Gujarat (the northern division of the Bombay Presidency).

This applies to the law of inheritance *ab intestato* and the law of wills,[3] but it does not give a Khoja the Hindu power to provide for his succession by way of adoption,[4] nor apply to any other branch of the law. In the case of *Rashid* v. *Sherbanoo* [5] the rule was summed up in the epigram that although a Khoja lives and marries as a Muhammadan yet 'So far as inheritance is concerned he dies a Hindu'. Epigrams are dangerous in law, and this one has led to curious consequences. It is incorrect to speak of one who is buried according to Muhammadan rites, not burned according to Hindu rites, and who cannot adopt, as 'dying a Hindu'.

The Hindu law of succession in Gujarat consists of two parts: the first, succession to joint family or ancestral property by unobstructed inheritance, that is by a right acquired in its

[1] *In re Kassam Premji*, 5 T. of 1928. *Fatimabai* v. *Md. Ladha*, 6 T. of 1928, distinguishing [2].

[2] *Shumbana* v. *Adm. Gen*, 3 Z. 51; cf. *Nasur* v. *Hirbayu*, 1 Z. 14.

[3] *Fazal Haji* v. *Fatimabai*, 1 Z. 598.

[4] *In re Kassam Premji*, 5 T. 1928.

[5] 1 Z. 163 = 29 B. 85.

fullness on the birth of the son, not merely on the death of the father; the second, succession by obstructed inheritance, that is by a right which does not inhere in the heir till the death of the person to whom he succeeds.

Historically these two parts are only parts of a single whole, the law of *daya* or inheritance. But the decisions of our courts have not been consistent on the question whether the Khojas after their conversion to Islam have retained the whole system or treat all inheritances alike as obstructed. Thus in *Rashid* v. *Sherbanoo* (1904), 1 Z. 163, the widow was excluded from inheritance in favour of a joint brother, an express recognition of the joint family, apart from which a widow would always be preferred to a brother; and in the latest case, *Jafferali Bhaloo* v. *Standard Bank of South Africa*, 3 Z. 64 P.C., the intention of the Khoja donor and testator was clearly to set up as nearly as he could a joint family among his sons and to confine the widow to maintenance from the joint funds, an intention in which he was successful. (The case of course is not directly in point, since a joint family cannot be created by deed, will, or other disposition: it comes into existence by nature or not at all. But it shows a sentiment in favour of that institution.)

On the other hand in *Fazal Isa* v. *Md. Lakha* (1891), 1 Z. 37, it was held that there was no joint family among Khojas, the court (Cracknall J.) observing that the experience of all in Zanzibar was against it, and the records of the consular court contained no suit where an allegation of joint property had been made. This might be regarded as overruled by *Rashid* v. *Sherbanoo*; but that decision of the Bombay High Court, though given by two judges, is put in doubt by the subsequent decision of a single judge in *Jan Mahomed* v. *Datu Jaffer* (1914), 38 B. 449, to the effect that the Khojas had 'adopted' the Hindu law of succession and inheritance only 'as applied to separate and self acquired property', and further that 'as no Khoja son can enforce a partition it follows that he cannot be a co-sharer'. This overlooks the fact that the Khojas are the descendants of Hindu converts to Islam, who did not adopt but retained a part of their Hindu law. It has, however, been followed in Sind by a bench of two judges in *Mahomed Kassim* v. *Natho Bhano* (1928), 107 I.C. 211, the latest ruling on the subject. The balance of

authority seems to be with the latest ruling, namely that the Hindu joint family does not exist among Khojas as a matter of law, though something very like it existed even in *Jan Mahomed's* case as a matter of practice.

The point decided in the earliest case [1] was, as has often been pointed out, merely the existence of a custom debarring females from inheritance in certain circumstances in which they would receive it in Muhammadan law. Some of the subsequent decisions go a great deal further than that case warrants, but it is too late now to hold that they were wrong: see *per* Doorly J. in *Shumbana's* case, 3 Z. 51.

The following is the order of inheritance to separate property among Khojas, each of the heirs numbered excluding the succeeding classes. But the mother and the widow and grandmother only take a limited estate with a restricted power of alienation, and on their death the succession of the original *propositus* reopens.

1. Sons, agnate grandsons, and agnate great grandsons only, succeeding *per stirpes* with a right of representation.
2. Mother (by a caste custom common in Gujarat).[2]
3. Widow.
4. Daughter.
5. Daughter's son.
6. Father.
7. Brother (full blood preferred).
8. Brother's son.
9. (perhaps) Brother's son's son.[3]
10. Father's mother.
11. Sister (by strength of blood tie).

*Wills.* It is certain that at the time of the conversion of the Khojas to Islam, and for long after, Hindu law did not recognize wills; and if wills were made they must have been made according to Muhammadan law. Nevertheless, it is held that a Khoja possesses the unrestricted power to make a will which

[1] *Hirbae* v. *Sonbae*, 1847 Perry 110. See also criticisms in *Jan Mahomed* cited above; but see also *A.G.* v. *Muhammad Husen* (the Aga Khan case), 1 Z. 630; 12 B.H.C. 323, in which the Hindu element in the Khojas is well brought out.

[2] In the goods of *Rahimbhai*, 12 B.H.C. 294.

[3] Cf. *Buddha* v. *Laltu*, 42 I.A. 208.

Hindu law of to-day recognizes as regards separate property; [1] that power being used by different testators either to imitate the Hindu joint family [1] or to import the Muhammadan law of inheritance.[2] The will of a deceased Khoja is to be construed according to Hindu law.[3] It has been held in Bombay that such a will is not subject to the Hindu Wills Act,[4] as a Khoja is not a Hindu within the meaning of that act (and further the act is not in force in Gujarat): but in Zanzibar,[5] Probate or Letters of Administration have been held essential in reference to the estate of a deceased Khoja, *Fazal Isa* v. *Md. Lakha*, 1 Z. 37 (on grounds, however, unconnected with the Hindu Wills Act). In *Abdulla Karim* v. *Saleh Hasan* it was held that that act applies to all Hindus in Zanzibar 'and therefore to Khojas', and the same view has also been taken (*obiter* without dispute) in *re Kassam Premji*, 5 T. 1928, and *re Sunderji Karim*, 2 U. 342. But can a Khoja, alive or dead, fairly be called a Hindu?

### C. SHIA BOHRAS

The Ismaili law of inheritance has never been studied by Europeans. The Ismailis assert[6] that Muhammad, the grandson of Imam Ja'far as Sadiq, succeeded his grandfather as Imam in spite of the competition of his uncle, Ja'fars younger son. From this it might perhaps be inferred that they carry the doctrine of representation to the extent of overriding the rule that the nearer in degree excludes the more remote. But the particular point might easily be confused with the common inheritance of sons, grandsons, and great-grandsons, in Hindu law: and no case determining the Ismailia Bohra law of inheritance appears to have arisen. Mr. Justice Tyabji, himself an Ismaili Bohra, implies throughout his book on Muhammadan law that their law is the ordinary Shia law.

[1] *Jafferali* v. *Standard Bank of S. Africa*, 3 Z. 64 P.C.

[2] *Nasur* v. *Hirbayu*, 1 Z. 14.

[3] *Fazal Huji* v. *Fatmabai*, 1 Z. 598, partly following and partly overruling *Abdulla* v. *Saleh Hasan*, 1 Z. 149: *Hirbäi* v. *Gorbai*, above cited.

[4] *Abdul Karim* v. *Karmali*, 22 Bom.L.R. 224. See now Indian Succession Act 1925.

[5] *Fazal Isa* v. *Md. Lakha*, 1 Z. 37; *Abdulla Karim* v. *Saleh Hasan*, 1 Z. 149.

[6] See p. 20.

CHAPTER XVIII

# INHERITANCE: MISCELLANEA

A. The estate is to be distributed according to the law of the *de cujus* at the date of his death; *Skinner* v. *Skinner*, 25 I.A. 34; 25 C. 537; Kenya Laws, cap. 171, sec. 4, Tanganyika, Deceased Natives Estates Ordinance 21 of 1922.

In Tanganyika (ibid., sec. 4) the law of an Arab or Somali is conclusively held to be Muhammadan, that of a Swahili is presumed to be Muhammadan but may be shown by evidence to have been tribal law.

The law of the claimants to an estate is irrelevant: thus *A* an Ismaili Khoja dies leaving heirs who have become Ithna Asharia, or *B* a Shia dies leaving heirs who have become Sunni. The law to be applied is the Ismailia Khoja law in the first case and the Shia law in the second.

This applies even where the difference of law is due to the conversion of the *de cujus* to a different religion; and it applies to all property whatever whether ancestral or self acquired and whether acquired before or after conversion. Thus *C* by birth a Hindu becomes a Muhammadan and dies. Those who would have been his heirs according to Hindu law are absolutely barred from inheritance by the difference of religion, *Chedambaram* v. *Ma Nyin Mc*, 6 R. 243. In *Mitar Singh Sen* v. *Maqbul Hasan*, 3 Luck. 154 (recently upheld by the Privy Council), a family was divided into two branches one of which had been converted to Islam. It was alleged that by a custom binding the family before the conversion, females were excluded from inheritance. But it was held that the Hindu branch not being possible heirs to a Muhammadan were not in a position to urge this plea.

In pure Muhammadan law an apostate can neither inherit nor be inherited from; his whole property going to the *Bait-ul-Mal*. Abu Hanifa (followed in Egypt; Q.P. 587) allowed inheritance according to Islam to his property acquired before apostasy. The Two Disciples and the other schools disallow even this. (But conversion from one branch of Islam to another, even

between Sunni and Shia, is not apostasy.) In territories under British control this rule is superseded by that given at the head of this section. Further, in India (Freedom of Religion Act XXI of 1850) and in Tanganyika (loc. cit.) a convert [1] may still claim to inherit from his kindred who remained true to his old religion, even though by his conversion he has barred their chance of inheriting from him.

The relation of husband and wife, however, is in some cases dissolved by change of religion; see above, pp. 84–6. And a Hindu who ceases to be a Hindu ceases *ipso facto* to be a member of a Hindu joint family and may by so doing prejudice his rights of inheritance.

### B. EXCLUSION

In addition to exclusion by nearer relatives, the following are excluded from inheritance:

(a) A slave, even a slave wife.

(b) An infidel cannot succeed to the estate of a Moslem (nor *vice versa* according to the prevailing opinion in all schools, though some Hanafis have denied this). Thus *A*, a Muhammadan, has a son who becomes Christian, makes a large fortune, and dies childless. The father, according to Muhammadan law, cannot inherit, because of the difference of religion. The rule applies in all its strictness even in the case of a Christian or Jewish wife succeeding to her Muhammadan husband.[2] But conversion to Islam even after the death of the husband will suffice to remove the bar, provided it occurs before actual distribution of the estate; see below as to vesting of inheritance (section K, p. 159). This is the doctrine of all schools, including Ibadis.

C. No person who has caused the death of another, in such circumstances as to render himself liable to a penalty by Muhammadan law, can inherit to that other. So say all schools. This

[1] But not children of a convert born in his new religion; *Bhagwant* v. *Kallu*, 11 All. 100, frequently criticized, is overruled by the Privy Council in *Mitar Singh* above cited.

[2] The converse case would be similarly dealt with in Muhammadan law for the same reason, but in Christian or Jewish law for a different reason, namely, that the marriage being polygamous would not be recognized as conferring rights by those laws: see however *Nachimson* v. *Nachimson*, 1930 P. 277 C.A., and article by present writer, L.Q.R. 1931.

includes not only murder and manslaughter in English law (I.P.C. secs. 302, 304, 304a), but also serious wounds not intended to cause death. But it excludes lawful self-defence.

### D. ACCIDENTAL HOMICIDE

The inheritance is barred according to the Hanafis and Ibadis,[1] and the prevailing opinion amongst the Shafiis (so the *Minhaj*, p. 253, and the *Fath ul Qarib*, Bk. 7, sec. 1, p. 425).

The inheritance is not barred according to the Malikis.

But (submitted), it is improbable that British courts would enforce a bar of inheritance in such a case.

E. In all the above cases 'A BAR TO INHERITANCE IS ALSO A BAR TO EXCLUSION', e.g. *X* is murdered by his son *Y*. *Y* cannot inherit *X*'s estate, but *Y*'s son *Z* can do so. Again, *A* leaves a son *B* who has become Christian, and *B*'s son *C*, who has been reconverted to Islam before the distribution of the estate. *B* is barred from inheriting, but is equally barred from excluding *C*. *D* leaves a father, two brothers, a mother; of whom one brother murdered him. The mother will take *one-third* of the estate both in Sunni and Shia law. This rule exemplifies the fact that there is no representation in the English or Roman sense in Muhammadan law. It is as true of Shia as of Sunni law. Rules similar to (C) and (E) exist in Hindu law, so there need be no hesitation in applying them to Khojas. (See above, p. 151.)

F. *Commorientes*. When two or more persons perish in a common calamity, or when the priority of death between them cannot be ascertained, the estate of each is distributed ignoring the other. There is no succession between them.

This is the rule in the Maliki, Shafii, Hanafi, and eastern Ibadi schools.[2] To take a simple case:

Husband and wife perish together. The wife's estate will be inherited by her blood relations and the husband's by his blood relations.

Again, there are three brothers, *A*, *B*, and *C*, of whom *A* has a son *D*. *A* and *B* perish together. *B*'s estate will be inherited by *C* because a brother excludes a brother's son, and *A*'s estate will be inherited by *D*, because a son excludes a brother.

[1] Imbert, quoting the *Nil*, p. 64. [2] *Minhaj*, p. 253; Sachau, *Ibad.*, p. 203.

In Hanbali and western Ibadi law,[1] in distributing each estate we assume the survival of the other persons. Thus in the example just cited of husband and wife, the wife's relatives will take her share in the husband's estate, and the husband's relatives will take his share in the wife's estate. In the example of the three brothers, *D* will get one-half of *B*'s estate, and *C* will get one-half of *A*'s.

G. *Nasciturus pro jam nato habetur.* A child conceived but not yet born at the time when the inheritance falls due, i.e. at the death of the *propositus*, is entitled on being born alive to inherit as if he had already been born at that death.

This rule is probably universal in all systems of law, but in Muhammadan law leads to greater complications than in other systems owing to the rival claims of residuaries and sharers, and the possibility of *'aul*. The rights of the unborn child may be safeguarded by setting aside the maximum possible share which that child, if male, might inherit. But this is not satisfactory, as there is always the possibility of twins, or even, according to some authors, of four at a birth. Consequently, the most practical rule and the one which it is believed is generally followed, is the Maliki rule not to make any distribution until after the birth.

H. *The mafkud-ul-khabar.* That is, the absent person of whom it is not known for certain whether he is alive or dead. His estate is placed in the custody of a receiver appointed by the Qadi, until either his death is proved, or a sufficient time has elapsed to establish a legal presumption. The supersession of Muhammadan Evidence Law has rendered unreasonable presumptions obsolete.

During the custody of the receiver, the *mafkud-ul-khabar* neither inherits [2] nor bars inheritance of others.

I. A hermaphrodite inherits according to prevailing sex. If in doubt, half according to each sex.

J. An heir may take by two or even three titles, provided they are not inconsistent, e.g. as husband and patron of a freed slave, or as husband and also paternal uncle's son. It is possible that one who has himself risen from slavery may emancipate and

[1] Imbert, p. 62, and Sharani, pp. 563–4. I have chosen very simple instances. The authorities give instances of great complexity.

[2] *Francoudi* v. *Heirs of Michaelides*, 3 Cyp. 221.

then marry his own kindred, in which case the three titles would coexist. But where the two titles are inconsistent the higher only will be taken.[1] Thus *A* has in ignorance married a woman within the prohibited degrees, and had a child. That child may inherit to him as his child in spite of the fact that the marriage is *batil*. But it could not claim to inherit both as his child and by the other relationship which has been ignored in the marriage.

K. *Vesting of inheritance*. The inheritance of a Moslem vests at his death by a specific title in each individual heir, although it may not be possible to determine exactly what property shall fall to each heir for many months, e.g. until the prior charges have all been paid, and see above, pp. 156 and 158.

Coheirs in Muhammadan law are tenants in common; not, except where there is a custom to the contrary, joint tenants. An heir will be presumed to hold on behalf of himself and his coheirs unless and until he makes clear his intention to hold adversely: *Rustam* v. *Janki*, 51 A. 101; *Ahmad* v. *Shamas*, 10 Lah. 842; *Muhammad* v. *Fateh*, 10 Lah. 849. But in *Zainab* v. *Ghulam Rasul*, 4 Lah. 402, the male heirs had effected distribution of the property, excluding the females. The latter took no steps to set aside this partition for over twelve years, and when they did so were non-suited on the plea of limitation of time. The Palestine Supreme Court in *Nadim Abdul Rahman* v. *Abdallah Seilan*, *Palestine Gazette*, L.R. Supp., 16 July 1926, has held that a coheir cannot set up a title by adverse possession as against other coheirs. If this is correctly reported and intended as a statement of general Muhammadan law as opposed to the customary law of Palestine, it appears to go too far.

But a law which distributes inheritance in numerous and often complicated fractions is always difficult to administer, and particularly unsuitable to agricultural wealth. Thus, where the heirs are on good terms with one another, they often find it convenient not to divide the estate, but to continue to enjoy it in common. Such an agreement, whether established by direct evidence or inferred from the history and circumstances of the estate, will of course bar the power of any one heir to obtain a title by adverse possession against his coheirs, unless

[1] *Minhaj*, 28, 9, 255; Perron's *Khalil*, vol. 6, p. 360; Baillie, *Imameea*, p. 311 at foot. Cf. also Sachau, *Ibad.*, Abschnitt 3, sec. 7, and see above, p. 48.

he proves that he definitely repudiated the agreement, that the others knew of his repudiation, and that he successfully remained in possession of the property on his own behalf for the statutory period after they knew of that repudiation.

Common enjoyment may and usually does go on for many years. But when the eventual division comes we shall have to calculate what would have happened at each death.

In a case quoted in Mitchell's *Mirathi* which actually came before the Qadi and the District Court in Tanga (Tanganyika), an estate consisting mainly of palm trees and valued at under two thousand shillings had to be divided into parts of which the denominator was 2016. Even more complicated cases are to be found in Turkish official records, including some in which the denominator runs to seven figures. It need hardly be said that it is beyond human ingenuity to effect such perfect subdivision, and in practice the estate has to be divided in fractions corresponding as nearly as may be, but still roughly, to those ideally arrived at.

Of course if, as will usually happen, subsequent deaths involve the devolution of other property besides that inherited from the original *propositus*, there is no help for it but to make entirely separate distributions of the succeeding inheritances in order; and this may be the simplest course in any case.

CHAPTER XIX

# ADMINISTRATION OF ESTATES

## A. UNIVERSAL SUCCESSION?

As already mentioned,[1] inheritance in accordance with the rigorous individualism of the law[2] vests in each several heir by a separate title at the moment of death of the *de cujus*, even though it may not be possible to distribute the assets for some months or even in special cases[3] to say what fractions individual heirs are to receive. No one heir is an agent for any other, either to give a valid acquittance,[4] or to dispose of any portion of the estate, and the mere fact of his having possession of the whole estate does not constitute him such an agent or enable him to bind the interests of his coheirs.[5]

It is the duty of the Qadi[6] to see that the prior charges[7] are paid, and for this purpose, as below explained, he may appoint a *wasi* even where none has been appointed by the deceased. But such a procedure is not compulsory. All schools agree that each heir individually can sue a debtor for his fraction of a sum due to the deceased; and that each heir is individually liable to the extent of his share of the inheritance and no further for his proportionate fraction of a debt due from the deceased.

Such a rule is obviously unworkable: and some non-Moslem jurists have accordingly been inclined to postulate the idea of universal succession. For this there is little justification; though, as Abdur Rahim J. has pointed out,[5] the deceased may be looked upon as an interdicted person still the owner of that part of his property necessary to meet the prior charges (we may compare the *pars defuncti* of many medieval European customs). The most workmanlike solution which has been offered by *Sharia* lawyers is as follows:[8]

1. Where a claim is made against the estate for a definite object, no matter what the title by which that object is claimed,

[1] Ch. xviii K.
[2] See pp. 1 and 8.
[3] See pp. 156 and 158.
[4] *Ramautar* v. *Ghulam Dastgir*, 51 A. 589.
[5] *Abdul Majeeth* v. *Krishnamachariar*, 40 M. 243 F.B.
[6] See ch. xix B below.
[7] Ch. xix C below.
[8] Tabulated from *Mejelle*, 1642.

the suit must be against the heir in possession of that object. No other heir is concerned or is even a possible defendant. [The system does not recognize anything resembling the English rules about joinder of parties or causes of action.]

2. In all other cases any heir may sue or be sued on a claim on behalf of or against the estate.

3. If the suit is decided on the admission (*iqrar*) of the litigant heir, this will not bind the other heirs.

4. But if the suit is decided after contest on evidence, the eventual decree will be for the whole debt or dismissing the whole claim.

5. The litigant heir will only recover or be liable for a fraction of the decree corresponding to his fraction of the inheritance.

6. The other heirs will be able to take advantage of and be bound by the decree: and the points already decided will be *res judicata* for or against them.

7. But each of the heirs not a party to the suit can still raise any exception open to him which could not have been pleaded by the first litigant heir. Such an exception he must prove.

The effect of this is that the litigant heir sues or is sued in a representative capacity (*Sadyk* v. *Tanni*, 6 Cyp. 31): but the representation is, according to English standards, incomplete. The section was also considered in *Eleni Papadopoulos* v. *Law Union Rock*, 10 Cyp. 65, a claim by one of the heirs against an insurance company for money due on an insurance policy on the life of the deceased. The court, after citing section 1642 of the Mejelle, remarked that such suits by a single heir are an everyday occurrence in the Courts of Cyprus. After proof, judgement would be given for all the heirs, but the heir suing would recover only the amount due to him.

The case of *Bazayat Hossein* v. *Doolichand*, 5 I.A. 211, establishes the two following points:

(a) that a *bona fide* purchaser for value without notice of debts from a Muhammadan heir will not be liable for those debts.

(b) that an heir has the right to convey his own share of the inheritance and is able to pass a good title to the alienee, notwithstanding any debts which might be due from the deceased.

The position of an heir in this respect is superior to that of a creditor in possession, such as a wife exercising a lien for her

unpaid dower. The heir has a title, the creditor merely a lien: but mere possession by the heir is insufficient. He cannot alienate even to a *bona fide* purchaser that to which he has no title.

In India the effect of section 214 Indian Succession Act 1925 (formerly section 4 Succession Certificate Act 1889) is to protect debtors to the estate against a multiplicity of suits. But the practical inconvenience remains in such cases as *Ram Autar* v. *Ghulam Dastgir*,[1] in which it was held that on the death of a mortgagee each of his heirs has a distinct and definite interest in the mortgaged property and payment to one of the heirs without concurrence of the rest cannot operate as a valid discharge of the mortgage debt. The same principle presumably applied to voluntary payment of any debt: yet how is a debtor in a complicated succession to ascertain who are the heirs of a deceased Muhammadan or what are their respective fractions?

A debtor can always wait to be sued: but a creditor of the estate is in an even worse position, for he has the responsibility of finding out who the possibly numerous fractional heirs are and suing them all individually or jointly. It is submitted that he could apply to the Qadi to appoint a *wasi*; or, under the various enactments dealing with administration,[2] to the court to appoint an administrator. But such an application would have to be made immediately, and there are many cases in which it is no longer possible. Nor is the court's duty, so far as possible to see that all necessary parties are on the record, a sufficient safeguard.

The question, therefore, has been much debated in India whether an heir in possession of the whole or part of the estate can be said to represent his coheirs so as to bind their interests in a decree obtained against him, when the property possessed by him in excess of his own share is brought to sale in execution. The Calcutta High Court[3] has held that he can, substantially agreeing with the rule of the *Mejelle*. The Allahabad High Court per Mahmood J.,[4] partly on a different reading of the authorities and partly on the ground that the

[1] 51 A. 589.

[2] Sec. 234 Indian Succession Act 1925; formerly sec. 198 Indian Succession Act 1865 and sec. 21 Probate and Administration Act.

[3] *Assamathem* v. *Roy Lutchmiput*, 4 C. 142 F.B.

[4] *Jafri Begum* v. *Amir Muhammad*, 7 All. 822 F.B.

Muhammadan law of procedure is no longer in force in India, has held that he cannot: though, it was added, the other heirs might be debarred in equity from reopening the matter except on conditions. Bombay [1] and (*obiter*) Madras,[2] after following the Calcutta view have now accepted that of Allahabad. The result is to retain the inconveniences of Muhammadan law without the rules of procedure by which those inconveniences were mitigated.

### B. APPOINTMENT OF *WASI*

A *wasi* to wind up the estate (see also ch. xiii, p. 108, for his duties as a guardian of property, and ch. xx Legacies), may be appointed either by testamentary declaration or by the Qadi [3] with the agreement of the heirs representing the larger part of the estate; or, it is submitted, the appointment might be made even without consent where the interests of creditors or debtors demanded it. At the present day, as his duties are not of a religious nature, any person of full age and business capacity may be appointed *wasi*; and it is common to appoint a public official, e.g. the Administrator-General.[4]

A *wasi*, however appointed, is entitled to remuneration, though it is laudable to work without remuneration where he can afford to do so. If no remuneration has been fixed he may get it fixed by the Qadi.

(*Submitted*) Such remuneration will be an unsecured debt on the estate, but the *wasi* will have a possessory lien for it similar to that held in Muhammadan law by other creditors of the deceased over property lawfully in their possession (e.g. by a wife for her dower-debt, ch. vii, p. 69).

The duty of the *wasi* being to wind up the estate, he must be held to have all necessary powers for that end.[5] He is a necessary party to all suits for or against it. But he cannot, as *wasi*, bind the estate by a formal acknowledgement (*iqrar*): though he may bind his own share if he is an heir. It would appear therefore that he cannot compromise litigation or admit a

[1] *Bhagirthibai* v. *Roshanbi*, 43 B. 412; *Shahsaheb* v. *Sadashiv*, 43 B. 575; *Lala Milja* v. *Manubibi*, 47 B. 712.

[2] *Abdul Majeeth*, 40 M. 243.

[3] *Minhaj*, Bk. 65, ch. 3.

[4] *Adm. Gen.* v. *Abdul Husain*, 4 E.A. 26; *Abdulla* v. *Abdulla*, 3 E.A. 76.

[5] *Minhaj*, Bk. 28, sec. 1, *ad init.*, and sec. 7.

doubtful claim so as to bind the other heirs. He cannot in any way delegate his authority, unless expressly authorized in his appointment or in case of necessity: therefore he cannot appoint a successor in the event of his own death unless expressly authorized.

These restricted powers he can now, in countries where the Indian Probate and Administration Act[1] is in force, at his option enlarge by obtaining probate or letters of administration and therewith the powers of an English executor or administrator: but Muhammadan law will still apply, save for such enlargement, even to an English official administering a Muhammadan estate.[2]

### C. THE ORDER OF WINDING UP AN ESTATE

In pure Muhammadan law of all schools without distinction,[3] the following expenses *ought to* (*not must*) be met in the following order before distribution of the estate to the heirs: the *mirath* or dividend being the estate after deduction of these charges. The second column shows the variations introduced into the order by sections 320–2 Indian Succession Act 1925 (formerly sections 101–3 Probate and Administration Act 1881) in cases to which that Act applies.

1. *Special Privileged Claims.* This includes debts charged upon specific property by mortgage or otherwise, and the return of property held in *amanat*; in the Maliki law of insolvency goods bought but not paid for are regarded as *amanat*. The *zakat*, an early form of income-tax and succession duty, which still exists in Northern Nigeria, comes under this head. But there is

[1] Now secs. 211–69 Indian Succession Act 1925: in Zanzibar the Probate and Administration Decree and in other East African territories the original act locally applied.

[2] *Adm. Gen.* v. *Abdul Husain*, 4 E.A. 26; *Abdulla* v. *Abdulla*, 3 E.A. 76.

[3] *Maliki*, Ruxton, pp. 373–4; *Hanafi*, Q.P., sec. 582; Shafii, *Minhaj*, Bk. 28, sec. 1; *Ibadi*, cf. Imbert, p. 65.

no authority for giving other claims of the state a privileged position.

2. *Moderate and reasonable funeral expenses* according to the degree and quality of the deceased.

2. Including the medical and other expenses of his last illness, and board and lodging for a month before death. Expenses of probate or letters of administration are inserted here.

3. Unsecured debts (for 1 and 3 see below, p. 176, as to acknowledgements). The dower is such a debt except where it has been charged on specific property.

3. Wages due for services rendered to deceased during his last three months of life by any labourer, artisan, or domestic servant, have precedence among such debts.

4. Legacies up to, but not exceeding, one-third of the estate.

Ostentatious or extravagant funerals are contrary to the spirit of Islam: but funeral expenses are largely regulated by custom. Even the whole estate may be spent in hiring a substitute to perform posthumously a pilgrimage, omitted by the deceased during life. But this is exceptional in the Shafii law, which teaches that religious duties omitted in this life can only be paid for by purgatorial punishment (*'azabu'l qabr*). Hanafi law, however, encourages legacies for the purpose of compensating for omitted religious duties;[1] and widespread custom in many Shafii countries goes beyond the Hanafi rule encouraging the heirs to spend the estate in this way, even when there are no legacies.[2] *Submitted*, such custom cannot bind an unwilling heir.

[1] See per Abdur Rahim J. in *Abdul Majeeth*, 40 M. 243 at 254.

[2] *Minhaj*, 8, 1, 108; *Mirathi*, p. 74; *Achehnese*, ii, p. 308; contrast ibid. i. 344 and 435–6.

CHAPTER XX

# LEGACIES

## A. HISTORY

It appears that the Arabs in the time of the Prophet had an unlimited power of disposing of their property by will. The first restriction on this is to be found in Q. 2, 176: 'It is prescribed for you that when one of you is face to face with death, if he leave any goods he should make an equitable legacy in favour of his father and mother and his kinsmen.' So far as it concerns legacies in favour of heirs this text is held to have been abrogated by subsequent texts dealing with inheritance. The restriction of legacies to one-third rests upon a tradition [1] that the Prophet forbade Sa'ad b. Abu Waqqas from bequeathing more than one-third of his estate ('and that', said the Prophet, 'is ample'), although Sa'ad had no heirs save a daughter. This tradition is universally accepted. The Prophet himself, according at least to the Sunnis, left no will, desiring that all his property should be dealt with according to the Book of God.[2] The meaning of this wish and the wording of it are points at issue between Sunnis and Shias.

In spite of the abrogation of Q. 2, 176, and the tradition of Sa'ad b. Abu Waqqas above quoted, and the paramount duty of a man to his heirs, Bokhari (**55**, 1) quotes several texts to show that the execution of a testament is a religious duty, binding on every man who has property to dispose of in excess of what is necessary for his heirs. This is a universal doctrine among the learned. Among the commonalty of Islam it would hardly be too much to say that there is a strong feeling against the execution of wills, which can only be justified in public opinion by exceptional conditions. Burton in his *First Footsteps* (1st ed., p. 123) goes so far as to say that in Somaliland, 'as elsewhere in Al Islam, a man cannot make a will'.

## B. GENERAL CONCEPTION

Strictly speaking, a Muhammadan cannot make a will; but he can give certain directions regarding his estate and his children

[1] Bokhari, **55**, 2 and 3.

[2] Bokhari, **55**, 1, 3.

after his death. And as those directions commonly are, though they need not be, embodied in a single document, *kitab ul wasiyat*, *wasiyatnama*, we customarily speak of that document as a 'will' and of the person, if any, appointed by it as an 'executor', and of the person giving the directions as a 'testator' (*mausi*). These words are convenient, but it is unsafe to import the connotations which they carry in English.

The directions which may be given are:

(a) That a named person (*wasi*, literally administrator) [1] shall wind up the estate and distribute the assets, see ch. xix, p. 164.

(b) And/or that the *wasi* shall manage the property of the testator's infant children or grandchildren; see ch. xiii, pp. 106–7. In Maliki law this may include the property of children who have attained puberty but have not been emancipated; or the father may emancipate them by will. Similarly, in Maliki law the father may dispose of the marriage guardianship with the right of *jabr* (see under Marriage Guardianship, ch. vi, p. 57). A *wasi's* powers are strictly limited by the terms of his appointment, but a *wasi* appointed by the father will be presumed to be appointed guardian of the property of the infant children, unless the contrary appear in the appointment.

(c) That legacies not exceeding one-third of the value of the estate after deduction of the prior charges 1, 2, 3 (above, pp. 165–6) be paid out of the estate. Payment of legacies may be enjoined on the heirs without appointment of a *wasi*; just as a *wasi* may be appointed merely to wind up the estate although there are no legacies.

If the legacies exceed one-third of the net estate, they must be abated *pro rata*. There is no priority between legatees. A legatee of a specific object would have to bear his share of the abatement (e.g. *A* leaves *X* his diamond ring value £100 and *Y* £300—but *A*'s whole estate is only £900. Then *X* must either pay up £25 or see the ring sold and pocket the proceeds less £25: and he cannot even have the ring until the valuation of the estate and of the legacies has been made).[2] A legacy or legacies exceeding one-third of the estate may be validated by

[1] This is Steingass's interpretation. *Mekkawi* and the author of the *Mirathi* give a slightly different meaning.

[2] *Minhaj*, Bk. 29, sec. 2 *ad fin.*

consent of the heirs. But such consent can only be given after the death of the testator:[1] *nemo est haeres viventis*. In Hanafi law this validates the legacy as a legacy: but in Maliki law the excess is only a gift from the heirs, i.e. delivery of possession is necessary to complete title. In Shafii law the point is doubtful.

The substantive provision of Muhammadan law by which a testator cannot bequeath more than one-third of his property is not abrogated by the circumstance of a testator subject to that law being also subject to the provisions of a British enactment regarding wills, such as Lord Kingsdown's Act: *Bartlett* v. *Bartlett*, 1925, A.C. 377.

### C. PARTICULAR RULES

(a) *Who may bequeath?*

Anybody whether Moslem or not who is adult and sane: even, it is said, a minor if of discretion (though a minor cannot make an *iqrar*, see below). According to the Shafiis even a feeble-minded person may make a *wasiyat*, though of course a lunatic or a madman cannot.

(b) *To whom?*

(i) Any living free individual[2] whether Moslem or not and whether resident in a Muhammadan country or not, including all the persons excluded from inheritance except those noted below.

(ii) A child in the womb—*nasciturus pro jam nato*.

(iii) A class of persons, e.g. 'near relatives', 'neighbours', 'the poor', 'students', 'the doctors of the law'. There are rules for determining each of many such classes, and for distributing legacies among them.

(iv) A *waqf*, whether established by the *wasiyat* or already existing.

But the following cannot be legatees:

(i) An heir, i.e. a person who at the death of the testator is entitled to inherit, e.g. *A* dies, leaving a son, a father, and a father's father. The grandfather being excluded from inheri-

[1] Except in Shia law.

[2] When infants are legatees the court has power to order payment to their guardian either by instalments or in a suitable case of the whole legacy. *Re Mahamed b. Abdulla*, 1 Z. 550.

tance by the father, may receive a legacy. But if at the date of *A*'s death the father were already dead, the grandfather would inherit as an heir, and this would bar his taking as a legatee. The rule applies whether the legacy or the share in the inheritance be the greater. A legacy to an heir may be validated by the consent of the other heirs, the rules governing this being the same as those governing their consent to legacies exceeding one-third of the estate; see above, p. 168. In the Shafii system, agreeing with Hanafi, this validates a bequest as a bequest.[1] The distinction is important, since delivery of possession is necessary to a gift, while it is not necessary to a legacy. The Ibadis hold that a *waqf alal aulad*, at least where it is made by testament, must be assented to by the heirs as being in the nature of a legacy to heirs. See pp. 212–13, under *Waqf*. But if so assented to, they allow it to operate as a legacy, and not merely as a gift.

This rule against legacies to heirs, along with the rule against legacies of more than one-third, has given rise to a series of evasions; see next chapter.

(ii) An unborn person other than a *nasciturus*. This follows from the discussion in the authorities of the topic of the *nasciturus*, from which it is clear that an unborn child cannot take a legacy unless he or she was conceived at the date of the testator's death.

The rule assimilates legacies to gifts. Some doubt has been thrown upon it by the case of *Umes Chander* v. *Zahoor Fatima*, 17 I.A. 201 (18 C. 164), but that was actually a case of a lease, though for an indefinite term, and, moreover, the potential rights of the prospective child were not actually in issue. See below, p. 188.

(iii) The *mafqud-ul-khabar* (see above, ch. xviii, p. 158).

(iv) According to Hanafi law a manslayer may not take a legacy from the person slain: the Shafiis allow even the murderer to take a legacy though not to inherit; cf. above, pp. 156–7.

It is submitted that English courts would probably incline against allowing the manslayer to profit in any way by the death of his victim, except in case of accidental homicide.

(v) An animal or animals, but an heir or the *wasi* can be directed to provide for their maintenance.

[1] *Mirathi*, pp. 68, 69.

(c) *What property?*

(i) Any actual thing or share in a thing belonging to the testator; but not the property of another. The doctrine of *musha'a* (see p. 191) does not appear to apply, and a legatee (except perhaps a *waqf*, see p. 214) may be made co-owner with the heirs of an indivisible unit, where the whole property consists of such a unit.

(ii) Things not yet in existence but arising out of things over which the testator had power, e.g. the next child which may be born to slave *X*, or the next calf of camel *Y*, or the first year's fruit after testator dies of his grove of date palms *Z*.

(iii) At least in Shafii and Shia law, a usufruct whether for life or for a definite period: or the *usus* to *A* and the fruits to *B*.

This raises the difficult question what interests in property are recognized by Muhammadan law; for which see below, ch. xxiii.

(d) *Formalities.*

Strictly speaking there are none. Any unequivocal expression will suffice. It is not even necessary for all the legacies to have been made at a single time or in the same way.

But

(i) The practical effect of the Muhammadan law of evidence (p. 28 above) is to render two witnesses essential.

(ii) Oral delivery of the directions contained in the 'will' appears to be essential: a written document is merely evidence of utterance by word of mouth: see above, p. 27, and *Mirathi*, p. 69, the author, however, making a definite exception in favour of a written testament where testator was too ill to speak. There is reason for this distrust of writing, particularly in the matter of wills, when dealing with an illiterate population. But the introduction of English rules of evidence involves the introduction of the English idea of dispositive documents; accordingly a Muhammadan will may now be written *or* oral, though no definite form or attestation is required.

For Khoja wills see above, p. 153.

(e) For appointment and powers of a *wasi*, see above, pp. 107, 164, and 168.

(f) *Vesting of Legacies.*

(i) If the legatee predeceases testator, the legacy lapses. In Shia law the legacy survives to the heirs of the legatee.

(ii) If a legacy is made to two or more persons and one of them predeceases the testator,[1] then

1. If the several shares were specified his share lapses to the residuary estate.
2. If the shares were not specified, according to Hanafi doctrine the legacy is regarded as joint and the surviving legatees take: according to Shafii doctrine the share of the deceased legatee lapses to the residuary estate. But in no case and in no school except Shia have the heirs of the deceased legatee any title: legacies are purely personal.

(iii) If the specific object is lost or has perished from whatever cause in the testator's lifetime, the legacy lapses (unless compensation is provided for in the will), because the will speaks from the death of the testator.

(iv) If the legatee survives the testator but dies without accepting or refusing the legacy, which he cannot do till after testator's death, the right to do so passes to his heirs. [Contrast English law; *In Re Madge, Pridie* v. *Bellamy*, 44 T.L.R. 372.]

(v) In the interval between death and acceptance of the legacy:

1. All duties arising out of ownership must be discharged by the *wasi*, who will be recouped by the heir or the legatee, as the case may be.
2. The heirs must pay for their use of the property during this period and for any deterioration due to use or to their fault. They are *not* liable to recoup the legatee if the article was lost or damaged without fault on their part.

*Minhaj*, Bk. 29, sec. 3, p. 263.

[1] *Mekkawi*, pt. i, p. 4.

## CHAPTER XXI

# DEATH-SICKNESS

## (MARD-UL-MAUT)

THIS chapter deals with the various moves which have from time to time been made in the direction of unrestricted freedom of testation (i.e. to evade the limit of one-third and the rule against legacies to heirs); and the answer which the law has given to such attempts. But one of the most successful of such practices, namely the *waqf alal aulad*, is not dealt with here, but in the chapter dealing with *waqf*.

### A. THE GENERAL PRINCIPLE

The general rule is that all dispositions *mortis causa* by whatever name they have been called 'are binding on the third of the estate of the disposer only, although they have been made while he was in perfect health'. Q.P., sec. 580. But in view of the decision in *Ibrahim Goolam Ariff* v. *Saiboo*, 34 I.A. 67; 35 C. 1, this cannot be regarded as good law in British India. Indeed the practice of *hiba bi'l ewaz* (see below, p. 205), common in some parts of India for at least the last half century, is a flagrant defiance of this rule.

A *hiba bi'l ewaz* (see below, p. 204) resembles a sale *inter alia* in that transfer of title is complete without delivery of possession. Accordingly, a Moslem in health will make *hiba bi'l ewaz* of portions of his property for small considerations with the tacit understanding that possession is not to be transferred till after his death. It does not appear that this subterfuge has ever been successfully challenged; and *Ibrahim* v. *Saiboo* supports it.

The more restricted rule, the validity of which is unquestioned in all schools, is that sales, gifts, divorces, and in one case acknowledgement of debt, are adversely affected in various ways if made during the death-sickness, *mard-ul-maut*, of the person who by such means may be attempting to evade the restrictions on legacies.

### B WHAT IS DEATH-SICKNESS?

A sickness of which the person concerned actually dies, and by which his death is so imminent at the time of the transaction that it must have been always present to his mind. It has been laid down that a man has reached this stage when he can no longer fulfil his religious obligations, and a woman when she can no longer fulfil her household duties; [1] but these tests are not necessarily exclusive.

Certain illnesses, e.g. phthisis and constant haemorrhage, are held to be manifestly dangerous. Others, e.g. leprosy, though they can only end in death, are so slow that the patient is not overshadowed by the fear of death. These only become *mard-ul-maut* in the last stages, when death must be present to the testator's mind.

In Shafii and Maliki law,[2] the same doctrine applies to dispositions made when a captive in the hands of savages, during desperate battle or storm at sea (and presumably before going into battle), under sentence of death, or by a woman in the pangs of childbirth or even, in Maliki law, the last three months of gestation, provided of course that death results from the danger in question.

### C. SALES DURING DEATH-SICKNESS

The *Mejelle*, Art. 393, provides that sales during death-sickness to an heir can only be validated after the death of the vendor by the consent of the other heirs: Art. 394 that sales to persons who are not heirs are valid, but that the heirs may compel the purchaser, where the gratuitous benefit granted him exceeds one-third of the value of the whole estate, to make up the price to a fair price, and if he does not do so can annul the sale. Where the estate is overwhelmed with debt, the creditors (Art. 395) have a similar remedy. There appears to be no reported case.

[1] See *Ibrahim Goolam Ariff*, above cited, p. 173; *Fatima* v. *Ahmed Baksh*, 35 I.A. 67; 35 C. 271; *Hassarat Bibee* v. *Golam Jafar*, 3 C.W.N. 57.

[2] Charani, p. 549; Morand, *Avant Propos*, p. 254.

### D. GIFTS DURING DEATH-SICKNESS

Gifts made during death-sickness take precedence over legacies, but may not, together with the legacies, exceed one-third of the *net* estate.

Thus if *A*, whose estate is £900, makes a death-bed gift of £240 to *B* and separate legacies of £50 to *C*, *D*, and *E*, *B* will keep his £240 in full, and *C*, *D*, *E* will find their legacies abated to £20 each.

This precedence of gifts over legacies is subject even in Maliki law to the rule that delivery of possession is necessary to complete a gift, and that the gift lapses if the donor dies without having delivered possession.

### E. ACKNOWLEDGEMENT OF DEBT (IQRAR)

In Muhammadan law (see above, p. 28) a deliberate acknowledgement of liability once made is normally conclusive both against the acknowledger and all persons claiming under him. Thus the heirs could be bound and their rights defeated by such an acknowledgement binding them. Perhaps also the importance attached by Moslem sentiment to the payment of debts of the deceased and the human belief (world-wide in spite of all the historical examples to the contrary) that a man will not willingly lie with the fear of death before his eyes, may have contributed to the same result.

At first sight, therefore, any one who is prepared to take the risk of hell has a broad road for evading the restrictions on legacies, whether to favour one heir at the expense of the others or an outsider at the expense of all the heirs. He may e.g.:

(a) acknowledge that he is indebted to *A* for a definite sum; or

(b) that certain property in his hands is not his own at all but a deposit from *B*; or

(c) that *C* has repaid a debt which he owed to the acknowledger.

Such an acknowledgement

(a) can only be made by a person entitled to dispose freely of his property—not a minor, a lunatic, a prodigal, or a bankrupt—nor under compulsion or drunk, &c.—nor in Maliki law

a married woman if the debt acknowledged exceeds one-third of her property;

(b) and can only be made regarding property which he owns or possesses on his own behalf, not therefore by a dying *wali* as regards the property which he holds for his ward, or a dying *mutawali* regarding the affairs of the *waqf*.

(c) No form of words or oath is necessary, and once it has been validly made, the acknowledgement

(d) *cannot* be revoked by the acknowledger;

(e) cannot, it is said, be declined as such by the acknowledgee. But, *submitted*, this is a mere technicality. The acknowledgee could obviously repudiate the existence of the debt when he first hears of it, and refuse to rely on the *iqrar*.

(f) The acknowledgement is valid even to the extent of the whole estate and even though made in death-illness;

(g) ranks as a specific charge (class *a* of the prior charges) or as a debt (class *c*) according to the nature of the debt acknowledged.

(h) According to Malik, Shafi, and Hanbal there is no difference between acknowledgements made in health and those in death-illness—they rank together. According to Abu Hanifa and his school (Q.P., sec. 569; Charani, p. 337) an acknowledgement in death-sickness, even of a deposit or secured debt (which would otherwise be in the first class of the prior charges, see p. 165), is postponed to all acknowledgements made in health.

(i) An acknowledgement in favour of an heir?

1. *Never admissible*—Abu Hanifa and Hanbal (Charani, 337). But Q.P., art. 564, makes three specific exceptions to this—apparently in cases where an obligation is otherwise known to exist and the question is whether it has been discharged.
2. *Always admissible*—Shafi and the Ibadis (Charani, p. 337; sec. 1, ch. 58, sec. 28; *Minhaj*, Bk. 15, sec. 1).
3. Look at the facts of the case and find out whether it was intended to prejudice other heirs—if so invalid, if not valid—Malik (Charani, p. 338; Morand, *Avant Propos*, Art. 735). It is submitted that this amounts to saying that an acknowledgement in favour of an heir may be valid if there is reason to think that it is evidence of a genuine transaction, but not otherwise.

But

*In all cases and all schools*

(i) an acknowledgement obviously impossible (e.g. of a debt owed to an unborn child (*Minhaj*, Bk. 15, sec. 1)),

(ii) or obviously intended to defeat the law (this is a modern view, Q.P., sec. 735),

(iii) or conclusively disproved by other evidence,

(iv) or too uncertain to be given effect to,

(v) an acknowledgement of debt coupled with a statement that it is not due till the death of the acknowledger (such an acknowledgement is an obvious contradiction in terms. *Mejelle*, Art. 1584; *Hypermachos* v. *Dimitri*, 8 Cyp. 56).

} are void and of no effect as against the net estate divisible to legatees and heirs.

But in some unimportant cases the person in whose favour such an acknowledgement is made could claim *as a legatee*, e.g. the unborn child in the womb or (according to the *Hedaya*) an incomplete acknowledgement, e.g. of a debt of uncertain amount: 'I am indebted to Zaid and you must credit what he says (when he tells you how much).'

The question whether fictitious acknowledgements can be allowed to prejudice the rights of heirs in countries where the Muhammadan law of evidence has been superseded does not appear to have been considered except in Cyprus, a fact which is in itself a testimony to the respect of Moslems for their sacred law. In Cyprus the provisions of the *Mejelle* apply also to non-Moslems. In *Haralambo* v. *Haralambo*, 2 Cyp. 21; *Pieri* v. *Haji Yanni*, 2 Cyp. 153; and *Eudoxia* v. *Despinou*, 9 Cyp. 53 (cf. *Hypermachos* v. *Dimitri*, above cited), it was held that proof that an acknowledgement was intended to be a fraud on the heirs would be a defence to an action based on the acknowledgement. How far the Muhammadan doctrine of acknowledgement is to be regarded as part of the substantive law and how far as part of the law of evidence is perhaps questionable. In reference

to acknowledgement of paternity (see ch. xi, p. 91), it is well established that the doctrine is so far part of the substantive law that it is not abrogated by the Indian Evidence Act. On the other hand, a Moslem would certainly not be allowed by our courts, nor probably by Muhammadan courts, to defeat the rights of his creditors by a fictitious acknowledgement, and it is a little difficult to see why he should be allowed to defeat the rights of his heirs, whatever may be thought of the conduct of the heirs in impugning the acknowledgement.

The whole question of fictitious charges has been much before the courts in India under the name of *benami* (*lit.* nameless transactions). It arose in East Africa in the case of *Abdi Nuri* v. *B.E.A. Corporation*, 3 E.A. 12. There the *wasi* of one Abu Bakr sued for a *Shamba* (fruit garden) impugning the right of one Rukiya, the defendant's predecessor in title, to sell the land. It was found that Rukiya had been held out as the sole owner by the connivance of Abu Bakr: and the Shaikh ul Islam regarded this as a solemn acknowledgement by Abu Bakr binding on the heirs. But the court went on to consider that a fraud had been thereby effected upon one Jaffer Dewji, who had been induced to drop his action against Abu Bakr for specific performance of a contract to sell Abu Bakr's share in the property.[1] It explained and approved of the principles which Indian courts have enunciated for dealing with *benami*, and the connected English decisions: and it is at least arguable that but for the perpetrated fraud and subsequent purchase in good faith, i.e. had the property still been in the hands of Rukiya and had no question of Jaffer Dewji arisen, the court would have taken the same line as the Cyprus Supreme Court and allowed the heirs to repudiate the fictitious acknowledgement.

F. ACKNOWLEDGEMENT OF PATERNITY,

including acknowledgement of marriage or of *firash*, can be made on the death-bed according to all schools, though they always prejudice other heirs (see ch. xv, pp. 121–2). Thus, though I cannot leave more than one-third of my estate to a foundling, I can on my death-bed acknowledge him for a son.

[1] Such a suit does not lie at Muhammadan law: but this point did not arise.

### G. DIVORCE

(a) Death-bed divorce as a means of depriving a wife of her just share in the inheritance is provided against by the rule of *talaq ul mariz* (see ch. ix, p. 75).

(b) Death-bed divorce (*khulaʿ*) as a means of giving a favourite wife more than her share?

e.g. Zaid is dying. In order to provide more fully for his favourite wife Zuleika (whose *fard* cannot be more than one-fourth and may be as low as one-thirty-second, or even lower in the case of *ʿaul*) he sends for her and says, 'Ask for thy release' (*khula*). She does so and he releases her: as the release is at her request she ceases immediately to be an heir; and he thereupon leaves the whole bequeathable third to her; or acknowledges a debt in her favour.

This possibility is provided against by the Egyptian Code, Sec. 566, which lays down that in all cases where *khulaʿ* or *mubarat* occurs during the husband's death-illness, the woman shall get her inheritance as a wife or her legacy or 'acknowledged debt', whichever is less.

## CHAPTER XXII

# PROPERTY AND OBLIGATIONS

### A. CONFLICT OF LAWS

THE portions of the law dealt with in this chapter are of restricted application; and considerations of space compel us to confine ourselves to a very brief abstract of leading ideas. In Northern Nigeria private property in land is not recognized: elsewhere the Muhammadan law on these topics is not followed, except that in Zanzibar it is declared [1] the fundamental law to be applied except so far as expressly overridden or repealed by Decree. In the Sultan of Zanzibar's dominions, accordingly, including the mainland dominions,[2] it is administered to all subjects of the Sultan. It may affect the rights of others than the Sultan's subjects:

(i) As the *lex loci rei sitae*: thus in the great case of *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling* (28 I.A. 121; 1 E.A. 24; 1 Z. 105; 26 B. 1), neither party owed allegiance to the Sultan; the Treaty of 1886, Art. XVI, conferred on British subjects extra-territoriality in respect of their persons and property; but this was held not to affect the law applying to land where purchased by a British subject. Accordingly a transaction between a British subject and the British Government at English (or Anglo-Indian) law had to be valued with reference to the rights of Muhammadan trespassers at Muhammadan law (see below, pp. 190 and 193). See also *Saleh* v. *Mohamed*, 1 Z. 423 (below, p. 185); *Barton* v. *Mohamed*, 1 Z. 335 (below, p. 187); and *Munser* v. *Reece*, 2 Z. 30, where it was held that the title of a transferee from a Muhammadan heir was good or bad according to Muhammadan law.

(ii) *Where one party is a subject of the Sultan and the other is not.* It is, however, arguable, that in all cases where Muhammadan law of property or obligations has been applied to others than Zanzibar subjects it has been applied as *lex loci rei sitae* and that the mere question of parties to the suit has been immaterial.

[1] Zanzibar Courts Decree 1923, sec. 7 (formerly cap. 6, sec. 11).

[2] i.e. the coastal strip 10 miles wide in Kenya protectorate.

Thus the Muhammadan law of sale was applied, the defendant being a Zanzibar subject, in *Cobb* v. *Rashid*, 3 E.A. 35; and in *Mzee b. Ali* v. *Alibhoy*, 1 E.A. 58, the plaintiff being a Sultan's subject. See also *Barton* v. *O'Swald*, 1 Z. 420, where it was held that the Sunni Muhammadan law applies in the case of a conflict between the Zanzibar government and a person subject to the British Orders in Council concerning the rights over a road in Zanzibar, if there is no applied Indian Act touching those rights. On the other hand, in *S.S.* v. *Abdurrehman*, 2 E.A. 71, a Muhammadan who was not a subject of the Sultan of Zanzibar could not benefit by local Zanzibar legislation giving state compensation for freed slaves. In 1 Z. 186, *Charlesworth* v. *Narayanji*, the question whether English or Muhammadan law should be applied to the restraint of a nuisance by noise was considered. The court did not decide it, finding that the nuisance could equally be restrained by either system, but inclined to the view that the English law was applicable because both parties were British subjects.

The increasing volume of Zanzibar legislation based on English and Indian models and applicable by the joint authority of the Sultan and the British Resident to all alike makes it sometimes difficult to say whether the Muhammadan law is still in force or not. Moreover, in practice this is the field in which, more than in all others, that law has been modified by custom. The market law as conceived by the lawyer-moralists of the *sharia* and the same law as actually practised in the market have never been identical. Interest on money, which the moralists stigmatized as usury; the taking of risks in forward contracts and the fluctuations in the rate of exchange, both of which they regarded as gambling: all these things are the life-blood of legitimate commerce. In this branch of law we have always to inquire not merely what the lawyers say but what respectable merchants practice. Nevertheless the *sharia* has always been the nominal basis of, and a powerful factor in, the market law.

### B. SALE (AND CONTRACT GENERALLY)

That contract grew out of conveyance may or may not be generally true as a proposition of historical jurisprudence: in Muhammadan law, contract, with some apparent exceptions

such as agency and suretyship,[1] remains a branch of conveyance; and the step forward from a completed transfer to a legally binding promise has not been taken. The command 'Believers! fulfil the obligations' [2] remains a moral injunction, though one of extreme sanctity: it has never been made the basis of a legal system of binding agreements. The texts which have determined the form of the law have been those which forbid usury[3] and gambling.[4] In particular, the sentence, 'God has made sale lawful and usury unlawful', has had the effect of making sale the archetype and usury the antetype of conveyances and contracts alike. Contracts are deliberately assimilated to completed transactions; and a peculiarity of Arabic grammar has contributed to the same result. There are only two tenses, the perfect or tense of completed action and the aorist or tense of uncompleted action. The mere fact that an agreement has been concluded, therefore, necessitates its expression in the perfect tense by formal declaration (*ijab*, not merely offer but a definite statement of fact) and acceptance or ratification (*qabul*). The aorist is the tense of negotiation and does not convey certainty or *consensus ad idem*.

SALE, *bai'*,[5] in the generic sense, is the transfer of a definite ascertained object, having a legal value, in exchange for an equivalent; or, in Shafii law, the transfer of a definite use of property in perpetuity in exchange for a price. This definition includes a large number of different contracts, among which sale in the specific sense is the *transfer of a definite ascertained object seen by* [or at least known to] *both parties for a definite equivalent in money*. On this definition all schools are agreed.

The object must further be *mal mutaqawwim*, that is to say, capable of legal ownership and legal transfer, not e.g. *res omnium communes*, nor things, such as wine or pork, forbidden by Islam. It must also be *mulk*, i.e. actually in such ownership. It must be in existence at the moment of sale (not, therefore, future crops or future fruit, though I may sell fruit which has set but not yet ripened); and it must be capable of immediate delivery.

[1] These and others which have not been the subject of reported decisions in East Africa are omitted from this volume; see preface.

[2] *Uqud*, pl. of *aqd* a contract, Q. **5**, 1.

[3] Q. **2**, 275–6 : **3**, 129 ; **30**, 39.

[4] Q. **2**, 219 ; **5**, 90–1.

[5] F.Q. 6, 1, pp. 311–12 ; *Mejelle*, Art. 149.

*Transfer of ownership takes place at once*, even though delivery does not.

Normally both delivery and payment of price are due at once: but the *price* may be made payable by instalments or at a future date, and the vendor may retain a possessory lien till paid. Any uncertainty in the thing to be delivered (except where a choice among specified things is allowed the purchaser) or in the price to be paid will invalidate the transaction.

There can be no such thing as a contract to sell, because that introduces an element of uncertainty and becomes gambling, the world-wide practice of speculation in 'futures'. A mere exchange of promises does not give rise to any liability in Muhammadan law.[1] It is no cause of action either for damages or for specific performance: nor does even the acceptance of earnest money make it so. Indeed the practice of earnest money has itself been frowned upon as in the nature of gambling.[2]

In *Cobb* v. *Rashid*, 3 E.A. 35, an illuminating case, the defendant Rashid agreed to sell to the plaintiff 'subject to the claims, if any, of Rashid's relatives ten thousand acres of land to the north of Kilifi harbour'. This agreement was held to be a nullity (*batil*): (i) for futurity, since a sale must be a present transfer; (ii) for condition, since the claims, if any, of Rashid's relatives go to the root of the contract and a sale must be an absolute and unqualified transfer; (iii) for uncertainty since the ten thousand acres had not been demarcated. Both Shafii and Hanafi authorities were relied upon.

The terms *sahih*, *fasid*, and *batil* are part of the vocabulary of the law of sale as also of *ijara* and other contracts founded on sale (see also ch. iv, p. 45). The classification is, however, of more difficulty and importance in Hanafi law (see *Mejelle*, 361–79) than in the other systems. A *sahih* (true) transaction is without flaw and valid; a *batil* or void transaction is one without legal effect as between the parties, e.g. where the parties are incapable of contracting, where the object of the transaction is non-existent, or not deliverable or *extra commercium*. A *fasid* contract is defined as good in its essence (*asl*) but bad in its accidents [3]

[1] Cf. *Abdulla* v. *Abdulla*, 3 E.A. 76; but the rule is more stringent than the English law.

[2] *Minhaj*, **9**, 3, 2, 129.

[3] *Mejelle*, 109; *Minhaj*, **9**, 3, 2, 128.

(*wasfan*). In Hanafi law a sale where the vendor has no title to the property is so regarded—it may be validated by his subsequently acquiring title or by the consent of the real owner: in Shafii law such a sale is regarded as *batil*.[1] In Shafii law *fasid* sales are those voidable for fraud, the instances given being mostly instances of sharp practice on one side or the other. Normally, they are revocable even after delivery and payment of price, unless the object sold has been so altered as to render *restitutio in integrum* impossible. In Hanafi law sales with unexpired options of rescission should perhaps be classed as *fasid*.

*Options in sale*

Good faith between parties is also enforced by a number of options, of which the most important are

(i) the option of meeting *khiyar ul majlis*. Although the declaration is expressed in the perfect tense, the vendor in Hanafi law may withdraw it at any moment before it is capped by acceptance: in Shafii and Maliki law either party may call off the bargain at any moment before they part company.

(ii) the option of inspection: actual view of the property sold (by sample in the case of things *mithli*, otherwise the whole object sold) is essential to the completion of the purchase. Where the contract has been concluded without the purchaser seeing the goods, he may always resile on doing so.

(iii) the option of approval. As in other systems a sale may be made subject to approval by the purchaser to be confirmed or rejected after a short period (usually not more than three days) of possession.

(iv) the option of defect.

Even where the purchaser has exercised, or failed to exercise, the options of inspection and approval, the vendor none the less warrants the object sold. Even although the vendor acted innocently, the purchaser may still resile and claim *restitutio in integrum* if after all other options have expired he finds a radical defect in the property which existed at the time of the sale and was not then disclosed: *Mehmet* v. *Tringo*, 1 Cyp. 132. But he must reject the contract *in toto* or not at all: he cannot keep the goods and claim damages for the defect.

[1] *Minhaj*, Bk. 9, ch. 1, clause 4, p. 124.

### C. PRE-EMPTION OR RETREAT (SHUFA')

'The faculty allowed by the law to an existing co-sharer [1] in virtue of his co-ownership to evict a new co-owner on condition of reimbursing him the price which he has paid.' [2] This troublesome appendix to the law of sale does not appear to be in force in any of the African territories. In *Saleh Lalji* v. *Mohamed*, 1 Z. 423, it was held that the law could only be enforced as *lex loci rei sitae* and not as a matter of personal law between Indian immigrants. This agrees with the practice in the ex-Ottoman dominions,[3] where the Hanafi law of pre-emption is binding on every one irrespective of creed, sect, or nationality. It was further held that by local custom there is no right of pre-emption in Zanzibar, the Shafii and Ibadi chief Qadis stating that no claim of pre-emption had ever been decided in a Zanzibar Court and the British judge giving the same opinion on his knowledge of the records. All this was strictly obiter, for the only claim was of pre-emption on the ground of contiguity (*shufa'-i-jar*) which Shafii law, the *lex loci*, does not admit. But there is no other reported case and this ruling may probably be regarded as law in all the East African territories. For a general outline see Appendix 3.

### D. SALAM

The law recognizes two kinds of sale for future delivery under strict safeguards against gambling in options, namely *salam* and *istisna'*.

In *salam* the price must be paid in cash at the conclusion of the bargain. A bargain must be for definite delivery at a definite future date of a *res fungibilis*: that is to say of something which is not specific but is sold by quantity and quality, e.g. corn. Thus, if a cultivator wishes to sell his as yet ungrown harvest, he cannot sell the crop to be reaped from a certain field, because that is a specific item and it depends on an uncertain future event, namely the success of the harvest: he would be selling a risk and the transaction would be akin to gambling. But he may sell for delivery at a certain future date so many bushels of such and such a quality of corn: he anticipates that by that date he will have reaped that quantity and quality of

[1] *Sc.* in land. [2] F.Q., p. 375. [3] *Mejelle*, Arts. 1008–44.

corn from his own field, but he keeps the risk and makes an unqualified promise to deliver. And from the side of the purchaser the method of gambling on settlement of differences, favoured by speculators all over the world, is prevented by the requirement of an immediate cash payment in full.

### E. ISTISNA'

This is the giving of an order to a workman to make a definite thing, with an agreement to pay a definite price for that thing when made.

It is the only form of sale in which nothing changes hands immediately. It is only valid in respect to those goods with respect to which a custom is proved, and it is akin to the hire of a workman to do a particular job.

### F. LETTING AND HIRING (IJARA)

Leases of land or buildings, the letting and hiring of chattels, e.g. of a horse or of a string of camels, and the letting and hiring of the services of a free human being are all forms of the same contract, the last named being divided into two classes according as the workman hires his entire services to one person, as, e.g. a domestic servant, or undertakes to perform the same service for all who require it, e.g. a common carrier.

*Ijara* in all its varieties is treated in Muhammadan law as analogous to the contract of sale, and the *Mejelle*, art. 405, even defines it as the sale of a known benefit in return for its known equivalent. This definition, however, is discountenanced in Shafii law,[1] the reason being that sale in that law even of less than the full ownership implies a transfer in perpetuity.[2] Whether the lease is treated as a form of sale or merely as resembling sale, the result is the same, namely, that both the advantage conveyed and the price to be paid must be definite, certain, and lawful.[3] In *De Souza* v. *Pestanji*, 1 Z. 22, reference was made to the fact that in certain cases a contract of hiring may be dissolved by the death of one or other of the parties (e.g. a hiring of personal services is dissolved on the death of the proposed servant), and other contracts may be dissolved by the Qadi in the event of the lessor's bankruptcy. But an alleged

[1] *Minhaj*, **21**, i. 218.
[2] F.Q., **6**, i. 311, quoted above, p. 182.
[3] *Hedaya*, **31**, 1, 490.

custom that a lease of land could be terminated by the lessor selling to a third party was found to be unreasonable even if it existed. In *Smith Mackenzie* v. *Tharia Topan*, 1 Z. 24, a custom that the landlord should do all repairs was proved to exist, but was held to be unreasonable as applied to what was practically a lease in perpetuity. See now the Transfer of Property Decree 1917, parts of which (but not ch. 2) modify Muhammadan law. *Barton* v. *Mohamed*, 1 Z. 335, was an agricultural lease to which that decree does not apply: the landlord was held to have powers (which he would presumably have had under any legal system) to re-enter and to obtain damages for a breach of covenant.

Agricultural leases on a part profits basis are regarded not as leases but as forms of partnership (*sharakat*): of such there are three, *musaqat*, *mukhabarat*, and *muzara'at*.

(a) *Musaqat*. A lease for a definite term of palms or vines, but of no other trees, the lessee to water and cultivate in return for a fixed fraction of the crop, e.g. one-half or one-third.[1]

(b) *Mukhabarat*. A cropping lease where the seed is provided by the cultivator.

(c) *Muzara'at*. A cropping lease where the seed is provided by the landlord.

*Mukhabarat* is nominally illegal, since the whole risk falls on one side. But the *Minhaj* explains devices by which the nominal illegality may be avoided.[2]

[1] F.Q., 6, 17, 381; *Minhaj*, Bk. 20, p. 215. [2] *Minhaj*, ibid.; F.Q., 6, 20, 391.

## CHAPTER XXIII

# OWNERSHIP AND POSSESSION

### A. OWNERSHIP

OWNERSHIP in Muhammadan law is essentially indivisible; estates for life or in remainder, *a fortiori* 'contingent remainders' [1] are unknown. In Hanafi law even a lease will be invalid unless it is for a definite term, and a gift to *A* 'for life' and thereafter to *B* is regarded as an outright gift to *A*, the transfer being valid and the limitation void.[2] Nevertheless, custom in Hanafi countries, both India and the ex-Ottoman dominions, has for centuries recognized leases in perpetuity; which are specifically allowed by the other systems, the Shafii regarding them as the sale of a perpetual interest less than ownership (see p. 186). Whether leases for life are allowed by custom in Hanafi countries may perhaps be doubtful. Life grants have sometimes been upheld in India as *ariyat* (see p. 196), but as such are always revocable.

Ownership is also unconditional: and restrictions cannot be imposed upon a transfer whether by sale or gift.[3] 'Covenants running with the title' are an impossibility. Nevertheless, even the Hanafi law recognizes the validity of conditions imposed for the benefit of one or other party to a transfer; [4] and accordingly the Privy Council have held in both Hanafi and Shia cases [5] that, though a gift must be absolute as regards *dominium*, it may be saddled with a condition in favour of the donor for income or enjoyment during the donor's life. Similarly in all systems praedial servitudes may be created by contract: and in Maliki, Shafii, and Shia law it appears that personal servitudes such as usufructs or the right to live in a house may be

[1] *Umes Chunder* v. *Zahoor Fatima*, 17 I.A. 201; 18 C. 164, was decided on principles imported from English law without reference to *sharia* doctrines. The settlement was effected by way of lease, and the Muhammadan law of lease is no longer in force in India.

[2] *Hedaya*, 488–9; Baillie, *Digest*, 517. This doctrine appears to have been overlooked in *Amjad* v. *Ashraf*, 56 I.A. 213.

[3] Cf. *Cobb* v. *Rashid*, 3 E.A. 35.

[4] Cf. *Mejelle*, 189.

[5] *Mohammed* v. *Fakhr Jahan*, 49 I.A. 195; 44 A. 301. *Umjad Ali* v. *Mohammadi*, 11 M.I.A. 517; cf. *Ibrahim* v. *Ummat ul Zohra*, 24 I.A. 1; 19 A. 267.

created by sale, lease, or gift, even for an indefinite term such as the life of the transferee: [1] such a usufruct is not altogether unlike to an English life estate. But the necessity for possession in the law both of sales and gifts makes it impossible to create a series of life estates: though in systems which recognize usufructs the usufruct for life may be given to *A* and the *dominium* to *B*. The law of *waqf* (see ch. xxvi) provides a means of creating successive interests, though these cannot be said to amount to estates in the English sense.

In *Sadik Husain* v. *Hashim Ali*, 43 I.A. 212; 38 A. 627, it was held that a gift otherwise invalid cannot be validated by a trust: followed in *Mirza* v. *Bindaneem*, 6 R. 343. In *Jeewa* v. *Yacoob Ali*, 6 R. 543, it was held that personal trusts are unknown to Muhammadan law except in the form of *waqf*.

### B. CLASSIFICATION OF PROPERTY

The distinction between immovable and movable property is, so far as possible, ignored. Sale, letting, gift, or pledge of the one may be effected as nearly as possible by the same means as the other. Nevertheless, the distinction is occasionally important, e.g. in the powers of a *de facto* guardian of property (see p. 108), the inheritance rights of a Shia widow (see p. 146), and the law of *waqf*, the law of pre-emption (see appendix 3), and the law of possession. Physical possession of land is not exercised in quite the same way as of a chattel: and there are differences also in the conception of possession.

Possession whether of movables or immovables is evidence of title; [2] and any one may acquire title to any ownerless thing capable of ownership by taking possession of it. Of waste land it appears that mere enclosure is insufficient: the squatter must break up the land and cultivate it: *Sultan of Zanzibar's Govt.* v. *Attorney General*, 4 E.A. 142.

Buildings upon and crops or trees planted in land are separate from the land itself; [3] and may be and commonly are held by

[1] The decision in *Adm. Gen.* v. *Halima*, 1 Z. 579, would perhaps have been different had the court been able to regard the gift as one of the usufruct of the garden and not merely a gift *in futuro* of ungrown crops. But the only authority cited was the Hanafi *Hedaya*.

[2] See *Sudi* v. *de Souza*, 1 E.A. 2; *Sudi* v. *Mahammed*, 1 E.A. 3, and footnote as to land under eaves of a house.

[3] And may be separately made *waqf*: *Minhaj*, p. 236.

a separate title—even where my title to the land is due to my having planted trees upon it. A tenant's or trespasser's accretions do not merge in the land (though in the case of *waqf* land only there is a rebuttable presumption that they were intended so to merge).[1] See *Secretary of State* v. *Charlesworth Pilling*, 28 I.A. 121; 1 E.A. 24; 1 Z. 105; 26 B. 1 (above, p. 180). The defendant had no title to buildings erected on his land by a trespasser and could not claim compensation for them, but merely for the land as it would be when restored to its original condition.

### C. POSSESSION[2] (QABZA, YAD)

Delivery of possession is essential to the completion of a gift (see ch. xxv, Gift): the possibility of delivery is essential to the validity of a sale, though the actual delivery may be delayed by agreement of the parties. Thus:

(a) Neither gift nor sale can be made to take effect at a future date: there can be no such thing as a contract to transfer title hereafter. *Cobb* v. *Rashid*, 3 E.A. 35.

(b) Sale or gift of immovable property which is at the time in the adverse possession of a trespasser is void: *Seif* v. *Muhammad*, 3 Z. 21 (sale) and *Rahim Baksh* v. *Muhammad Hasan*, 11 A. 1 (gift). But in view of *Mahomed Baksh* v. *Hossein Bibi*, 15 I.A. 81; 15 C. 684, it is probable that where the transferor has done everything in his power to implement his transfer and the title is established, British courts would not allow the trespasser to raise this plea. *Mahomed Baksh* was decided four months before *Rahim Baksh*, but is not referred to in the latter case. It is possible to distinguish them on the ground that in the former the donor though unable to put the donee in physical possession was able to put him in a position to give orders about the property: in the latter he could not do this. But in *Mahomed Baksh* the Privy Council followed their own decision on a similar difficulty in Hindu law, *Kalidas* v. *Kanhayalal* (11 I.A. 218; 11 C. 121), in which the possession was with a trespasser, as in *Rahim Baksh*. The distinction, therefore, would be doubtful. In *Seif* v. *Muhammad* the dispute was between vendor and purchaser only. The sale being *batil*, the latter recovered the price though aware from the outset that he bought a litigious claim.

[1] See *Khanim* v. *Dianello*, 6 Cyp. 52.

[2] The word *seisin* should be avoided.

But possession does not necessitate physical contact and no formalities are necessary. It may be either actual physical possession (*khas*, *haqiqi*) or possession by the power of giving orders (*hukmi*) or control, e.g. where I hand over possession of an estate by authorizing the purchaser or donee to collect the rents, telling the tenants to pay him and the Revenue authority to look to him for the revenue. In *Mahomed Baksh* (above cited) a gift was held valid where the donor publicly authorized the donee to take possession and the latter subsequently did so. In *Ibrahim* v. *Mwenye*, 4 E.A. 3, a sale was held void for non-delivery where the purchaser was already in possession as mortgagee. This appears to be incorrect and is contrary both to such Indian rulings as *Hamam* v. *Sajawal*, P.R. 86 of 1910, and to the recognized rules that a creditor can make a gift of the debt to his debtor or a wife of her unpaid *mehr* to her husband. Indeed in India it is not doubted that a mortgagor may give away his equity of redemption even to a third party.

*Musha'a*. The older authorities, particularly the *Hedaya*, have certain difficulties about separate possession of divisible property, holding that possession is not effectually delivered so long as the property remains undivided. In cases of sale this was one of the reasons for the decision in *Cobb* v. *Rashid*, 3 E.A. 35, and in *Manser* v. *Reece*, 3 Z. 30. It is very doubtful if the doctrine ever had any place in other than Hanafi law; and even in that system the compilers of the *Mejelle* ignored it and Omar Hilmi (Arts. 64 and 65) expressly negatives it, at least as regards transfers to *waqf* (see below, p. 214). The Privy Council in *Muhammad Mumtaz* v. *Zubaida Jan*, 16 I.A. 205; 11 A. 460, said that the doctrine 'is wholly unadapted to a progressive state of society and ought to be confined in the strictest possible limits': thus a gift of an undivided share in a village was made absolute by the transfer of the incorporeal right to receive and the actual receipt of a share in rents and profits: and in *Ibrahim* v. *Saiboo*, 34 I.A. 167; 35 C. 1, it was held that the doctrine did not apply to a gift of undivided shares in urban freeholds or shares in companies. In *Fayyaz ud din* v. *Kutab ud din*, 10 Lah. 761, the doctrine was held inapplicable where the property is of such a nature that some kind of benefit or advantage can only be derived from it so long as it remains undivided and will cease

on division, e.g. a business which cannot continue on smaller capital. This is contrary to the *Hedaya*, which goes so far as to insist on division in a gift of a share in partnership between partners. Practically, it is submitted, the scope of the doctrine to-day is no more than this: (a) that such possession must be given as the nature of the case admits; (b) that where the intention of the parties involved division of the property, the transaction is not complete till that decision has been effected.[1]

No formalities are necessary to the transfer of possession. Thus, where a lady made a gift of her house to her nephew, and both of them lived together in the house before and after the gift, it was not legally necessary that she should vacate the house. She continued to live in the house as his guest, just as he had been hers; *Humera* v. *Najmunnissa*, 28 A. 147. (There were other circumstances showing that the gift was not merely colourable.) Similarly in *Ma Mi* v. *Kalandar Ammal* (I), 54 I.A. 23, it was held that delivery from husband to wife had been effected by registration of the deed and entry in the land revenue records, although the husband continued to manage the property on behalf of the wife.

A special case is where a father or other guardian of property makes a gift to his ward; neither acceptance nor any outward formality of delivery is necessary and he will be presumed thereafter to hold as guardian for the ward. *Ameeroonissa* v. *Abedoonissa*, 2 I.A. 187; *Abdulla* v. *Mohamed Valli*, 1 Z. 258. This applies to the case of an infant wife living in her husband's house; but not to a wife of full age: nor to the case of children living with a relative who was not a legal guardian: *Musa* v. *Kadar*, 55 I.A. 171; see above, p. 109.

### D. POSSESSION OF THE PROPERTY OF ANOTHER; TRESPASS

Apart from *ijara* (p. 186), *ariyat* (p. 196), and *rahn* (p. 197) such possession may be:

(i) Lawful, i.e. by express or implied permission *amanat* (the licensee *amin*). In its narrowest sense, *amanat* is the gratuitous holding of property on behalf of and for the benefit of the owner.

(ii) Unlawful or tortious, *ghasb* (wrongdoer, *ghasib*).

The words *amin* and *amanat* are from a root implying 'trust-

[1] But see *Bilkis* v. *Wahid*, 7 P. 118, and see also *Sarifuddin* v. *Mohiuddin*, 54 C. 754.

worthiness', and they have sometimes been translated, e.g. in Hamilton's *Hedaya*, by 'trustee' and 'trust'. This is misleading. The principal point to be noted about *amanat* is that the *amin* is not liable for accidents or for any damage not traceable to his own negligence or misconduct; and for profit which he may make during his holding of the property, being regarded as a trustworthy person, his own oath is conclusive. He need not produce accounts. *British Resident* v. *Hafiz*, 1 Z. 526.

In this case the position of the *ghasib* was compared to that of the English trustee, since he is liable to an account. But the *ghasib's* position originates in wrongdoing, and if any English translation is to be required the nearest is 'trespasser'.

It was also held that *ghasb* might be committed by any wrongful possession of property, even without violence, and, in *Abdulla* v. *Abdulla*, 3 E.A. 76, that it might be committed even in good faith. The *wasi* who in good faith dealt with the widow's private property and sold it as part of the property of the deceased, and the purchaser from him (who also acted in good faith), were both held to be *ghasib*, and to be jointly and severally liable for the property or its value.[1] On the other hand, where one *ghasib* is dispossessed by the force or fraud of another, his liability ceases.

The law does not permit wrongdoing to be a source of profit even to the person wronged. Consequently, on the eviction of a trespasser the rightful owner is entitled:

(a) to have the property restored to him

(b) in the same condition as when he was ousted,[2] or, failing that, to be compensated for the deterioration, *or* to

(c) *ijr mithl*, a fair rent for the period of ouster if the property was one from which he habitually derived a profit, but not otherwise.

A trespasser even *mala fide*, or a lessee who has broken his covenant, is entitled:

(a) to remove buildings erected by him; [2]

(b) to harvest crops planted by him if already above ground, but not to delay ouster till they ripen;

[1] 'A third party receiving anything from the wrongful converter is equally liable with him to return it or to make good its loss to the owner. Knowledge is not necessary to render the third party responsible.' *Minhaj*, Bk. 18, sec. 7.

[2] *Secretary of State* v. *Charlesworth Pilling*, 28 I.A. 121; 1 E.A. 24; 1 Z. 105; 26 B. 1.

(c) to obtain compensation for seed actually sown by him but not for prospective crops which are not above ground at the time when he is forced to restore possession. Such compensation may be offset against damages.

The buildings or crops not being regarded as part of the land the trespasser on that land is as much entitled to peaceable possession of his buildings and crops as is the owner to his land. Consequently, if the owner takes the law into his own hand he may have to pay damages. Thus in *Sheriff Jaffer* v. *Mzee*, 4 E.A. 94. *A* had encroached on the land of *B* and erected boundary pillars on that land, readjusting the boundary in his own favour: *B* broke down the pillars without notice: *held*, he must pay *A* the difference between their full value and their value as decreased by his action. *Sed quaere?* The trespasser's right is to the value of his property regarded as something separate from the land on which he trespasses, not to any adventitious value which it may have from being joined to particular land which is not his. Unless, therefore, the value of his materials as materials was decreased, the decision appears incorrect.

Where, however, the trespasser has acted in good faith and the property erected by him exceeds in value the land, he may even compel the landowner to sell him the land.

### E. INVASION OF THE RIGHT OF PRIVACY

There is no easement of light or air, but the right of a Muhammadan to privacy for his women folk with a sufficiency of light and air resembles our doctrine of ancient lights, and any invasion of it will be actionable. In *Athman* v. *Ahamed*, 4 E.A. 30, the Shaikh ul Islam held that 'it is lawful for a man to open air holes and windows on his own walls for purposes of light, even if by so doing he can see his neighbour's family who are unlawful for him to see. In this case the neighbour is to erect a wall opposite the windows to prevent him from seeing the other side through them. Every one can deal with his own property in any manner that would not damage his neighbour's property, although it might harm him by opening such windows, but not so as to cause him damage, such as to dig a pit at the neighbouring place; he will be stopped from doing so'.

In *Ali* v. *Papa Yanni*, 2 Cyp. 79, the defendant was in the habit

of taking the air on the roof of his house, which commanded a full view of the courtyard of the plaintiff's house, to which the plaintiff's ladies resorted, also to take the air. It was held that the defendant must be restrained from so using the roof of his house except at times of which he must give reasonable notice to the plaintiff.

In *Erikzade* v. *Arghiro*, 1 Cyp. 84, it was held that a defendant can be compulsorily restrained from making windows in his house so as to overlook those parts of the plaintiff's house necessarily used by the women which the house-owner cannot protect from being overlooked except at unreasonable expense or undue interference with his enjoyment of the property, but that the defendant cannot be restrained where the overlooking is such that the plaintiff can protect himself against it without appreciable expense and without throwing any burden on his neighbour.

The maxim *sic utere tuo ut alienum non laedas*, enunciated by the Shaikh ul Islam in *Athman* v. *Ahamed*, 4 E.A. 30, is explained in *Ibrahim* v. *Subhi*, 7 Cyp. 23.[1] That maxim only applies to excessive damage, but where there is a definite interference with my neighbour's property in addition to enjoyment of my own, as for instance where the water from my eaves (in the actual case) falls on his threshing floor, it is not necessary to prove excessive damage. The mere fact that I interfere with my neighbour's property in itself imports damage.

The only other cases on the Muhammadan law of torts in East Africa appear to have been *Charlesworth* v. *Narayanji*, 1 Z. 186 (nuisance by noise), and *Salim* v. *Juma*, 1 Z. 467 (mischief by an animal). No authorities were cited, and the advice tendered by the Qadis appears to have been based on customary grounds.

[1] See also Charani, p. 468, and Morand, *Études*, no. 6.

CHAPTER XXIV

# LOANS AND SECURITY

## A. LOANS

LOANS are either *qard* or *ariyat*.

(a) *Qard*, the transfer of a *mithli* or fungible commodity, e.g. money or grain, to be repaid later by an equal quantity and quality of the same commodity. This is regarded as a form of sale or barter—the exchange, e.g., of a bushel of best oats to-day for a bushel of best oats six months hence.

(b) *Ariyat*, the loan for use of a *qimi* commodity *quae usu non consumitur*, revocable at any time at the will of the lender. But where the lender has allowed the borrower to act on the faith of his loan, he must allow a reasonable time for the borrower to make other arrangements. In a case reported by *Al Wancharisi* (*Touchstone of the Fatwas*, *Arch. Maroc*, 13, p. 144) *A* had permitted *B* to dig a grain pit on *A*'s land. He could not evict *B* without giving him a reasonable time to dig a similar pit elsewhere.

Both *qard* and *ariyat* are in the eye of the *sharia* gratuitous. But the loan of a thing *quae usu non consumitur* in return for a consideration is possible, being regarded as a form of letting and hiring (*ijara*, see p. 186). Religion strictly forbade the taking of usury, while it commended gratuitous loans as pleasing to God and an act of brotherhood in Islam.[1] Innumerable instances could be given to show the effect on the private lives of pious Moslems both of the prohibition and the recommendation. Thus, when the Government of India opened a general provident fund for its employees, offering handsome interest on compulsory deductions from their pay, the consciences of many Moslems, even in the poorest grades of Government service, prevented them accepting the interest. Nevertheless, in the everyday business of the market, the prohibition of usury is impossible to enforce, and attempts to enforce it, such as the East African courts have made, can only eventuate capriciously —though of the necessity of some check on exorbitant usury

[1] e.g. Q. 2, 245; 2, 276; 57, 11 and 18.

most judges with experience in the East are agreed. In *Ahmed* v. *Hosein*, 1 E.A. 39, and *Shariff Abdulla* v. *Nasibu*, 3 E.A. 90, a device by way of *Sadaqa* was rejected (see p. 202); *contra* in *Abdur Rahim* v. *Hatija*, 1 E.A. 86: the prohibition of usury was held inapplicable to a promise to pay a larger sum at a future date in exchange for a smaller sum now. (*Submitted*, however, this ruling is not sustainable on the authorities, though possibly so on custom.)

Numerous devices have been sanctioned by the Hanafi and Shafii schools to evade the prohibition; and the later Hanafi law even shows traces of the doctrines of *damnum emergens* and *lucrum cessans*. Even the Maliki law of to-day recognizes the *bai' bi'l wafa* (see below) under the name of *thania*. Commonest of all devices, as everywhere, is a fictitious acknowledgement by the borrower of a larger sum than he actually receives. Such an *iqrar* is conclusive (see p. 28), and even under English ideas of evidence it could hardly be displaced except by proof of undue influence. For the right of a *waqf* to exact interest see below, p. 214, note 3.

### B. SECURITY FOR DEBT

(a) The simplest form is *rahn* or pledge, whether of movable or immovable. This is a contract collateral to and independent of the loan. The contract of pledge is naturally based upon sale, since it is by sale that the security is in the last resort to be enforced. Accordingly the thing pledged must be capable of being sold, see pp. 182 and 190. The contract consists, as does sale, of declaration, acceptance, and delivery; but it differs from sale and resembles gift in that, until possession has actually been delivered, the pledgor may always resile and leave the pledgee if he has already lent the money with an unsecured claim.[1] The continued possession of the pledgee is equally essential to the maintenance of his rights. It follows therefore that Muhammadan law does not permit of second mortgages. *Nasoro* v. *Salim*, 1 E.A. 77.

In Maliki law[2] the pledgee's rights terminate even where the pledgor has recovered possession temporarily as his bailee, the

[1] Cf. *Jaffer* v. *Mahomed*, 6 E.A. 170; [2] *Ibn Asim*, Rule 233. cited below under *Bai Khiyar*.

reason being apparently that third parties, seeing the thing in the hands of its owner, are entitled to assume that his power over it is unrestricted. But this is not the Hanafi or Shafii doctrine. For Hanafi, see *Mejelle*, art. 749; and for Shafii, *Mwana Mkame*, 3 E.A. 48. This case is particularly instructive, as a sale in execution was held to be subject to the pledgee's rights contrary to the reason given for the Maliki rule. The case permits of the pledgor's continued user of the property pledged by arrangement with the pledgee.

The pledgee's right is normally the right of retention only, though accretions other than periodical fruits, e.g. young born to a flock, become part of the security. By agreement, however, both enjoyment and *periodical* fruits may belong to the pledgee, and as these are not taken into account against the principal debt they form a profit for the lender without infringing the rule against usury.

Foreclosure of the property is impossible, and neither pledgor nor pledgee can sell, even after expiry of the period named for repayment, without either the express consent of both parties or a judicial decree.

### (b) *Baiʿ Khiyar*

The forecloseable mortgage of Muhammadan law is the mortgage by conditional sale. Under this, the mortgagee is put into possession, and obtains the use and enjoyment on conditions similar to those just described. In the alternative it is possible for him to lease the property to the mortgagor, thereby obtaining under the name of lease-money what is practically interest on his money without being put to the trouble of managing the property; see *Said* v. *Mahfuz*, 1 Z. 189. Originally the whole transaction in all its forms was illegal as a breach of the law against usury. It was introduced by the convenient doctrine of 'necessity', and is said to have been first recognized in Bokhara, but it is now familiar in all systems of Muhammadan law—called *baiʿ biʾl wafa* in Hanafi law, in Maliki law *thaniya*, and among the Shafis and Ibadis of East Africa *baiʿ khiyar*, or sale option.

The *baiʿ biʾl wafa* may perhaps have originated in an extension of the numerous options of rescission of sale allowed by the

law (see p. 184), though of course it goes far beyond them. Normally, however, a sale must be absolute, see e.g. *Jaffer Dewji Khoja* v. *Md. b. Abdulla*, 6 E.A. 170; a sale with a promise to cancel dependent on a future event is null and void. To meet this difficulty those who practise the *bai' bi'l wafa* usually embody their proceedings in two separate contracts—one of sale and the other a collateral or nominally subsequent promise to reconvey. This is perhaps the only promise of future conduct the legally binding character of which is supported by a reference to Qoran, 5, 1 (see above, p. 182). This dissection of a single contract into two separate agreements presents no difficulty in Muhammadan law, where all acts-in-law must be orally expressed, and documentary evidence of them is in no way preferred to oral evidence. But it has led to trouble where (as universally in East Africa under enactments based on the Indian Evidence Act) the principles of the English law of evidence are in force. Thus in *Said* v. *Mahfuz*, 1 Z. 189, the deed in suit was expressed as an absolute sale (*bai' qitai*), coupled with a lease to the vendor of the property sold for one year at a rent, the lease being written on the same paper as the sale.[1] The court permitted evidence to be given of the conduct of the parties to show that what they intended was really a mortgage. Parol evidence was again permitted for a similar purpose in *Brit. Res.* v. *Hafiz*, 1 Z. 526. Where the document is on the face of it unambiguous, this is contrary to the English law and to the Indian Evidence Act—*Balkishen Das* v. *Legge*, 27 I.A. 58 (22 A. 149)—though it is possible for two separate documents to be read together as a single transaction where that was clearly the intention of the parties, or for parol evidence to be given where the document is on the face of it incomplete. In *Maung Kyin* v. *Ma Shwe La*, 44 I.A. 236, the rule was again confirmed that as between the parties to an absolute conveyance Sec. 92 Indian Evidence Act precludes the giving of oral evidence to show that the transaction was a mortgage. This has been followed by the Court of Appeal for East Africa on appeal from the High Court of Zanzibar in *Rashid* v. *Salem*, 1 Z. 614, the Muhammadan law

[1] In *Pirbhai Alibhai* v. *Md. b. Abdulla*, 2 Z. 43, the court refused to construe the expression 'mortgage *bai' kata* [*qatai*]' on the ground that it was a contradiction incapable of meaning.

of evidence having been totally repealed in Zanzibar by Sec. 2 of the Zanzibar Evidence Decree. But in Maung Kyin's case the Privy Council proceeded to explain that this rule only applied *inter partes*, and therefore a grantee even for value from an ostensible owner who at the time of the grant is aware of a defect in his grantor's title cannot take advantage of the rule. Where, e.g., *A* conveys property to *B* by a document which is in form an absolute sale, but remains in possession of it owing to a tacit agreement between them that the sale is merely a mortgage, *B* cannot convey an absolute title to a third party *C*, unless *C* takes for value in good faith in ignorance of the tacit understanding, and the fact that *A* continued in possession will be said to put *C* upon inquiry as to the real nature of *B*'s rights. Sec. 92 Indian Evidence Act is a rule of evidence, not a rule of substantive law. In *Rashid* v. *Salem* the mortgagor was suing a third party to recover possession. It was held that he could not go behind his own deed.

Originally, on the expiry of the time stipulated for repayment in a *bai' khiyar* the sale became absolute, but British courts applying the English principle that there must be no clog on the equity of redemption have held that even after that date it continues in force as a mortgage. See *Said* v. *Mahfuz*, 1 Z. 189, and *British Resident* v. *Hafiz*, 1 Z. 526.

A *bai' khiyar*, like a *rahn*, can only be terminated by:

(a) Mutual consent,

(b) Repayment and reconveyance to the mortgagor, or

(c) Judicial decree.

It differs from a *rahn* in that the judicial decree will be for foreclosure, not for sale. Where English law has made writing essential to certain transfers of property it is advisable for the mortgagor on redemption to insist on a formal reconveyance.

## CHAPTER XXV

# GIFT

### A. DEFINITION

'An immediate and unqualified transfer of ownership of a determinate object in the lifetime of the transferor without an equivalent[1] (*'ewad*). So say all schools.[1]

The pillars, or essentials, of gift as of sale are declaration, acceptance, and delivery of possession. 'Anything that may be sold may be given; anything that may not be sold, as an unknown or usurped thing or an escaped animal, may not be given.'[2] So, therefore, there can be no gift of a future interest. *Khujooroonissa* v. *Roshan Jehan*, 31 A. 291; *Chaudhri Mehdi Hasan*, 33 I.A. 68.

Gift differs from sale in that

(a) there is no equivalent (*'ewad*);

(b) actual delivery of possession is necessary to completion of a gift (except perhaps a *sadaqa*, see pp. 202–3), but only the possibility of delivery to a sale. (As to both these points, see below, *hiba bi'l 'ewad.*) Maliki law, like the other schools, lays down that a gift is only complete on possession,[3] and if a donor dies without delivering the gift falls into his estate; but in Maliki law only he may be compelled to deliver even by the heirs of the donee unless such compulsion be inequitable, e.g. on grounds of his own subsequent illness (not necessarily death-sickness) or destitution.

### B. CLASSIFICATION

Although gift is gratuitous, the law regards it as always made with an object in view. Thus it is of two kinds:

(a) *Sadaqa*, the object being to acquire merit in the sight of God and a recompense (*thawab*) in the next world.[4]

(b) *Hiba*, or worldly gift, to ingratiate oneself with a human being: of this, also, the *Minhaj* uses the word *thawab*. The *Hedaya*, Bk. 30, ch. 2, p. 486, says:

[1] F.Q. 405. *Hedaya*, Bk. 30, Introd.; Baillie's *Digest*, Bk. 8, ch. 1; Ruxton, p. 263; R. and S. Rule 165; *Ibn Asim*, Rule 1191; Baillie, *Imameea*, Bk. 4, ch. 1.

[2] *Minhaj*, Bk. 24, p. 234.

[3] R. and S. Rule 165.

[4] *Minhaj*, loc. cit.

'The object of a gift to a stranger is a return; for it is the custom to send presents to a person of high rank that he may protect the donor, to a person of inferior rank that the donor may obtain his services, and to a person of equal rank that he may obtain an equivalent.'

### C. SADAQA (in East Africa *nathira* or *nathiri*)

The Prophet found himself in a land where nature was niggardly in its gifts and the inhabitants consequently inclined to be niggardly also. He taught therefore the duty not merely of almsgiving to the needy[1] but of the wider virtue of which almsgiving is merely a species, namely, generosity, though always without extravagance. Such generosity is a virtue pleasing in the sight of God, and even a gift to the rich (e.g. hospitality) may be a *sadaqa* if given without a thought of worldly recompense.[2] But among objects of generosity a man's own family have the first claim. Thrice over, in almost the same words,[3] the Qoran approves the righteousness of him 'who gives wealth for the love of God to kindred and orphans and the poor and the wayfarer and beggars and captives'—kindred ranking first; and a tradition in the same sense runs: 'It is better to give alms to kindred than to beggars. The most excellent of *sadaqa* is that which a man bestows on his own family.'

*Sadaqa*, from its very nature, cannot be used as cloak for an act unpleasing to God.[4] Thus in *Ahmed* v. *Hosein*, 1 E.A. 39, and *Shariff Abdulla* v. *Nasibu*, 3 E.A. 90, attempts to use it as a cloak for what the *sharia* regards as usury were checked: and in *Joka* v. *Iki*, 4 E.A. 27, it was held unpleasing to God for a parent to treat children unequally as by giving to one absolutely to the exclusion of the others a large portion of the property.[5] *Semble*, a deed of gift while heavily indebted would be equally unpleasing and void; and see *Talibu* v. *Exors. of Siwa Haji*, 2 E.A. 33.

The advantage of *sadaqa* for purely secular purposes is that it is irrevocable from the moment of declaration (*ijab*), and that acceptance and delivery of possession are alike unnecessary: see *Mohamed* v. *Mwana Mkee*, 1 E.A. 55, and *Korshed* v. *Mwanate*,

[1] Cf. Q. **93**, 6–11, *et al. loc.*
[2] *Hedaya*, 489.
[3] Q. **2**, 177, 215, and **4**, 36.
[4] *Minhaj*, Bk. 32, sec. 4, and Bk. 24, p. 234; R. and S. 180.
[5] Similar rules are familar to students of the Middle Ages: e.g. Beaumanoir, sec. 1972.

7 E.A. 194.[1] There is some authority, however, for saying that until delivery is effected the human transferee being 'a mere volunteer' has (at least in our Courts) no right to enforce it.

### D. HIBA, SECULAR GIFT

(a) *until delivery*, or until a reciprocal gift has been made and accepted, is always revocable by the donor (but see above, p. 201, for Maliki law), though the Prophet is reported to have said 'To revoke a gift is like swallowing one's own spittle'.

(b) *after delivery*, is revocable only

(i) by consent, or

(ii) by decree of a Court.

Such a decree may be given

(i) in all schools on the ground that a reciprocal present was contracted for or is obligatory by custom and has not been made, or

(ii)[2] in Maliki and Shafii law where the donor was the father, the mother in the lifetime of the father, or (in Shafii law only) any other ascendant.

(iii)[2] *E converso*, Hanafi and Shia law permit a decree for revocation in all cases where the donee was a stranger, but forbid it on the ground of relation: *Abdulla* v. *Mahomed Valli*, 1 Z. 258:

1. In Hanafi law, a spouse or any relative within the prohibited degrees.

2. In Shia law, any blood kinsman: revocation between spouses is permissible, though in a high degree *makruh*.

(c) In all schools judicial revocation is barred

(i) By the death of the donor.

(ii) By the death, illness, or poverty (*fiqr*; insolvency, *falas*, is not essential) of the donee.[3]

(iii) By the marriage of the donee [undertaken, presumably, in view of his increased affluence by the gift].[3]

(iv) By his use of the sum gifted to pay his debts.[3]

[1] Also *Hedaya*, **30**, 2, 3, 489; *Ibn Asim*, 1211.

[2] The application of these rules is a matter of the personal law of the donor, not of the *lex loci rei sitae*. Thus a gift of house property in Zanzibar by father and mother to their son, the parties being Khojas, was governed by Shia, not by Shafii law (*Abdulla* v. *Mahomed Valli*, 1 Z. 258).

[3] *Ibn Asim*, 1212, 1213.

(v) By his parting with the property, adding to its value, or changing its identity, or by these things happening without his volition, e.g. the accidental loss or destruction of the property.

(vi) By his giving and the donor accepting a return gift.

### E. HIBA BI'L 'EWAD

A gift, it will be seen from the above, is a transfer without consideration or equivalent *'ewad*, but made in view of a reward, *thawab*. That reward, however, is sometimes spoken of as an *'ewad*, and we have an apparent contradiction in terms due to the use of one word in two different senses. We must distinguish:

(i) Where the reward is fixed by stipulation and comes within the legal definition of *'ewad* in the doctrine of sale; the *hiba bi'l 'ewad*, by whatever name the parties may have chosen to call it, is simply a sale, and all the incidents of sale attach to it, including (where the law of pre-emption is in force) the liability to be pre-empted.

(ii) But a reward may not be an *'ewad* within the definition of that word in the law of sale—it may not be expressed or capable of being completely expressed as a definite sum of money—and yet it may, if either expressly stipulated for or actually paid, have the effect (1) of rendering the gift irrevocable even before delivery of possession; (2) that a failure to render the return after delivery will be cause for revocation. In *Ioanni Demetriades* v. *Liverdou*, 10 Cyp. 49, a document was in form a sale at a definite price. On a claim for pre-emption the transferee (son of the transferor) was able to show that the real consideration was an undertaking to pay a debt of the transferor, to maintain both his parents for life and his two sisters during spinsterhood, and to provide them with suitable *dots* on their marriage (amounts not stipulated). Such a return is manifestly incapable of accurate computation: the gift therefore was not a sale and the pre-emptor failed; but failure to perform the stipulated return might have been a ground for revocation. Similarly (*submitted*) the reservation of income in *Mohammed* v. *Fakhr Jehan*, 49 I.A. 45, and *Umjad Ali* v. *Mohammadi*, 11 M.I.A. 517 (see p. 188) may perhaps be regarded as an *'ewad* in the second though not in the first sense. Failure to pay it would entail revocation.

These two senses of the word *'ewad* explain, though they do not reconcile, the discrepancy between such judgements as *Fida Ali* v. *Muzaffar Ali*, 5 A. 65,[1] and (*contra*) *Bashir Ahmad* v. *Zubaida*, 1 Luck. 83. The Prophet said: 'Send ye presents to one another for the increase of your love'; and where transactions on the face of them purely business transactions are entered into between persons, as e.g. husband and wife, bound together by ties of natural love and affection, there must always be room for difference of opinion how far a non-monetary element incapable of exact computation enters into the consideration for the transfer.

The practice of *hiba bi'l 'ewad* has received a large fictitious extension in India, where it has been seized upon as a substitute for freedom of testation. A man makes large gifts of his property (of course before his death-sickness) to those of his heirs or others whom he wishes to favour and accepts a small return for each gift. 'Undoubtedly,' said the Privy Council in *Khujooroonissa* v *Roushun Jehan*, 3 I.A. 291, 'the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given.' But once the consideration has been given the gift is irrevocable, even without delivery of possession. The practice has been checked but not abolished by the rule in *Khujooroonissa* v. *Roushun Jehan* and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*, 33 I.A. 68; 28 A. 439: see also *Ibrahim* v. *Saiboo*, 34 I.A. 167; see above, p. 173, and also for rules observed elsewhere in Islam which militate against this practice.

*Hiba ba shart ul 'ewad* is the name used for *hiba bi'l 'ewad* when the *'ewad*, whether such as defined in the law of sale or not, is expressly stipulated.

[1] Followed in *Mohamed Esuph*, 23 M. 70; *Ali Baksh*, P.R. 23 of 1906; and *Fateh Ali*, 9 Lah. 428.

## CHAPTER XXVI

# *WAQF* OR *HABS*

### A. DERIVATION

THE word *waqf*, pl. *auqaf*, comes from a root meaning 'to cause to stand still, to render firm'; *habs*, pl. *hubus*, the commoner word in West Africa, from a root meaning 'to imprison or confine'. 'Foundation' [1] expresses the former idea, 'tying up' (as in a settlement) the latter.

### B. DEFINITION AND CHARACTER

The essence of a *waqf* at the present day is that it is a perpetuity: no perpetuity, no *waqf*.[2] But this has not always been the case. 'According to [Abu] Haneefa it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue and the advantage of it go to some charitable purpose in the manner of a loan.'[3] This view also survives in the early Maliki lawyers, among whom a *waqf* for a definite period with reversion to the *waqif* or his heirs (now obsolete) was a possibility; and there are traces of it in Shia law in which the word *habs* is used for the purely secular grant of a usufruct, and Shia authority may be found for the contention that in default of express trusts the property is not maintained for the benefit of the poor but reverts to the *waqif*. The next stage is that adopted in Clavel's definition[4] from Hanafi and Maliki sources: 'The immobilization of the usufruct of a thing for a term equal to the duration of that thing . . . ' [&c.], leaving the question of *dominium* open.

Practically, however, only one definition holds the field to-day in all schools alike, that first propounded by Imam Abu Yusuf, the real architect of the law in this field: 'According to the two disciples, *waqf* signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property,

[1] Cf. in Hindustani *bewuquf*, a man without foundations, unstable, a fool; *ilm ka waqif*, one well grounded in a science, an expert.

[2] See below, pp. 209 and 215.

[3] *Jewun Doss* v. *Shah Kubeer-ood-deen*, 2 M.I.A. 390, at 421; *Hedaya*, Bk. 15.

[4] Clavel, D.M. Stat. Pers., Art. 740.

whence the appropriator's right in it is extinguished and it becomes the property of God by the advantage of it resulting to his creatures.'[1]

### C. HISTORY

[*This section should be read in conjunction with section E—Objects.*] *Waqf* is a branch of *sadaqa* or religious gift, consequently the texts and traditions (see above, p. 202) which apply to *sadaqa* govern also *waqf*. In particular, a Moslem's duty to his own family takes precedence of all other objects of his generosity. That duty, indeed, may be viewed as a branch of his duty to propagate Islam; see *hadith* quoted on p. 36. The attempt to distinguish between 'family endowment' and 'religious and charitable objects' is entirely foreign to Islam. Nothing in the Qoran, only one tradition in Bokhari, and a few in later collections deal with *waqf* as distinct from other forms of *sadaqa*. Bokhari's tradition[2] in its simplest form runs as follows—'Omar b. al Khattab said: "Apostle of God, I have land at Khaibar, the most precious thing that ever I had; what shall I do with it to be pleasing to God?" The Prophet replied: "Render it firm so that it cannot be sold nor given nor inherited; and distribute its income to the poor," ' adding, according to a variant also given by Bokhari, ' "But let there be no accumulations".'

From the point of view of scholarship, this tradition may be open to suspicion: it is difficult to reconcile either with the original temporary character of *waqf* (see above) or with what we learn of Khaibar from other sources;[3] and the same remark applies even more strongly to later tendentious versions of the same *hadith* which direct Omar to provide for himself and his family out of the revenues in priority over the poor (although in view of the Qoranic texts above cited (p. 202) the direction to provide for his family might well be implied).

But the authenticity of the materials of which Muhammadan law is built up is a matter which, as practical lawyers, we are not entitled to question, when all Moslems are agreed. The law rests not only on traditions (which we may doubt, though

[1] *Hedaya*; and *Jewan Doss* (loc. cit.); *Jawahra* v. *Akbar Husain*, 7 A. 178 (Mahmood J.); Omar Hilmi, Art. 1; *Minhaj*, Bk. 23, sec. 3, p. 232.

[2] Bokhari, 54, 19.

[3] See e.g. *Kitab ul Kharaj* (Fagnan), pp. 76 and 133.

they do not), nor even on debatable interpretations of Qoranic texts, but on the solid basis of the *ijmaʿa* or consensus of opinion of the great lawyers of all schools who unanimously interpret those texts in the same sense, accept those traditions, and declare the validity of family settlement as the pre-eminent form of religious and charitable foundation. So far as it enunciated anything to the contrary, the decision in *Abul Fata* v. *Russumoy*[1] is (as, indeed, their Lordships impliedly admit) based on nothing but the lack of correct information.

*Ijmaʿa* is the principal basis of *waqf* law; and some of its most famous rules[2] have admittedly no other foundation.

The distinction which is sometimes made between *waqf* by the sacred law (*waqf sharʿi*) and customary *waqf* (*waqf ada*) is commonly misunderstood. All *waqf* is *sharʿi*—that is to say, it is based on sacred sources and developed by legal exegesis which has thrown its mantle over the customary element also. The element of custom consists not in the provision for a man's family, which is a very sacred duty, but in the succession of interests within that family, and perhaps also in the provision for himself (see p. 212).

### D. WHO CAN CREATE A WAQF?

Any Moslem, or in Hanafi law (but not Maliki or Shafii) any subject of or protected alien in a Moslem state,[3] who is:

(a) free, sane, and master of his own affairs to the extent necessary for the gift he makes. A total interdiction, e.g. minority or prodigality, will bar the gift altogether; a partial interdiction, e.g. death-sickness or the restriction which Maliki law places on a married woman's disposal of property, bars it *pro tanto*.

(b) The full and unrestricted owner of the property dedicated.

In the Ottoman Empire a private person could not dedicate tithe-paying land, the ultimate ownership of which was held to reside in the Sultan; in India the dedication of revenue-paying land is not questioned. Similarly, in the Ottoman Empire neither mortgagor nor mortgagee (whatever the form

[1] 22 I.A. 76; 22 C. 619. See below, p. 213.

[2] See below, p. 218.

[3] A grant by a non-Moslem ruler to a Moslem subject for the upkeep of a shrine is not a *waqf* (*Muhammad Raza* v. *Yadgar Husain*, 51 I.A. 398).

of mortgage) could dedicate the mortgaged land. Such a grant is contingent (see below, p. 215); and the dedication could only be made by both parties agreeing together to convey a complete title. In India, however, *waqf* is valid even though made sub- to an existing mortgage and other specific charges: but not where contrary to a disability to transfer imposed by law.[1]

(c) The possessor of the property dedicated. *Waqf* being a form of gift, the *waqif* must be in a position to give possession (either *haqiqi* or *hukmi*; see p. 191, Possession), even in those cases where the possession remains with him in a new character as *mutawali*.

### E. FOR WHAT OBJECTS?

The law of *waqf* fills the place which in other systems is filled by the law of public non-trading corporations (including, however, some trade guilds), religious and charitable foundations and trusts, religious offices, and family settlements. It is the only form of perpetuity known to Islam.

It may be made for any purpose whatever which is recognized as laudable both by Islam and by the religion of the founder. Thus a Moslem cannot make a *waqf* for church or synagogue; a Christian cannot make a *waqf* either for mosque or church—the former is contrary to his own religion, the latter to Islam.[2] A Hindu cannot make a *waqf* for a Moslem shrine.[3] But any man may provide for a hospital or an almshouse, even though the beneficiaries be not confined to his own faith: and Moslem, Christian, and Jew alike may provide for the *Bait ul Muqaddas* at Jerusalem, which all three reverence though in different ways.

A *waqf* being a *ṣadaqa* cannot be used for purposes unpleasing to God; not therefore to evade or delay payment of a man's just debts.[4] The purposes recognized as laudable by Islam are these:

(a) First and foremost, a man's duty to his own family; see above, p. 202;

(b) The maintenance of God's worship according to the tenets of Islam;

[1] *Musharraf* v. *Sikandar*, 51 A. 40.

[2] But of course in British dependencies the English law of charitable trusts can be resorted to (*A.G.* v. *Saleh Muhammad*, 1 Z. 544).

[3] *Muhammad Raza* v. *Yadgar Husain*, 51 I.A. 398; see above, p. 208.

[4] *Talibu* v. *Exors. of Siwa Haji*, 2 E.A. 33, and see above, p. 202. There are Indian and Algerian decisions also setting aside *waqfs* in fraud of creditors.

(c) Charities in the everyday English sense, including works of public utility.

It will be convenient to treat of these in the reverse order, proceeding from the general to the particular.

(c) *Charities*. No general definition can be given. Hospitals, almshouses, pensions for the poor, schools, universities, public libraries, conduits and fountains supplying water to great cities, bridges, serais, and chests of money to be lent to the poor either free or on easy terms (like the medieval *monts de piété*): all these have been the objects of famous *waqfs*. In *Barton* v. *O'Swald*, 1 Z. 420, dedication of land to public use as a right of way was treated as *waqf*.

English lawyers have been much exercised by the question whether the English rule in *Morice* v. *Bishop of Durham*, 10 Ves. 539, should be applied to *waqf*. By that rule a bequest to trustees for a charitable purpose will be void for uncertainty if the bequest is too general and indefinite for the court to execute. The distinction on which that case turns between 'charitable' and other trusts is foreign to the law of *waqf*;[1] and if the intention to create a *waqf* be unequivocally declared, e.g. by the use of such a technical word as *waqf*, *habs*, or *sadaqa* (though none of these words is strictly necessary), any uncertainty as to objects will be cured by a general presumption in favour of administration for the benefit of the Moslem poor through the agency of the *Bait-ul-Mal*. In countries where neither the *Bait-ul-Mal* nor any similar agency functions there may of course be difficulty.[2]

(b) *Waqfs for worship*. 'The motive of dedication is the seeking to approach God and worship him by the gift of property for philanthropic purposes.'[3] It is not sufficient that a *waqf* enables the founder to approach God: there must be some advantage resulting to God's creatures. *Waqfs* for the erection and upkeep of mosques and maintenance of worship therein[3] are common; but a chapel for a wealthy man's private devotions

[1] See below, p. 213, as to Privy Council cases importing that distinction from English law, and reasons why such cases are not followed in Africa.

[2] *Allarakhia* v. *Lakha*, 1 Z. 119; *Omar Fakir* v. *Remtulla*, 4 T. of 1928; *Muhammad Ismail Ariff* v. *Ahmed Moola*, 43 I.A. 127; 43 C. 1085; *Ibrahim Ismail* v. *Abdool Carrim*, 35 I.A. 151 (1908), A.C. 526.

[3] Hilmi, Art. 52.

is not a *waqf* and is not sacred. A *waqf* for a graveyard is undoubtedly good;[1] but although the sentiment of respect for graves, even isolated graves, is strong among Moslems, a *waqf* for the upkeep of a single grave (other at least than that of a saint) is bad (perhaps because there is no general resulting benefit to God's creatures). It is not certain how far a *waqif* may limit the user of a graveyard to a particular sect, race, or family.

The crucial question as to any particular religious purpose is whether it savours of idolatry or polytheism. On this question Moslem views vary. The puritan Wahabi regards even the veneration of the Ka'aba with disfavour, and many modernists hold the same view. On the other hand, the immense majority of Moslems all over the world venerate the tombs of saints, both small and great.

In *Fakhruddin Shah* v. *Kifayatullah*, 7 A.L.J.R. 1095; (1910), 8 I.C. 578, Karamat Husain J. considered this question of the veneration of tombs. He held that 'the recital of the *fateha* over food, and its distribution to all and sundry at the grave of a deceased Moslem . . . gathering together for festivities at the tomb of a deceased Moslem, *whether saint or not* . . . illuminations and distribution of food . . . savour of idolatry. . . . The Prophet said, "Do not make my tomb a place for festivities".' On the other hand, prayers for the dead are good. 'The Prophet and the first three Caliphs used to visit the tombs of the martyrs at the beginning of every year and used to say, "May safety be for you in consequence of your patience. The next world is good for you".' This test, strictly applied, would invalidate innumerable *waqfs* which have been held valid in India and the practices of many, if not most, Moslems all over the world. It was expressly dissented from by Mirza J. in *Azim-un-nissa* v. *Sirdar Ali*, 29 Bom. L.R. 434; 102 I.C. 129, holding that 'in such cases the Courts are not primarily concerned to decide what may be the true tenets and practice of a religion as propounded by its founder, but must consider them as customarily understood and practised in the country where they are administering the law.'

It is praiseworthy for a Moslem to assist in the spread of

[1] *Alias Nurmahomed* v. *Ismail*, 1 Z. 30; cf. also *Haidar* v. *Risasi*, 3 Z. 30.

Islam. Under different conditions a *waqf* for war horses and armour for *jihad* was one of the earliest recognized *waqfs* of movables. Ancient *waqfs* exist for communities of the religious orders, e.g. the Dancing Dervishes: see *Fakhri Bey* v. *Shekhi Jelal*, 11 Cyp. 61. Modern *waqfs* for the same purpose or for other missions would be valid.

(a) *Waqfs intended primarily for the discharge of a man's duty to his own family: waqf ala'l aulad.*

(i) In Hanafi law only [1] but in no other system a founder may make his own maintenance for life a first charge on the whole income of the *waqf*. The Prophet is reported to have said, 'A man giving maintenance to himself is giving *sadaqa*'. This was held illegal in Shafii law, *Seif* v. *Adm. Gen.*, 6 E.A. 74, and in Shia law, *Abadi Begum* v. *Kaniz Zainab*, 54 I.A. 33 (but see also p. 215).

(ii) In Hanafi law also [1] but in no other system a founder may create a *waqf*, making the payment of his own debts the first charge on the income. But he must not thereby defeat or delay his creditors. A composition with creditors is of course possible in all systems: but it is not *per se* a *waqf*.

(iii) In all systems *waqfs* may be made for the support of the founder's own immediate descendants and for collaterals, capable of taking at the time of creation, with remainder over to the poor; and similarly the use of a house, at least, may be given to a wife until death or remarriage, with remainder over; and in India daughters-in-law have been held to be included in the family for purposes of *waqf*.

This was the case in *Shawana* v. *Ali*, 3 Z. 6, an Ibadi case in which it was held after consulting both Ibadi and Shafii authorities that the phrase *auladihi allathina min sulbihi* (literally 'from his backbone') means with one or two exceptions children of the first generation only, and therefore the property went to the ultimate charity on the extinction of that generation. Similarly, the first and second generations may be specified.

In Ibadi law also (*Ali b. Nassor* v. *Zwena*, 1 Z. 365), if a man

[1] These and other advantages of the Hanafi system (see also pp. 215–16) make it a common practice among Maliki and Shafii founders in Northern Africa to dedicate their *waqfs* according to Hanafi law. Such a course is quite orthodox (see above, p. 18), but impossible in India under the Wakf Validating Act 1913.

leaves property as *waqf* for his descendants, whether for one or two generations only or in perpetuity, his immediate children can either confirm the *waqf* or reject it and deal with the property as their absolute property. Once they have exercised their option in this respect, the *waqf* stands or falls. The Qadis consulted in *Shawana* v. *Ali*, 3 Z. 6, explained the rule by saying that such a *waqf* is a bequest in favour of heirs which is only good if not objected to by other heirs. It may perhaps be surmised that some notion of the *'ashirat* or family council (cf. Guardianship of Property, p. 107) also enters into it.

In a series of cases [1] the Privy Council established, so far as India is concerned, a distinction imported from English law between public charitable and private endowments. These culminated in the case of *Abul Fata* v. *Russumoy* (1894), 22 I.A. 76, in which it was held that a perpetuity could not be established by the device of an ultimate but illusory gift to the poor: there must be a substantial dedication of the property to charity, not merely a gift to charity of a substantial amount.[2] The attempted distinction is, as (outside Indian courts) every one now admits, foreign to Muhammadan ideas: [3] family settlements infringing the suggested rule have been common throughout Islam for centuries. Moreover, the effect of the leading case is by the terms of the judgement confined territorially to India, and Indian decisions, even of the Privy Council, do not bind African Courts.[4] Accordingly *waqf* for descendants in perpetuity (with remainder to the poor on failure of descendants) have been held valid in *Suleman* v. *Salem* (1910), 1 Z. 328; *Ali* v. *Zwena* (1911), 1 Z. 365, in spite of Abul Fata's case.[5]

Nevertheless, two grounds which moved the Privy Council in coming to these decisions are of importance: see p. 219

[1] *Mahomed Ahsanulla*, 17 I.A. 28; 17 C. 498; *Abdul Gafur*, 19 I.A. 170; 17 B. 1; *Abul Fata* 22 I.A. 76; 22 C. 619: see also *Mujibun nissa*, 28 I.A. 15; *Muhammad Munawar*, 32 I.A. 86; *Mutu* v. *Yava*, 44 I.A. 21, and cases cited below (notes 2 and 5).

[2] Cf. *Bala Mal* v. *Ata ullah*, 54 I.A. 372.

[3] Though actually family *waqfs* are commonly left uncontrolled by the *Bait-ul-Mal* and by ministries or commissions of *auqaf*.

[4] *Taliba* v. *Exors. of Siwa*, 2 E.A. 33; *Shawana* v. *Ali*, 3 Z. 6, &c.

[5] In India the Wakf Validating Act 1913 passed to remove the effect of this decision is most unfortunately not retrospective. Difficulties therefore still arise as to ancient *waqfs*: see *Bala Mal* above cited; *Solehman* v. *Salimulla*, 49 I.A. 153, and *Habibullah* v. *Janaki Nath*, P.C. Appeal 86 of 1928. Act XXXII of 1930 remedies this omission.

(accumulations) and p. 223 (control of *mutawali*). The Muhammadan remedy is to maintain the *waqf*, but to treat the illegal provisions as void.

### F. WHAT PROPERTY MAY BE MADE WAQF

(a) Property[1] which is capable of being given. This follows from the fact that *waqf* is a form of gift; therefore

(i) *mal mutaqawwim* } see pp. 201 and 182.
(ii) *mulk* }

(iii) specific property, *muiyyin*. Not therefore so many bushels of grain or so much money or the assets of my business (to be realized) nor a debt to be recovered from *X* (even in Maliki law where such a debt is a thing capable of sale);

(iv) capable of immediate delivery. Shares in companies and interest-bearing loans have been ruled out (*Kulsom* v. *Golam Hossein*, 10 C.W.N. 449) on the ground that physical separate possession of the interest is impossible. But such new forms of wealth should, it is submitted, be regarded as themselves things. Actually, the great Moslem foundations at Mecca, Kerbela, and elsewhere are believed to have large investments in this form of wealth, which may be regarded as valid by custom. The application of the rule against *musha'a* to *waqf* is expressly denied by Omar Hilmi, Arts. 64, 65.

(b) In Maliki and Shafii law, 'Of such a kind that perpetual use may be made of it' [2] . . . 'either movable or immovable.' 'Houses and plantations may be made *waqf* even though on land leased from another.' But not things which are consumed in a single use, nor, adds the *Minhaj*, odoriferous trees.

(c) In this as in all else the Hanafi school gives a wider extension to *waqfs*, Imam Muhammad, who is usually followed, having permitted the *waqf* of anything sanctioned by custom. This includes some things only capable of a fictitious perpetuity, e.g. a chest of money for loans to the poor (to be repaid with other money) [3] or of artisan's tools (to be renewed as they wear out).

[1] In India, 'any property' (Wakf Validating Act 1913).

[2] *Minhaj*, Bk. 23, sec. 1, *ad init*, p. 230.

[3] Such a *waqf* was allowed to take interest if so directed by the *waqif*. The law against usury applies between man and man, but obviously not between man and God.

### G. HOW CAN A WAQF BE CREATED?

(a) Divesting of ownership.
(b) Formalities *inter vivos*.
(c) Formalities by will.

(a) *Divesting of ownership.*

The founder must absolutely strip himself of all title in the property settled: a *waqf* defeasible or revocable is in all systems void.

Thus, in *Amiruddin* v. *Muzaffar al Hasan*, 45 A. 107, a document which purported to create a *waqf in praesenti* provided that the *waqif* should be the first *mutawali* with *inter alia* power to sell or mortgage the property during her own lifetime (i.e. absolutely to defeat the *waqf*). Held that the *waqf* being contingent was absolutely void and could not be validated either as a *waqf in praesenti* or as a testamentary disposition. Similarly, where the settlor's children are to take an absolute estate and the *waqf* is accordingly contingent on the death of the settlor without issue; *Pathukutti* v. *Avathalakutti*, 13 M. 66; *Casamally* v. *Currimbhoy*, 36 B. 214. See also *Hamid Ali* v. *Mujawar Husain*, 24 A. 257—a Shia case. But:

(i) In all systems the founder may appoint himself the first *mutawali*, or constituted guardian, of the *waqf*, and may assign to himself in that capacity a remuneration not exceeding that which he appoints for subsequent *mutawalis* and not exceeding the customary remuneration.[1]

(ii) Certainly in the Hanafi system, and as regards 1 and 2 but not 3, perhaps in the others, the founder may expressly reserve to himself in the *waqfiyat* (declaration or instrument of foundation, see below) a power to modify the foundation in the following ways:

(1) By modifying the course of devolution or the method of appointment to the office of *mutawali*.
(2) Without prejudice to the rights of existing beneficiaries by adding to or altering the objects (within the limits recognized as laudable by law) on which the income may be expended.

[1] For a Shia case, see *Abadi Begum* v. *Kaniz Zainab*, 54 I.A. 33.

(3) Even the right to withdraw the *waqf* property from the *waqf* in exchange for other property of not less value. (Hanafi law only.)

But any such power must be clearly and expressly reserved in the *waqfiyat*, which will be strictly construed.

(iii) Normally the *waqif* retains during his life the right of appointing a new *mutawali* when required.

(iv) *In the Hanafi system only* the *waqif* may retain to himself for life the usufruct of the property (see p. 212), without power of dealing in any way with the title or encumbering even the use and enjoyment beyond the term of his own life.

He may not, for instance, reserve to himself the right to grant a lease beyond the term of his own life [1] (leases not exceeding one year are permitted). But see below (p. 222) as to the Qadi's powers to sanction such a lease.

(b) *Formalities, inter vivos.*

(i) As in other Muhammadan transfers of property, writing is not strictly necessary,[2] though its advantages are obvious and its adoption practically universal.

(ii) It is doubtful whether the presence of two witnesses is necessary to the validity of the foundation, though where the Muhammadan law of evidence prevails it would be practically impossible to prove the declaration without them. In *Court of Wards* v. *Ilahi Baksh*, 40 I.A. 18, the existence of a *waqf* and the extent of land covered by it were treated as established by user and by entry in a public record of customary rights, even though the original foundation was no longer traceable. In *Jewun Doss* v. *Kubeerooddeen*, 2 M.I.A. 390; *Muhammad Hamid* v. *Mian Mahmud*, 50 I.A. 92; 4 Lah. 15, and in the next-mentioned case, it was also held that dedication may be inferred from repute and from facts not otherwise explicable.

(iii) Declaration, *ijab*, to be expressed in the perfect tense as in other Muhammadan acts, is essential. According to Karamat Husain J. in *Fakhruddin* v. *Kifayat ullah*, 7 A.L.J.R. 1095; (1910) 8 I.C. 578; (cf. *Banubee* v. *Narsingrao*, 31 B. 250; see also Hilmi, Art. 88), this must be delivered orally: if e.g. the terms are

[1] Cf. *Jabeda Khatun* v. *Syed Mahomed*, 57 I.A. 125; and Omar Hilmi, Art. 270.

[2] *Khanim* v. *Dianello*, 6 Cyp. 52.

embodied in a written document, the *waqif* must none the less read out the whole document, which will merely be evidence of his verbal utterance. *Quaere*, whether this is good law where the Law of Evidence is founded on English models? It is not necessary that the word *waqf*, *habs*, or *sadaqa* should be used in the declaration, provided that the intention of the declarant is clear: *Shah Mohammad* v. *Md. Shamsuddin*, 2 Luck. 109.

(iv) Acceptance? It has been suggested that in Hanafi law *waqf* is a unilateral declaration, while in Shia law it is a bilateral contract: *Agha Ali* v. *Altaf Husain*, 14 A. 429 at 447, cited in *Fakhruddin* above). The fact, however, seems to be that a unilateral declaration is sufficient in Sunni law of all schools where, and only in so far as,

(1) there is no determinate beneficiary (as e.g. in a *waqf* for the poor or for the foundation of a mosque),[1] and
(2) no transfer to a *mutawali* other than the founder, or
(3) where the first beneficiary (in Hanafi law only) is the founder himself.

In all other cases there must be acceptance whether in Sunni, Shia, or Ibadi law: see e.g. *Minhaj*, Bk. 23, sec. 1, p. 231. That is to say, acceptance is necessary except where on the facts of the case it is impossible.

(v) Transfer of possession? The rule is the same as for acceptance. Cf. per Cave L.C. in *Solehman Qadir* v. *Salimullah*, 49 I.A. 153, 'The *wakfnamas* were gifts and were therefore subject to the rule of Mahommedan law, which requires that a gift shall be accompanied by delivery'; see above, pp. 201–3, and ch. xxiii, p. 190.

(vi) The judicial approval of the Qadi is necessary according to Abu Yusuf, and appears to have been usual in the late Ottoman Empire. Where the *waqif* himself was the first *mutawali*, a *mutawali ad litem* had to be appointed to conduct the case against him. In French territories the Qadi registers the *waqf* 'as notary, not as judge'. In British territories neither judicial approval nor registration appear to be necessary: *Muhammad Rustam* v. *Mushtaq Husain*, 47 I.A. 224.

[1] See Omar Hilmi, Art. 47.

(c) *Formalities by will.*

*Waqfs* by will or by gift in death-sickness differ in no way from other legacies or gifts in death-sickness, are subject to the same restrictions, and have not as *waqfs* any priority over other such gifts or legacies.

### H. MOTIVES FOR WAQF ALA'L AULAD

(a) Except that he cannot terminate the *waqf* or escape liability to the Qadi for its continuance, the *waqif* may as first *mutawali* (and in Hanafi law first beneficiary) remain in control and partial (or complete) enjoyment.

(b) Against his own future debts, against spendthrift successors, tyrannous governments, or local bullies, he may obtain the protection of religion and the favour of the courts for his settlement. Thus a trespasser's or a tenant's accretions are presumed to merge in the *waqf*, contrary to the usual rule.[1]

(c) He may assure the permanence of his family from generation to generation in spite of all rules against successive estates.[2] But see below, p. 219.

(d) He may evade the strict letter of the law of inheritance and in particular may escape the fractional subdivision of his property. There is some authority for saying that he cannot totally deprive son or daughter of all interest: see next section.

### I. POWERS OF THE FOUNDER

'The will of the *waqif* is as an express text of the lawgiver' (an ancient and famous *ijma'a* of all schools cited in *Khajeh Salimullah* v. *Abul Khair*, 37 C. 263, and in *Shawana* v. *Ali*, 3 Z. 6).

Although *waqf* is not a question of inheritance,[3] yet a *waqif* by his almost unrestricted power of laying down the succession of beneficiaries (see pp. 219–20) possesses a power of legislation such as probably no other legal system concedes to a private individual. Except that probably he cannot completely exclude his own son or his own daughter from benefit in his estate,[4] he can provide for the succession as he pleases. In lands where

[1] *Khanim* v. *Dianello*, 6 Cyp. 52.

[2] Similar inconsistencies are common in all legal systems. In England the power to bar an entail and the power to make a strict settlement were inventions of the same great equity lawyer, and cf. the conflict of ideas which went to make up the property legislation of 1925.

[3] *Adm. Gen. Native Estates* v. *Abu Bakr*, 6 E.A. 147; cf. Gambia Laws, cap. 20, and *Bacos* v. *Asile des Veillards*, Egypt. Gaz. Trib. III, no. 425.

[4] So held by Algerian courts.

patriarchal sentiment is strong the power has been used to exclude females, elsewhere to enable them to share benefits equally with males contrary to the normal 2 : 1 ratio; to put the cognates on a level with the agnates, or not to do so; to introduce a rule of succession *per stirpes* and a fuller form of representation than the law elsewhere knows.

Normally, however, in the absence of any express direction by the *waqif*, it will be assumed:

(i) That male and female share alike.

(ii) That agnate and cognate share alike (but the expression *aqib*, pl. *aqaba*, means agnate descendants only, whether male or female).

(iii) That distribution is *per stirpes*, not *per capita*, and

(iv) That the children of a deceased beneficiary represent their parents even during the lifetime of beneficiaries nearer in degree.

All these rules, however, may be barred by express direction.

For the powers of the *waqif* as to retaining control of the property see pp. 212 and 215, and for his powers over the *mutawali* see p. 220.

### K. RIGHTS AND POWERS OF BENEFICIARIES

(a) *No accumulations.*

See above, p. 207 and pp. 213–14. Excess of income over expenditure after cautious management should be spent in the year in which it occurs.

(i) *A* who is childless makes a *waqf* for his children and thereafter to the poor. Until children are born to him, the income must go to the poor.[1]

(ii) *B* who has sons makes a *waqf* for his male descendants. His sons die leaving only daughters. Until one of those daughters has a son the income must go to the poor.[2]

Clearly, therefore, there can be no accumulations for the benefit of the *waqf* estate (a rule which Indian *waqfs* frequently infringe). Query, can there be accumulations for an incumbent beneficiary, e.g. for my son until he reaches the age of 21?

Morally, any income in excess of the wants of the beneficiaries in any particular year should be spent on the poor; but this is obviously incapable of legal enforcement.

[1] Hilmi, Art. 77. [2] Ibid., Art. 79.

(b) The right of the beneficiaries is not an estate in the property but a personal claim against the property. No beneficiary (as such) has any individual right of control over the property but merely to receive a share in the income or, e.g., to occupy the house as the declaration lays down. This right he cannot assign, encumber, or lease: and the general rule against executory contracts prevents his anticipating it.[1]

(c) Except where the *waqif* provides for the beneficiaries to appoint and control the *mutawali*, they have no control over him except through the court.

(d) In the case of a mosque, or property for the support of a mosque and its services, every individual Moslem (at least every one who may normally expect to worship there) has a personal right in the *waqf*, which he is entitled to defend on his own behalf.[2] He may sue in his own name to eject trespassers, to remove encroachments, to assert his right of access to the mosque, or for a declaration that property belongs to it and is not, e.g., the private property of the *mutawali*. Such a claim is not filed in a representative capacity but as an individual, and a decree in it or compromise of it will bind nobody but the parties to the suit; *Abdur Rahim* v. *Muhammad Barkat Ali*, 55 I.A. 96, 55 C. 519—a very strong case, as the plaintiffs were numerous and had joined with their personal claims and compromised with them other claims which they admittedly made in a representative capacity with the sanction of the Advocate-General.

(e) Where the beneficiary's only right is to receive an income from the *waqf*, it is probable that his only remedy is against the *mutawali* and not, e.g., directly against a trespasser. But the point is obscure.

### L. DEVOLUTION OF THE OFFICE OF MANAGER (MUTAWALI)

(a) The founder may

(i) during his lifetime appoint, control, or remove *mutawalis* (as to his power to be *mutawali* himself, see p. 215);

(ii) invest his *wasi* with the same power;

[1] Except perhaps by constituting an agent to receive the benefit.

[2] *Jawahra* v. *Akbar Husain*, 7 A. 178: 'Every Muhammadan according to the tenets of his religion is entitled to get public charitable property protected from the hands of strangers,' per Mahmood J.; *Zafaryab* v. *Bakhtawar*, 5 A. 497; *Mohiuddin* v. *Sayiduddin*, 20 C. 810 (overruling earlier Calcutta decisions).

(iii) provide a scheme of succession to the office;

(iv) prescribe the amount and character of remuneration (10 per cent. is customary in many places).

(b) The Qadi may

(i) remove a *mutawali* for misconduct (even the founder himself),

(ii) but never except for misconduct;

(iii) after the founder's death may accept the resignation of a *mutawali*;

(iv) and may appoint a new *mutawali*; see also p. 223.

(c) In making appointments, he will

(i) have regard to the founder's expressed wishes;

(ii) *ceteris paribus*, prefer a member of the founder's family; but

(iii) these preferences are to be interpreted in the spirit rather than the letter. Thus where the founder of a Shia *imambara* had limited the office to his descendants, and the only available descendant was a Babi, the court was justified in appointing a collateral: *Shahar Banoo* v. *Aga Mahomed*, 34 I.A. 46; 34 C. 118.

The management of a mosque for public worship is normally vested in a body of managers, a *jama'at* or *panchayat*.[1] The members of such a managing body are not removable except by order of the court, being all *mutawalis*; but if they appoint a deputy he is removable by them.

In *Omar* v. *Remtulla* the court held that all the communities which by subscription had provided the endowment were entitled to a share in the management: also that in settling a scheme it had a wide discretion. This followed *Mohamed Ismail's* case. 'As regards the management, which must be governed by circumstances, he [the Qadi] had complete discretion, his primary duty being to consider the best interests of the general body of the public for whose benefit the trust is created: in his judicial discretion he might vary any rule of management which he finds either not practicable or not in the best interests of the institution. In settling a scheme of manage-

[1] Cf. *Ibrahim Ismail* v. *Abdool Carrim*, 35 I.A. 151, a case in which the Hindu origin of Muhammadan communities led to a dispute which was argued before English judges according to French law and final judgement was delivered by a Roman-Dutch lawyer. Cf. also *Mohamed Ismail* v. *Ahmad*, 43 I.A. 127; 43 C. 1085; *Allarakhia* v. *Lakha*, 1 Z. 119; *Omar* v. *Remtulla*, 4 T. of 1928; *Alias* v. *Ismail*, 1 Z. 30.

ment the question is not one involving determination of conflicting rights, but the consideration of the best method of carrying out the purposes of the trust.' Nevertheless where the bulk of the money came from one section of the worshippers they were entitled to preference for the mutawaliship and a majority on the committee so long as circumstances did not vary.

### M. POWERS OF THE MUTAWALI

The *mutawali* has no power to grant a lease of the property beyond the term of his own life: *Jabeda* v. *Syed Mahomed*, 30 C.W.N. 807, and 57 I.A. 125; though by custom he is allowed to grant very short leases for definite terms, e.g. one year. He has no power to hypothecate, sell, or exchange the property. For all these purposes he requires the consent of the *waqif*, if alive, *and* of the Qadi: and the latter's consent can only be given

(a) in the case of a lease or an exchange where the transaction is obviously advantageous to the foundation;

(b) in the case of a hypothecation or sale where there is absolute necessity—e.g. where the mosque is in disrepair and money cannot be raised to repair it without charging or selling the lands of the endowment.

But where it is shown that a lease has been in existence for a very long time (seventy years) and the circumstances of its creation are not clear, necessity and the consent of the Qadi may be presumed: *Jabeda* v. *Syed Mahomed* (above cited).

In *Nimai Chand Addya* v. *Golam Hossein*, 37 C. 179, where a large number of texts were considered, it was held that where necessity was proven the Qadi's consent could be given *ex post facto*.

(c) A mosque, the land on which a mosque stands, or a graveyard, can never be lawfully sold. But there is authority both for and against the proposition, that if a locality intended to be served by a mosque becomes completely deserted by Moslems, so that there is no one to use it, the court may order the land on which the mosque stands to be sold and the proceeds together with the materials to be used for some other mosque. A doctrine of *cy pres* is recognized at least in all other cases subject to proof of necessity and sanction of the Qadi.

### N. CONTROL OF THE MUTAWALI

It will be seen from the above that a strict control of the *mutawali* vests in the Qadi. In addition, the Qadi may appoint an inspecting officer (*nazir*, overseer; this title is also sometimes used, e.g. in the *Minhaj-ut-talibin*, for the *mutawali* himself) or may appoint a *naib-mutawali* to assist the *mutawali* where, e.g. through illness, he is unable to discharge his duties.

If the *mutawali* is personally interested in any transaction with the *waqf*, or if as *mutawali* of two different *waqfs* it is his duty to effect a transaction between them, he must get an *ad hoc mutawali* (*qa'im maqam*) appointed. In the late Ottoman Empire a Ministry of *Auqaf* further controlled the proceedings of *mutawalis* of public *waqfs*; and departments which have taken over its functions exist in Egypt and in those ex-Ottoman territories now under British control. In two East African dependencies, Zanzibar and Kenya, similar bodies have been created by legislation.

*Zanzibar.* The Wakf Property Decree (Laws, cap. 53 as amended by no. 21 of 1927) makes provision for a *waqf* commission, in whom all *waqf* property is to be vested. A register is to be kept (sec. 9), giving full details of all such property and of all persons owning buildings on or occupying *waqf* land, and the commissioners have power (sec. 9, cl. 3) to require the removal of any unauthorized building without compensation. All trustees (*mutawalis*) are under the complete control of the commissioners (secs. 10–12). Sec. 13, proviso, gives the commissioners power to make *cy pres* orders 'for the benefit of holders of the tenets of Islam' in cases where the original intention of the *waqf* is no longer practicable. Section 14 gives them power to sell any *waqf* property in the like event and to dispose of the proceeds under section 13, subject to the approval of the British Resident. Section 16 provides against alienation by *mutawalis* for a period exceeding one year without the sanction of the *waqf* commissioners, and section 16 that no mosque is to be built without sufficient endowment.

*Kenya.* The Wakf Commissioners Ordinance, cap. 28 (1900 and 1910). A body of four *waqf* commissioners is appointed, with power to add to their number, perpetual succession, and a

common seal. They are to control all *waqf* for public purposes, including *waqf* of which the private purposes have expired, leaving only the public purpose to be considered. By section 6 all *waqf* property without trustee is to vest in them. By section 7 a register of all *waqf* property is to be kept by them. Section 8 provides for control over trustees (*mutawalis*) and that all contracts relating to *waqf* require the sanction of the commissioners. By section 9 the court may vest *waqf* property in the commissioners if there is no properly constituted trustee or if the trustee misbehaves. Section 10 re-enacts the rule that the intentions of the founder are to be followed where possible. Section 11 provides that in other cases the property is to be applied with the sanction of the court for such good or charitable purposes on behalf of Muhammadans as may appear desirable. Section 12: Where it appears to the commissioners that the intentions of the founder of the *waqf* cannot reasonably be carried into effect the court may order a sale. Section 13: All property of deceased Muhammadan natives to which no claim can be established shall vest in the commissioners. Section 14: Accounts to be kept. Section 15: Rules for conduct of business.

# APPENDIXES

## APPENDIX I

In the following examples[1] only the problem and the ultimate solution are given. The student will find exercise for ingenuity in tracing how the result is arrived at. The problems chosen are such as daily occur; much more complicated problems are not uncommon.

[1] Partly from Markby's *Hindu and Muhammadan Law*.

The *de cujus* leaves:

1. Widow, mother, two sons ... ... ... ... ... ...
2. Widow, two sons, two daughters ... ... ... ... ...
3. Widow, daughter, two full brothers of the father ... ...
4. Two widows, uterine sister, four sons of an agnate brother, son of an uncle ... ... ... ... ... ... ...
5. Three widows, six sons, six daughters ... ... ... ...
6. Two daughters of a son, daughter of son's son, son of son's son's son ... ... ... ... ... ... ... ... ...
7. Two daughters, son's daughter, son's son's daughter, and son's son's son's son ... ... ... ... ... ... ...
8. Husband, daughter, and paternal uncle ... ... ... ...
9. Husband, daughter, son's daughter, and two sisters germane ...
10. Husband, daughter, son's daughter, one sister germane and and one consanguine ... ... ... ... ... ...
11. Husband, daughter, son's daughter, two sisters uterine ...
12. Husband and daughters of two daughters ... ... ...

13. Son's daughter, daughter's son, and brother ... ... ...
14. Father, mother, and daughter ... ... ... ... ...
15. Father, mother, one daughter, two full brothers ... ...
16. Husband, father, mother, two daughters ... ... ... ...
17. Father's father, father's mother, mother's father, mother's mother ... ... ... ... ... ... ... ...
18. Father's mother, mother's father and mother, one brother germane or consanguine ... ... ... ... ... ...
19. Father's father's father, brother germane, and brother consanguine ... ... ... ... ... ... ... ...
20. Two widows, mother, three sons ... ... ... ... ...
21. Widow, mother, and sister ... ... ... ... ... ...
22. Widow, father, mother, and two daughters ... ... ...
23. Widow, two daughters, father's mother ... ... ... ...

24. Widow, brother, sister, widow's mother, and widow's brother. Before distribution, the widow dies ... ... ... ...
25. Three sons and a daughter (all by the same marriage). Before distribution one son dies leaving a widow ... ... ...
26. Husband, father's mother, mother's mother, consanguine sister

27. Husband, father's mother, mother's mother, uterine sister ...
28. Husband, father, mother ... ... ... ... ... ...
29. Wife A, by her three sons B, C, D, and two daughters E, F; by another wife predeceased, daughter G. Before distribution A, B, C, G, die in that order ... ... ... ... ... ...

| | *Sunni, Ibadi, and Zaidi.* | *Maliki.* | *Shia.* |
|---|---|---|---|
| 1. | $\frac{1}{8}$, $\frac{1}{6}$, $2(\frac{17}{48})$ | ... ... | Same as Sunni. |
| 2. | $\frac{1}{8}$, $2(\frac{7}{24}+\frac{7}{48})$ | ... ... | Same as Sunni. |
| 3. | $\frac{1}{8}$, $\frac{1}{2}$, $2\frac{3}{16}$ | ... ... | $\frac{1}{8}$, $\frac{7}{8}$, 0, 0. |
| 4. | $2(\frac{1}{8})$, $\frac{1}{6}$, $4(\frac{7}{48})$, 0 | ... ... | $2(\frac{1}{8})$, $\frac{3}{4}$, $4(0)$, 0. |
| 5. | $3(\frac{1}{24})$, $6(\frac{7}{72}+\frac{7}{144})$ | ... ... | Same as Sunni. |
| 6. | $2(\frac{1}{3})$, $\frac{1}{9}$, $\frac{2}{9}$, | ... ... | $\frac{1}{2}$, $\frac{1}{2}$, 0, 0. |
| 7. | $2(\frac{1}{3})$, $2(\frac{1}{12})$, $\frac{1}{6}$ | ... ... | $\frac{1}{2}$, $\frac{1}{2}$, 0, 0, 0. |
| 8. | $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{4}$, | ... ... | $\frac{1}{4}$, $\frac{3}{4}$, 0. |
| 9. | $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{6}$, $2(\frac{1}{24})$ | ... ... | $\frac{1}{4}$, $\frac{3}{4}$, 0, 0, 0. |
| 10. | $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{6}$, $\frac{1}{12}$, 0 | ... ... | $\frac{1}{4}$, $\frac{3}{4}$, 0, 0, 0. |
| 11. | $\frac{1}{4}$, $\frac{9}{16}$, $\frac{3}{16}$, 0, 0 | $\frac{1}{4}$, $\frac{1}{2}$, $\frac{1}{6}$, *bait-ul-mal* $\frac{1}{12}$ | $\frac{1}{4}$, $\frac{3}{4}$, 0, 0, 0. |
| 12. | $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{4}$ | $\frac{1}{2}$, 0, 0, *bait-ul-mal* $\frac{1}{2}$ | $\frac{1}{4}$, $\frac{3}{8}$, $\frac{3}{8}$ (=their mother's *fard*+*radd*) |
| 13. | $\frac{1}{2}$, 0, $\frac{1}{2}$ | ... ... | $\frac{2}{3}$, $\frac{1}{3}$, 0. |
| 14. | $\frac{1}{3}$, $\frac{1}{6}$, $\frac{1}{2}$ | ... ... | $\frac{1}{5}$, $\frac{1}{5}$, $\frac{3}{5}$. |
| 15. | $\frac{2}{6}$, $\frac{1}{6}$, $\frac{3}{6}$, 0, 0 | ... ... | $\frac{5}{24}$, $\frac{4}{24}$, $\frac{15}{24}$, 0, 0. |
| 16. | $\frac{3}{15}$, $\frac{2}{15}$, $\frac{2}{15}$, $\frac{8}{15}$ | ... ... | $\frac{1}{4}$, $\frac{1}{6}$, $\frac{1}{6}$, $2(\frac{5}{24})$. |
| 17. | $\frac{5}{6}$, $\frac{1}{12}$, 0, $\frac{1}{12}$ | ... ... | $\frac{4}{9}$, $\frac{2}{9}$, $\frac{1}{6}$, $\frac{1}{6}$. |
| 18. | $\frac{1}{12}$, 0, $\frac{1}{12}$, $\frac{5}{6}$ | ... ... | $\frac{2}{9}$, $\frac{1}{6}$, $\frac{1}{6}$, $\frac{4}{9}$. |
| 19. | 1, 0, 0 | $\frac{1}{3}$, $\frac{2}{3}$, 0 [1] | Same as Maliki. |
| 20. | $2(\frac{1}{16})$, $\frac{1}{6}$, $3(\frac{34}{144})$ | ... ... | Same as Sunni. |
| 21. | $\frac{3}{13}$, $\frac{4}{13}$, $\frac{6}{13}$ | ... ... | $\frac{1}{4}$, $\frac{3}{4}$, 0. |
| 22. | $\frac{3}{27}$, $\frac{4}{27}$, $\frac{4}{27}$, $2(\frac{8}{27})$ | ... ... | $\frac{1}{8}$, $\frac{1}{6}$, $\frac{1}{6}$, $2(\frac{13}{48})$. |
| 23. | $\frac{5+14+14+7}{40}$ | $\frac{1}{8}$, $\frac{1}{3}$, $\frac{1}{3}$, $\frac{1}{6}$, *bait-ul-mal* $\frac{1}{24}$ | $\frac{1}{8}$, $2(\frac{7}{16})$, 0. |
| 24. | $\times$, $\frac{6}{12}$, $\frac{3}{12}$, $\frac{1}{12}$, $\frac{2}{12}$ | ... ... | Same as Sunni. |
| 25. | $2(\frac{13}{35})$, $\frac{13}{70}$, $\frac{1}{14}$ | ... ... | Same as Sunni. |
| 26. | $\frac{6+1+1+6}{14}$ | ... ... | $\frac{3}{6}$, $\frac{1}{6}$, $\frac{1}{6}$, $\frac{1}{6}$. |
| 27. | $\frac{1}{2}$, $\frac{1}{8}$, $\frac{1}{8}$, $\frac{1}{4}$ | ... ... | $\frac{3}{6}$, $\frac{1}{3}$, $\frac{1}{12}$, $\frac{1}{12}$. |
| 28. | $\frac{1}{2}$, $\frac{2}{6}$, $\frac{1}{6}$ | ... ... | $\frac{1}{2}$, $\frac{1}{6}$, $\frac{2}{6}$. |
| 29. | $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{4}$ | ... ... | Same as Sunni. |

[1] Also Shafii and Zaidi.

# APPENDIX II

## THE DOCTRINE OF SUBSTITUTION, *MAZHAB AHL-I-TANZIL*

As noted above, p. 119, this doctrine is regarded in Maliki law as a branch of the law of *patria potestas* and of the will-making power and has no other application. It is said (Luciani, Art. 580, p. 527) to have originated in the Hanbali school; but the principle is clearly set out in the Zaidi *Majmu'a al fiqh* (tradition no. 893) a work which claims to be prior in date to Ahmad b. Hanbal and is in any case one of the oldest known works of Moslem jurisprudence. It is also, as above noted (ch. xvii), the corner-stone of the Shia law.

The earliest Shafii works such as the *Rahbia* and the *Mukhtasar* of Abu Shuja take no cognizance of the *zavi-ul-arham*, and the *Fath ul Qarib* being merely a commentary on Abu Shuja, though comparatively late in date, does not mention them. The first Shafii treatise which mentions them appears to be the *Tanbih* of Shirazi (Leyden, 1879 s.n. *Jus Shafiticum*), a work of the fifth century A.H., almost contemporary with Abu Shuja. In this (p. 188) it is laid down that in default of legal heirs the inheritance should go to the *Bait-ul-Mal* if there is a just Sultan: if not, the actual holder should expend it in works of charity or preserve it till a just Sultan succeeds: *alternatively*, the writer states the doctrine of *radd*, and proceeds that in default even of sharers entitled to the *radd* possession will be given to the *zavi-ul-arham*: 'namely, the children of daughters and of sisters, the daughters of brothers and of paternal aunts, the uterine brother's children, the father's uterine brothers and the paternal aunts, the mother's father and the maternal uncles and aunts and those who base their claims on them. (*x*) Of these the children of daughters and sisters take the place of their mothers, the daughters of brothers and paternal uncles [1] the place of their fathers, the father's uterine brothers and the paternal aunts the place of the father, the mother's father and the maternal uncles and aunts the place of the mother.'

The *Muharrar* of ar-Rafi'i[2] repeats this list as far as (*x*) but puts the mother's father to the beginning of the list and adds after him 'and every excluded grandparent'. The *Minhaj* copies the list from the *Muharrar* with one trifling alteration. Neither the *Muharrar* nor the *Minhaj* gives any explanation of how the *zavi-ul-arham* inherit or

[1] The uterine brother's children have been omitted here—an obvious slip.

[2] Bodleian MS. Arch. Seld. A. 10.

any reason for changing the order of enumeration in the *Tanbih*, of which Nawawi, having glossed that work, was certainly cognizant. There is, however, no reason to suppose that the order of enumeration is an order of preference: such lists are common in books on inheritance and there are many in the *Minhaj* which are not orders of preference.

Van den Berg, in translating this passage of the *Minhaj*, made several mistranslations:

(i) he translated *ashrat asnaf* by *dix branches de parenté différentes*. It means simply 'ten sorts'. Both the *Nihayat* and the *Tohfat* point out that the correct addition is eleven; ten would have been true of the original list in the *Tanbih*.

(ii) he introduced the words *en général*, implying that the false ancestors inherit together by a single title.

(iii) he implied that daughters of uterine brothers were in the same category as daughters of agnate brothers and in a different category from the sons of uterine brothers.

(iv) he introduced ordinal numerals, thereby implying that the list was an order of preference, not an enumeration.

Whether he really thought it was an order of preference is not clear; he does not refer to the *zavi-ul-arham* in Shafii law in his own *Principes*, and in his *Minhaj* he uses similar numerals in lists where preference is out of the question. But he has misled Wilson, whose Art. 407 is founded on Van den Berg and nothing else.

Of the three authoritative commentaries on the *Minhaj* I have been able to consult the *Nihayat*[1] in the British Museum and the *Mughni* by the kindness of Professor Margoliouth. Both explain the text by saying that there are two schools, the *ahl-i-qarabat* and the *ahl-i-tanzil*, and that the latter is to be preferred. They then explain *tanzil* in the same manner as the *Tanbih*. They also make it clear that the alternative of *qarabat* which they have in mind is the ordinary Hanafi doctrine. The *Tohfat*, of which Professor C. Snouck Hurgronje has kindly sent me an extract, is in the same sense, giving both doctrines but implying a preference for *tanzil* by discussing it in detail and passing over *qarabat* without explanation. The authorities on whom Luciani (arts. 580–6, pp. 527–31) relies, Shinshuri and Bajuri, are in the same sense. There is, therefore, unanimity of the six greatest Arabic writers who have discussed the question, supported by modern vernacular writers, Mekkawi (i. 79) and Sheikh Ali (*Mirathi*).

[1] B.Mus. 14529 c. 19.

# APPENDIX III

## PRE-EMPTION (*SHUFA'*)

THE right of a pre-emptor is to take over a purchaser's bargain as it stands *including options of rescission*. Except as noted below, in Hanafi law the right can only be exercised by the *owner* of an undivided share in the property sold; a permanent tenant or an encumbrancer have no rights. In the Punjab a *mutawali*, though in no sense an owner, has been allowed to pre-empt on behalf of his *waqf*. This was not permitted in the Ottoman Empire. The right can only be exercised in respect of immovable property, including buildings and trees. But the owner of the soil is not regarded as a co-owner with the owner of the buildings or trees nor vice versa.

Except in Shafii law, it can only be exercised in respect of a sale in the strict sense, i.e. an immediate transfer for a definite money price, including, however, a mortgage by conditional sale when it becomes absolute.[1] In Shafii law it may be exercised at an assessed value in respect of certain other transfers, of which transfer by way of dower is the most important.[2] In Shia law it does not arise where there are more than two co-owners.

In Hanafi law, in default of co-owners, the following may exercise the right:

(*a*) persons connected with the property sold either as holders of dominant or servient heritages, or as sharing a common right, e.g. a common access; or in default of co-sharers and (*a*).

(*b*) In respect only of small properties, the owners of contiguous properties. The law has encouraged a variety of fictions to defeat this right.

Every pre-emptor must claim and be prepared to pay for the whole property sold, and is entitled to the whole property if the other persons who might pre-empt fail to claim or if their claims are dismissed or are not prosecuted.[3] A claimant who takes any person not having the right of pre-emption as a sharer in his claim loses his right by this equivocal conduct. In the event of two or more persons equally entitled establishing claims they share *equally* in Hanafi law, and not *pro rata* of their original interests.

In Maliki law the pre-emptor must sue within a year, in Shafii and

[1] See *Baijnath* v. *Ramdhari*, 35, I. A. 60.

[2] *Minhaj*, Bk. 18, sec. 1 (the translation is misleading).

[3] *Wajid Ali* v. *Puransingh*, 56, I.A. 1.

Shia law with all reasonable speed; in Hanafi law he must make three demands.

(i) *talab-i-mowasibat*; *immediately* on hearing of the sale; any avoidable delay will bar his right. This is construed with the utmost strictness.

(ii) *talab-i-isshad*; as soon as reasonably possible a demand from the purchaser in the presence of at least two legal witnesses *whom* the claimant *must solemnly invoke to witness his demand*. This may be combined with (i); but only if the purchaser and the witnesses are actually present when the pre-emptor first hears of the sale. Even the trifling delay of going to look for them before protesting will bar the right.

(iii) Proceedings in Court. The ownership in the property which gives the right of pre-emption must continue up to the decree in the same hands. If the claimant dies before decree, the right lapses. It is doubtful how far this rule has been altered by British enactments; and in any case the death of the decree-holder pending an appeal does not destroy his judgement right.

It is curious that the Hanafis who gave the law its widest development, allowing it to two classes not contemplated by the other schools, expended so much ingenuity in hedging it about with formalities to restrict the exercise of the right and inventing fictions to defeat it. The right has no foundation in the Qoran and next to none in the Traditions. Its origin is probably to be found in some obscure custom which the lawyers disliked (the *Hedaya* describes it as 'contrary to analogy') but were unable directly to repeal.

In the late Ottoman Empire the Hanafi law of pre-emption was enforced on all alike as part of the law of the land (*Mejelle*, Arts. 1008–44). In India this is not the case, and the High Courts differ in the principles on which they enforce it, the law being in a state of much confusion. In the Punjab (Punjab Act I of 1913), Oudh (India Act XVIII of 1876), and Agra (Agra Pre-emption Act, 1922), the matter is now regulated by enactment.

# APPENDIX IV

## BIBLIOGRAPHY

THE list here given is (except as shown in square brackets) confined to the sources principally consulted in the preparation of the present work; it attempts to show how far original Arabic authorities are available in English, or failing English in French translations.

The best and fullest English bibliography of the original sources is in Aghnides, *Mohammedan Theories of Finance*, pp. 157–96 (New York, 1916). The field, though vast, is not quite so unmanageable as it looks; for a separate title, more often than not, covers what is merely a re-edition, enlarged or compressed, glossed or unglossed, of an earlier work. On the other hand, the same title does not imply similarity either of treatment or doctrine; titles such as Mukhtaṣar, Bidaya, Toḥfat, are favourites with many different authors. Th. W. Juynboll in his *Handbuch des Islamischen Gesetzes* (Leyden and Leipsic, 1910: Italian translation by Baviera, Milan, 1916, as *Manuale di Diritto Musulmano*) gives a useful classification of the Arabic sources in groups according to their pedigrees: for the Shafi'i authorities only, Sachau does the same in greater detail in his *Muhammadanisches Recht* (Berlin, 1897).

A. THE QORĀN.

English translations by Sale, Rodwell, Palmer, and Muhammad Ali. As a work of English literature, Sale, A.D. 1734, is still the best and is not likely to be surpassed: Palmer is perhaps the most scholarly, and Muhammad Ali has the advantage of giving Arabic and English in parallel columns. All these are available in current editions. There is some slight difference in the division into verses. [A new version by Marmaduke Pickthall has appeared while the present work is in the press.]

B. TRADITIONS.

*The Ṣaḥih of Al Bokhari*, complete translation in French (*Les Traditions Islamiques*) by O. Houdas and W. Marçais. Paris, 1903–14. Bibl. de l'École des Langues Orientales Vivantes (cited as Bokhari). Separate translations with notes by F. Peltier of Book of Wills (Algiers, 1909) and the Books of Sale, *salam*, and pre-emption (Algiers, 1910).

*Mishcat ul Masābih*, The Niche of the Lamps, an anthology of the 8th century A.H., translated into English by A. N. Mathews (Calcutta, 1809).

For the science of Tradition, the *Taqrīb* of Nawawi translated by Marçais, *Journal Asiatique*, IX ser., vol. xvi.

*See also* Guillaume, *Traditions of Islam*. Oxford, 1924.

C. Constitutional Law.

*Kitab ul Kharāj* of Imām Abu Yusuf Ya'kub al Ansari translated by E. Fagnan, Paris, 1921, as 'Le livre de l'impôt fancier'.

*Aḥkam as Sulṭaniya* of Abu l Hasan Ali al Mawardi. (First eight chapters translated into French by Ostrorog, Paris, 1901–6. Complete translation by Fagnan, Paris, 1915: 'Les Statuts Gouvernementaux'.) Largely Utopian: Shafi'i, but gives other views.

D. Hanafi Law.

*Hedaya* of Shaikh ul Islam Burhanuddin al Marghinani (d. A.D. 1196). The translation was made by order of Warren Hastings from Arabic into Persian by a committee of *munshis* and thence by Ch. Hamilton into English. The *munshis* interpolated the text with examples (of their own or culled from the commentaries) without giving any indication what they were doing: and on this and other grounds the translation has been the subject of unfavourable criticism by scholars, notably by Perron and Baillie. Editions, London, 1791 and 1870: page references in this work are to the 2nd edition by S. G. Grady: but Book and chapter references have usually also been given. The *Hedaya* is probably the most authoritative single work of the Hanafi school. But, following the *Jami u's Saghir*, it contains no treatment of the law of inheritance. This gap is filled by the contemporary *Sirajiya* of Siraj-ud-din Md. al Sajāwandi, with its commentary the *Sharifiya* by Sharīf Ali b. Md. al Jorjani (d. A.D. 1401): both these were translated by Sir Wm. Jones and re-edited by Almeric Rumsey (Calcutta, 1792; London, 1880 and 1890). Baillie's *Moohummudan Law of Inheritance* (Calcutta, 1832) contains copious extracts from both these and some other texts with an exposition.

Macnaghten's *Principles and Precedents of Moohummadan Law* (Calcutta, 1825) contains under the head of Principles a number of extracts from commentaries on the *Hedaya* with translations; and under the head of Precedents opinions by Moslem law officers on cases before the Company's courts.

The *Futāwà Qaḍi Khan* of Fakhruddin Qaḍi Khan (d. A.D. 1196) is somewhat older than the *Hedaya*. The Tagore Law Lectures delivered in 1892 by K. B. Maulvi Md. Yusoof, *Mahomedan Law of Marriage and Divorce* (cited as Md. Yusoof) contain *inter alia* extracts from Qaḍi Khan with translations.

The *Futāwà ʿAlamgiri* compiled under the orders issued by the Mughal Emperor, Aurangzeb ʿAlamgir, in the eleventh year of his reign (A.D. 1669) to be the Imperial Digest of law for his Empire: consists not merely of *fatwàs* but also of extracts from authoritative writers: paramount in India and authoritative everywhere (elsewhere known as *Futāwà al Hindia*, the Indian fatwàs). Baillie's *Digest of Moohummudan Law* (London, 1865) and *Moohummudan Law of Sale* (London, 1850) are in the main translations from this, but unfortunately only selections and omitting the references given in the original to the authorities on which it is based. Baillie is considered the best English translator of Arabic legal literature.

LATER WORKS.

The *Multaqa al Abhūr* of Ibrahim Halebi (d. A.H. 956 = A.D. 1549) forms the basis of the legal chapters of Mouradja d'Ohsson's *Tableau Général de l'Empire Ottoman* (Paris, 1787–1824).

The *Mejelle*, the Ottoman Civil Code, promulgated between 1869 and 1877, is a code of religious law on those questions which might come before the newly constituted *nizamat* courts, i.e. those in which both Moslems and non-Moslems might be interested: its compilers had a very wide knowledge of the literature. English versions by W. E. Grigsby from the French official translation (London, 1895) and by Sir Charles Tyser and others direct from the Turkish (Nikosia, 1901).

The Egyptian *Code of Muhammadan Hanifite Personal Law* by Md. Qadri Pasha (official French translation incorporated in Clavel's *Droit Musulman: statut personnel* (see below); English version by Sir Wasey Sterry and N. Abcarius (London, 1914, under above title). This code is based on works of authority not otherwise translated, notably the *Durr al Mukhtar* of al Haskafi (d. A.D. 1677) and the *Radd al Mukhtar* of Ibn Abidin (d. A.D. 1836). Nawab A. F. M. Abdur Rahman's *Institutes of Mussalman Law* (Calcutta, 1907) consists of extracts from this with extracts in Arabic from the works on which it is founded.

[Adda and Ghalioungui, *Droit Mussulman, le waqf ou habous*, contains translations of the portions dealing with *waqf* from the *Isāf* of Burhanuddin al Tārabulūsi (A.H. 905 = A.D. 1507) and the *ʿUqūd al Durria* of Ibn ʿAbidin.]

Omar Hilmi, *A gift to posterity on the laws of Evqaf*,[1] 1890 (English

[1] The Turkish title is a typical jingle, *Itḥāf u'l Akhlaf fi Aḥkām u'l Awqāf*.

translation by Sir C. Tyser and Demetriades, 2nd edition, Nikosia, 1922). Omar Hilmi was president of the civil side of the Cour de Cassation at Constantinople and his work is an excellent code of *waqf* law.

MODERN EUROPEAN AND INDIAN WRITERS.

Clavel, *Droit Musulman: Statut Personnel et des Successions.* Paris, 2 vols., 1895.

Clavel, *Droit Musulman: Wakf on Habous.* Cairo, 2 vols., 1896.

W. Marçais, *Des Parents et Alliés successibles en droit Musulman.* Rennes, 1898.

Ameer Ali, *Mahommedan Law.* London and Calcutta, vol. 1, 1912; vol. 2, 1917 [vol. 2, 5th edn., 1930].

Sir R. K. Wilson, *Digest of Anglo-Muhammadan Law.* 5th edn., 1921.

Tyabji, *Muhammadan Law.* Bombay, 2nd edn., 1921. [6th edn., 1930].

Sir D. K. Mulla, *Principles of Mahomedan Law.* 9th edn., Bombay, 1929.

Marçais deals with inheritance according to all Sunni schools: the Indian writers with Hanafi and Shia law as practised in India. (See also below under Maliki Law, Sautayra and Cherbonneau and under Shafi'i law Luciani, Van den Berg, and Mekkawi.)

E. Mercier, *Le Hobous ou Ouakof.* Algiers (no date).

E. MALIKI LAW.

*Al Muwaṭṭā* of Malik (d. A.H. 179 = A.D. 795); Book of Sales translated by F. Peltier (Algiers, 1911).

*Bākūrat u's Sā'd*, or *Risālā* of Ibn Abi Zaid al Kairawānī (d. A.H. 386 = A.D. 996) still the most popular elementary book. Complete translation by Fagnan, Paris, 1914: selections with translation, introduction, and notes by Russell and Suhrawardy (R. and S.), London, 1906.

[The *Bidaya*, of Averroes (*Ibn Rushd*, ii) section on marriage translated by Ahmed Laimeche, Algiers, 1926; of purely historical interest.]

The Mukhtaṣar of Sidi Khalil ibn Isḥaq (d. A.H. 767 = A.D. 1865); by far the most famous work of this school, but owing to its extreme technicality and compression unintelligible to the average Qadi, who commonly prefers the *Risālā* or the *Tohfat*: translations:

(*a*) *In French.*

(i) *The whole work* by M. A. Perron. Paris, 7 vols., 1848–51.

(ii) *Statut réel.* Property and obligations; text and translation by Seignette. Constantine, 1878; and Paris, 1911.

(iii) *Marriage et répudiation*, by Fagnan. Algiers, 1909.

(*b*) *In English.*

*The Law of Marriage*, by Russell and Suhrawardy. London, 1913.

Ruxton's *Maliki Law* is a selection rendered into English mainly from French translations of Khalil, but also from other French works.

*The Tohfat al Ḥukkām of Ibn Aṣim, Qaḍi of Grenada* (d. A.H. 829 = A.D. 1426) in verse (text and translation by Houdas and Martel, Algiers, 1882) (cited as Ibn Aṣim).

Ibn 'Arfa, whose definitions are occasionally quoted by the editors of Ibn Aṣim and by Ruxton, was the author of a law lexicon, who died A.H. 803. See Aghnides, p. 167.

*Al Miyār, The Touchstone of the Fatwas*, by Al Wansharisi, A.H. 914, interesting as based on actual practice—French translation in *Archives Maroc*, vol. 13.

*Modern Works.*

Sautayra and Cherbonneau, *Du Statut Personnel et des Successions*. Paris, 2 vols., 1873.

E. Zeys and Sidi Said, *Recueil des Actes*. Forms for legal acts in Arabic with French translation and notes. Algiers, 1886.

Morand, *Études de Droit Musulman*. Algiers, 1910.

Morand, *Avant Projet de Code de D.M.* Algiers, 1916.

Morand, *Introduction à l'Étude de D.M. Algérien*. Algiers, 1921.

Pesle, *Adoption en D.M.* Algiers, 1919 (rather a *tour de force* but some evidence of custom).

See under Shafi'i law, Luciani.

F. Shafi'i Law.

The *Rahbia*, a short metrical treatise on inheritance, by an otherwise unknown author probably almost contemporary with Shāfi'ī himself: translated into English verse by Sir Wm. Jones 1791 and to be found in his collected works. This, together with a commentary upon it by Abdullah Shinshūrī (A.D. 1530–90) and a gloss on that commentary by Ibrahim al Bajuri, published in 1821, is the principal basis of Luciani's *Successions Musulmanes* (Paris, 1890) by far the fullest account available of the law of succession.

*The Mukhtaṣar or Taqrīb of Abu Shuja* (5th cent. A.H.) edited with French translation by S. Keyser, Leyden, 1859.

*The Fatḥ u'l Qarīb of Ibn Qāsim* (d. A.H. 918 = A.D. 1522). This is a commentary on Abu Shujā. This book Burton took with him on his expedition to Harar (*First Footsteps*, p. 30). It has been edited with a French translation by Van den Berg, Leyden, 1895. Among other glosses on the *Fatḥ ul Qarīb* is one by Ibrahim al Bajūrī. Sachau's *Muhammadanisches Recht* (Berlin, 1897: see also critique

by Snouck Hurgronje, V.G. ii. 367–415) is based in the main though not entirely on these works and gives a text and German translation of Abu Shujā differing slightly from Keyzer's text.

*Al Tanbīh of Abu Iṣḥāq al Shirāzi* (d. A.H. 476 = A.D. 1083), edited by A. W. T. Juynboll, Leyden, 1879, as *Jus Shafiticum.*

*The Muḥarrar of ar Rāfi'ī* (d. A.H. 623 = A.D. 1226).

*The Minhaj-u't-Talibīn of Imam Nawāwī*; the principal work of the Shafi'i school. Published with French translation by Van den Berg, 3 vols., Batavia, 1882–4. The translation, along with all Van den Berg's work, has been the subject of trenchant criticism by later scholars, notably Snouck Hurgronje. English version from the French by E. C. Howard (London and Calcutta, 1914). Page references in this work are to Howard; but book, chapter, and section have also been given.

Of commentaries on the *Minhaj* the *Nihayat al Muḥtaj* of Al Ramli (Egyptian) and the *Tuhfat al Muḥtaj* of Ibn Hajar (South Arabian) are the best known, but in East Africa the *Mughni al Muḥtaj* of Sharbini is as often quoted. Various other commentaries and abbreviations are also cited.

*Modern Works.*

*The Overflowing River* (*Al nahr al fā'id*) by Abdul Qadir Md. al Mekkawi of Aden—*both Shafi'i and Hanafi.* Text and German translation by Hirsch, Leipsic, 1891: text and English translation, Beirut and Aden, without date. (References to latter.)

*Mirathi* by Shekh Ali Kathi (= Qaḍi) of Tanga, Swahili text with English translation by P. E. Mitchell, Zanzibar, 1924.

*Principes de Droit Musulman* by Van den Berg, French translation by de France, de Tersant, et Damiens, Algiers, 1896 (both Shafi'i and Hanafi).

*Niese, Das Personen- und Familienrecht der Suaheli.* Berlin, 1902 (a doctoral thesis, few points of interest).

G. Ikhtilāf al Madhāhib (Differences of Schools).

*Al Mizān* by al Sha'rani (Charani), French translation as *Balance de la loi*, Perron. Algiers, 1898.

H. Zāiḍi Law.

Zaid b. Ali, *Corpus Juris* (*majmu'a al fiqh*) edited by Griffini. Milan, 1919.

I. 'Ibāḍi Law.

Zeys, *Législation Mozabite* (an inaugural lecture). Algiers, 1886.

Zeys, *Le Nil*, Ch. X, Marriage et Dissolution. Algiers, 1891.

[Zeys, *Le Nil*, Ch. XXI, Successions—*Journal de Jurisprudence et de législation Algerienne*, 1895.]

These two are translations from the standard book of the western 'Ibāḍis compiled about 180 years ago.

*Muhammadanisches Erbrecht nach der Lehre der Ibaditischen*,[1] in Sitz. K. Preuss. Akad. 1894, a translation by Sachau from a Zanzibar Mukhtaṣar by Al Basawi. I can only find one reference to an 'Ibāḍi Mukhtasar in any law Report. The works normally quoted are those mentioned in Sachau's preface, of which Europeans know nothing.

Article by Imbert in *Revue Algerienne et Tunisienne*, vol. xix (1903).

K. Shia Ithna Asharia.

Baillie's *Imameea Code* (London, 1869) consists in the main of extracts translated from the *Sharāya al Islām* (about 5th century A.H.). [Querry, *Droit Musulman*, is a translation of the same work.]

Ameer Ali, *op. cit.*, and Tornauw, *Moslimisches Recht*. Leipsic, 1855, French trans. Paris, 1860.

L. General.

The Bible.

[Abdur Rahim, *Muslim Jurisprudence*. London and Madras, 1911.]

Beaumanoir, *Coutume de Beauvaisis*, ed. Salmond. Paris, 1899, 2 vols.

*Blackwood's Magazine*, July, 1923.

Burchardt, *Notes on the Bedouins and Wahabys* (1831).

Burton, *First Footsteps in East Africa*.

Burton, *Arabian Nights*.

Burton, *Pilgrimage*.

Dubois, *Manners and Customs of the Hindus*, ed. 1906.

*Encyclopaedia of Islam*, edited by Houtsma and Arnold. Leyden and London.

Goadby, *International and Inter-religious Private Law in Palestine*. Jerusalem, 1926.

Goldziher, *Vorlesungen*, French trans. by Arin, Paris, 1920, as *Le Dogme et la Loi de l'Islam*.

Goldziher, Article in *Vienna Oriental Journal*.

Holland, *Jurisprudence*, 12th edn. Oxford, 1916.

Hughes, *Dictionary of Islam*. London, 1885.

Snouck Hurgronje, *The Achehnese*, translated by O'Sullivan, 2 vols. Leyden and London, 1906.

Snouck Hurgronje, *Verspreide Geschriften*. Leyden, Bonn, and Leipsic, 1923.

[1] Cited as Sachau, *Ibad*.

Jones, Sir William, *Addresses*.
Lammens, *Islam Beliefs and Institutions*, translation by Sir E. Denison Ross. London, 1929.
Lane, *Modern Egyptians*.
Lane, *Arabian Society in the Middle Ages* (being the longer notes to his translation of the *Arabian Nights* published separately).
Macdonald, *Muslem Theology, Jurisprudence, and Constitutional Theory*. New York and London, 1926.
Magna Carta, 1215.
Maine, *Ancient Law* (with notes by Sir F. Pollock). London, 1906 [and 1930].
Margoliouth, *Early Development of Mohammedanism*. London, 1926.
Moyle, *Justinian*, 5th edn. Oxford, 1912.
Ostrorog, *Angora Reform*. London, 1927.
Palgrave, *Central and Eastern Arabia*, 3rd edn., 1866 (2 vols.).
Petitio Baronum, 1258.
Robertson Smith, *Kinship and Marriage in Early Arabia*.
Steingass, *Arabic Dictionary*. London, 1884.

# GLOSSARY

(All words are Arabic unless otherwise shown: but the whole Arabic legal vocabulary has been imported into all other languages used in Islām.)

ab, abū, a father, 93.
Abū Ḥanīfa, *see* Ḥanīf, 10.
'ādat, custom, 12.
ādhīvēdānika (Sanskrit), supersessional, 71.
'adl, pl. 'udūl, a just man, a perfect witness ['ādil, a dispenser of justice, 'adālat, a court], 30.
ahl (as in ahl-ul-rai; ul hadith; i-qarabat; i-tanzil, &c.), people, 7, 12, 14, 63, 225, 229.
aḥsan, most seemly (intensive of ḥasan, beautiful or seemly), 76.
al akdariya, name of a special case in inheritance; derivation uncertain, 120, 128.
amānat, deposit or confidence, 165, 192.
amīn, a trustworthy person, a custodian of property (cf. amān, protection to a stranger, īmān, religious faith), 29, 192.
'aqār, immovable, 108.
'aqd, pl. 'uqūd, an obligation, contract, or treaty, 182.
'aqib, pl. 'aqabah, agnate descendants, 219.
'aqila, a clan or *gens* [the roots of both this word and 'aṣib imply 'binding together' as a bundle; cf. Aesop's fable of the peasant and his sons and the bundle of sticks], 114. *dist.*
akil (? 'āqil, an understanding or discerning person), a judge of native tribunals in Somaliland.
'āriyat, (also 'ariyyat) a revocable licence to use, 188, 196.
arkān, pl. of rukn, 37.
'aṣabah, agnate kindred, i.e. tracing relation entirely through males, 147.
'aṣabah bi ghairihī, by another, 114, 132.
aṣabah bi nafsihī, by his or their own person, 114.
'aṣabah ma ghairihī, with another, 114.
'aṣbat = aṣabah, 147.
'ashirat, a family council, 107, 213.
ashrat asnaf; ten sorts, 229.
'aṣib, an agnate, 114, 121, 148.
a'imma, pl. of imām, 3.
aṣl, a base; so, adjectivally; genuine or fundamental, 127, 183.
'aul, increase (of the denominator), 116, 130.
aulād, pl. of walad, 111.
aulādihī allathīna min sulbihī (children from his backbone), 212.
auqāf, pl. of waqf, 213.
ayefaru (Akan), a Gold Coast custom, 25.
'azābu'l qabr ['adhāb], the punishments of the grave, 166.
'āẓam, exalted, 10.
azān (adhān), the call to prayer, muezzin, muadhdhin, the summoner, 99.

bāb, a door or gate; hence a book or chapter of a treatise, 8.
bā'in, irrevocable, 74.
bai', sale, 182.
bai' qaṭā'ī (Swahili, bai kata), an absolute sale, 199.
bai' khiyār, sale-option, 198, the East African name for.
bai' bi'l wafâ, a mortgage by conditional sale, 13, 197.
bait ul māl; māl ul muslimīn; the house or store of the goods of the Moslems, the poor-chest, the public treasury, 94, 99, 117, 138.
Bait ul Muqaddas, The Holy House, i.e. the Holy Places at Jerusalem (al Quds, the Holy City), 209.
Bani Hāshim, the branch of the Quraish to which the Prophet as well as the houses of Omayya and Abbas belonged, 15.
bāṭil, void, 34, 42.
benāmi (Hindustani), nameless, 29, 178.
bewuqūf (Hindustani), unstable, a fool, 206.
bid'at, innovation, 76.
Bohra, name of a caste of Muhammadans of probably Hindu origin, 22.

caliph; khalīfa, pl. khulafā, lit. a deputy or delegate; from a root, as in such words as khilāf, ikhtilāf, implying differentiation: in particular the head of the Moslem commonwealth, iv, 17.

daf'a, a section; a form of gift on marriage, 71.
das āvatār (Sanskrit and Hindi), ten incarnations, 22.

dāsī, dāsīputra (Sanskrit), slave concubine and her son, 51, 97.
dāyā(Sanskrit), succession, inheritance, 152.
diya, blood money, 112.
dhimmī (zimmi), a non-Moslem subject of a Moslem state, 12, 31, 86.
dhū, dhavvī (zu, zawi), holder of, 118.

'ewaḍ, 'ewaz ('iwaḍ), an equivalent, consideration for a contract, 35, 78, 201.

faḍūl, vacuous, ineffective, 57.
falas, bankruptcy, 103, 203.
farā'iḍ, pl. of fariḍa, division of inheritance, 113.
faraḍi, a person versed in the law of inheritance.
farḍ, pl. furuḍ (lit. 'notches'), divine commands; especially commanded shares in inheritance, 2, 110, 129, 138.
fāsid, invalid, 34, 38, 183.
faskh, dissolution of marriage by judicial decree, 60, 73, 78.
fātiḥa, 'the opening', chapter i of the Qoran, 4, 39.
fatwà, pl. fatāwà, an authoritative opinion delivered in answer to a question of law, 9.
fiqh, jurisprudence, 1, 5, 17, 20.
fiqr (faqr), poverty (faqīr, a poor man, an ascetic), 203.
firāsh, the right of an acknowledged concubine, 91, 178.
furū', legal practice, 14.

ghabn fahish, excessive damage, 110.
ghair muqallidun, 'non-followers', 16.
ghair-ṣaḥīḥ, untrue, invalid, the opposite of ṣaḥiḥ, true or valid, 127.
ghaṣb, trespass, 192.
ghāṣib, a trespasser, 192.
al ghurā'ān, al gharrā', names of different anomalous cases in inheritance, 120.
ghurūr, deception, 48.

ḥabs, pl. ḥubūs = waqf, 206.
ḥadīth, pl. āḥādīth, tradition (literally, news), 3, 4, 5, 14, 17, 65.
ḥajab, exclusion, 117.
ḥajj [ḥijj], the pilgrimage to Mecca, 81.
ḥajr, interdiction, 102.
Ḥanafi, belonging to Abu Ḥanifa, 7, 10.
(ḥanīf, upright; a word used by Muhammad to designate the religion of Abraham; and also the religion of Islam.)
Ḥanbalī, belonging to Aḥmad b. Ḥanbal, 10.
ḥaqīqī, rightful, actual (haqq), 191, 209.
ḥaqq, pl. ḥuqūq, a right, rights, 2.
ḥarām, utterly forbidden, 2, 34, 61.
ḥasan, beautiful or seemly, 76.
hiba, gift, 203.
hijra, the escape from Mecca, the Moslem era, 1, 8.
(adj. hijri), 89.
(muhājir, one of those who escaped from Mecca to Medina), 75.
al ḥimāriya, the case of the donkey (inheritance), 120, 132.
ḥizānat (ḥiḍānat), cherishing or upbringing; guardianship of the person, 44, 58, 61, 96.
ḥukm, pl. aḥkam, command or order, 191, 209.
ḥukmi, by order (adj.).
(cf. ḥākim, a ruler; ḥakīm, a prescriber, i.e. a physician; ḥikmat, ḥukūmat, the knack of giving orders so that they are obeyed.)
ḥusn, beauty or symmetry, 1, 7.

'ibādat, service (of God): ['abd a slave], 2.
'Ibāḍī, follower of Abdulla b. 'Ibaḍ, 10, 17, 63.
ibāḥat, permission [mubaḥ], 3.
'iddat, a period of continence for a widow or divorcée, 40, 52.
'ifāf, an obligation to ancestors, 98.
iḥrām, the state of prohibition brought about by a vow of pilgrimage, 81.
ījāb, an offer couched in the form of a declaration, 37, 182, 216.
ijāra, leasing and hiring, 183, 186.
ijmā', agreement (the root signifies bringing together, assembling), 3, 6, 7, 17, 20, 146, 208, 218.
ijr mithl, the proper rent or hire, 193.
ijtihād (lit. great striving), authoritative expounding of the law, 5, 11.
īlā, an unlawful vow of continence, 73, 81, 82.
'ilm ka wāqif (Hindustani), expert in science, 206.
imām, a leader in prayer, so a religious head or a pre-eminent lawyer-casuist, 8, 10, &c.
īmān, faith, 21.
insidād, a self-closing [sadd], 9.
inzāl, active substitution, 138.
iqrār, acknowledgement, 28, 63, 91, 162.
Islām, total surrender, 1, 14.
Ismā'īlī, follower of Isma'īl, 19, 20, 151.
isnād, a succession, 5.

istiḥsān, desire for symmetry [ḥusn], doctrine of juristic development, 7.
istishāb, continuity of evidence, doctrine of juristic development, 7.
istiṣlāḥ, advisability [ṣulaḥ] or public policy, doctrine of juristic development, 7.
istiṣnā', the contract of ordering goods to be made, 185, 186.
ithnā ashāria, 'Twelvers', the main sect of Shias, 19, 20, 145, 151.

Al Jâbari, name of an early jurist, 112, 118, 129.
jabr, compulsion, 57.
Ja'fari, belonging to Ja'far, 20.
jā'iz, lawful, 2.
jamā'at, assembly, managing body of a Muhammadan caste (=panchayat), 24, 71, 221.
(jamā'at khāna (Hindustani), house of assembly.)
jihād, holy war (literally 'striving'), 212.
jinn, jinnī, a 'genie', a spirit of the air, 92.

Ka'aba, the Cube, the Shrine at Mecca, 211.
kalāla, a word of uncertain denotation, connoting collateral succession, 131.
kharch-i-pāndān (Hindustani, mixed Persian and Hindi), expenses of the betel box, 72.
khāṣ, private or particular, 191.
khāwārij, pl. of khārij, separate, the Seceders (cf. kharāj, that which is set aside, the tax), 10, 16.
khāwind (Pers.), a master or lord, 65.
khilwat-uṣ-ṣaḥīḥ, valid retirement, privacy under circumstances leading to inference of marital intercourse, 41.
khiyār, option [ikhtiyār, choice, mukhtār, a chosen or appointed person; in India an attorney, in Turkey a village headman].
khiyār ul bulūgh, option of puberty [bāligh pubes], 60.
ul majlis, option of conference, 184.
khōjā (Hindī) = khwājā (Persian), a lord, 22, 50, 151.
khula', release or redemption, 43, 73, 179.
kifā'at, sufficiency (kāfī, sufficient), 60.
kilemba (Swahili), bride price, 35.
kitāb, a book, a writing, 3, 40, 168.
kitābī (fem. -īya), a believer in a revealed book, 26, 40.
kitmān, secrecy, 19.
kogwika (Masai?), a sexual custom, 25.

li'ān, anathema, 26, 29, 55, 73, 82.

mafqūd-ul-khabar, missing and untraceable, but not definitely known to be dead, 158, 170.
maghrabi, a westerner; maghrab, the place of setting, the west (gharīb, lowly or humble), 13.
mahr, dower, 35, 65, 191.
makrūh, reprobated, 2, 36, 63.
māl, anything movable or immovable which is capable of being property, māl mutaqavvim, property: (*a*) actually, (*b*) lawfully held as such, 182, 214.
mālik, an owner, also a king or chief; used as a proper name [cf. mulk, property, mamluk (mameluke), a slave, &c.], 13, 65.
māliki, belonging to Mālik, 10.
al malikia, the case decided by Malik, 120, 128.
mandūb, approved, 2.
ba manzilat, in the place of, 119.
marz [marḍ], sickness, 91, 173.
marīz [mariḍ], a sick person, 102.
mash'ūm, unlucky, 124.
maṣliḥat, counsel or expediency [ṣulaḥ, advice or compromise], 7.
masnūn, according to the sunna, 2.
mal'ūn, anathematized, 97.
mausi, a testator, one who declares a wasiyat, 168.
maut, death, 91, 102, 173.
mazhab, pl. mazāhib (madhhab, madhāhib), a trodden path, so a doctrine, 140.
memon, a Hindi and Gujarati corruption for mu'min, a believer: name of a caste of Muhammadans of Hindu descent, 20.
mīrāth, inheritance [wārith an heir], 165.
mithl, proper, 46.
mithli, similar, non-specific, fungible, 184.
al mimbariya, the case of the pulpit (mimbar), 117.
mo-, see *mu-*.
mu'ajjal, payable on demand, 66.
mu'allim, a learned person ('ilm, learning or science), pronounced in Africa, mallim).
mu'āmalāt, civil affairs ['aml: 'āmil], 2.
mubāḥ, permitted (see ibahat), 2.
mubārat, dissolution of marriage by mutual consent, 73, 78, 179.
mubārik, a bringer of good fortune, 124.
mudda'a alaih, defendant, party in whose favour there is a presumption, 29.

mudda'i, plaintiff, party on whom the burden of proof lies, 29.
muflis, bankrupt (falas), 103.
muftī, a learned man appointed to give authoritative answers on questions of law and casuistry, 9.
muḥrim, a person in a state of prohibition (ḥurmat, ḥarām); one who has taken the oath of pilgrimage and must therefore abstain from sexual intercourse, 49.
mu'iyyin, mu'ayyan, specific, definite ['ain, essence], 214.
mujtahid, an authoritative expounder of the law (see ijtihād), 6, 8, 20, 151.
mukhâbarat, a form of agricultural partnership, 187.
mukhtaṣar, an abridgement or précis, v.
mulk, property [cf. mālik], 182, 214.
mu'minīn, pl. of mu'min, a believer (imān), 146.
munshī, a secretary, 233.
muqaddam, appointed, 110.
muqallidūn, copyists; 'the scribes', 8.
al muqāsama, the case of division *par excellence*; the most difficult case in the law of inheritance, 120, 128.
[*Qasim*, a divider, a title of God and also a civil court official, cf. Luke xii. 14; taqsīm, division, *qismat*, a portion, a portion of fate.]
murāhiq(a), on the verge of puberty, 60.
musâqât, a form of agricultural partnership, 187.
musha'a, masha', 'confused'. Such joint tenure as causes danger of an element of uncertainty in the title, 111, 171, 191, 214.
al mushtaraka, the case of partnership (inheritance), 120.
Moslem [Muslim], a believer in Islām; *the form, Musulman, is* a worldwide corruption of the plural, *Muslimīn*, used as a singular, 13.
mustaḥabb, desirable or recommended (ḥabīb, a friend: muḥabbat, friendship), 2.
musta'min, one who has sought and received amān, a protected non-Moslem alien, 12.
mutawallī, 'appointed guardian' of a waqf, 109, 176, 209.
mut'a, usufruct, leasehold marriage, 38.
muwajjal, deferred, 66.
mozakki (muzakki), a confidential spy, 30.
muzâra'at, a form of agricultural partnership, 187.

nafaqat, maintenance, 95.
nā'ib, a lieutenant (the honorific plural, nuwwāb = a lord-lieutenant), 110.
naṣīr, pl. anṣar, a helper, title of the people of Medina who welcomed the Prophet, 75.
naṣṣ, a text of authority, 4.
nathira or nathiri, an East African term for sadaqa (probably from the root nadhr as in nazr and nazrana, Persian and Hindustani words for ceremonial gifts), 202.
nāẓir, an overseer, 110.
niḥalat, wedding presents by parents or others, 71.

al omaryatani, two cases decided by Omar ('umariyyatāni), 120.

panchāyat (Hindi, Gujarati, &c.), the council of five, 24, 221.

qabūl, acceptance [maqbūl, accepted], 37, 182.
qabza [qabḍa], possession, from a root meaning to touch, 190.
qāḍi, a judge, 10.
qāḍi-ul-quḍā, the judge of judges, the chief justice, 11.
qā'im, standing; qa'im maqām, a person appointed to a place, 107.
qānūn, a regulation; in West Africa, a custom, 12.
qarābat, proximity, blood kindred, 138.
qarīb, pl. aqārib, near, a relative; as a title of God, He who is ever near, the Omnipresent (see taqrīb), 124.
qarḍ, a loan of money or grain, 196.
qīmī, having a specific value (qīmat, value), 196.
qiyās or rāi fi'l qiyās, analogy; opinion founded on analogy, 3, 7, 12, 20, 127, 147.
Qoran [Qur'ān], 3, 7, &c.
Qoraish, the ruling oligarchy of Mecca in the time of the Prophet, 55.

radd, return, 117, 130, 138.
raḍwa, satisfaction, gift to first wife on taking a second, 71.
rahn, pledge or pawn, 197.
rā'ī, opinion, 3, 7.
rajā'i, permissive, i.e. revocable, 74.
rukn; a pillar; so, an essential, 37.

ṣadaqa, gift with a religious motive, 197.
sadd, closure, slamming, 8.
ṣādiq, a title of Ja'far, the sixth Shia Imam; 'the straightforward', 20.
ṣadq or ṣadāq, dower [= mahr].

ṣaḥḥiyat, truthfulness, reliability, 5.
ṣāḥib, pl. aṣḥāb, a companion, 4.
ṣaḥiḥ, true or valid, 5, 34, 38, 47.
saiyyid, a lord, a title used by Arabs of good position: but specially (and in India invariably) a descendant of the Prophet: see sharīf, 55.
salam, prepaid purchase of goods by weight, measure, or tale, 185.
sāqit, excluded, 127.
Sayadna Mulla, 'Our Lord the Teacher', 22. (Hindi from Arabic.)
Seth (Hindi), a Hindu or Jain merchant's title, 22.
Shāfi'ī, a follower of Shafi [ash Shāfi'ī], 10.
shaikh, an old man, a venerable person, a chief or leader, e.g.
Shaikh ul Azhar, the Rector of the University Mosque of that name, 16.
shaikh ul Islām, the chief mufti, 15, 22, 32.
shaikh ul jabal, the chief of the mountain, 16.
shamba (Swahili), a garden plot, 178.
sharākat or shirkat, partnership, 187.
sharīf, noble or glorious: an epithet of the Qorān and of the Prophet and his descendants and sometimes of the house of Abbas, 55.
sharī'a (sheria), the system of law and casuistry, 1, 25, 120, 181.
shī'a, sect, shia [shī'ī], sectary, 9, 10, 19.
shubha, semblance, doubt or misapprehension, 48.
shuf'a, pre-emption, 230.
shuf'a-i-jār, pre-emption by a neighbour, 185.
shuf'a-i-khalit, pre-emption by one having a common right, 185.
ṣubḥiya, morning gift (ṣubḥa, morning), 71.
sūra, a chapter of the Qoran, 4.
sulṭān (abstract), power or authority; so (personal) an earthly supreme ruler, 19.
sunna, orthodox practice, 2, 4, 7, 76, 134.
sunnī, orthodox, 9, 18, 19.
swahili, adj. from the Arabic plural sawāḥil, the coasts; a native of the East African coast, 50.

ta'abbī, invoking as father, 93.
tābi'un, followers or successors, 4.
ṭalab-i-mowāthibat, the 'demand of jumping up', the instant demand, 231.
ṭalab-i-ishhād, the demand of calling to witness, 231.
ṭalāq, repudiation, divorce, 73.
ṭalāq-ta'līq, suspended divorce, 47, 77.
ṭalāq-tafwīz, delegated divorce, 47, 77.
taqiyya, prudence, concealing one's real tenets, 19.
taqlīd, copying or following, 18.
taqrīb, drawing near [to God], 5.
tanzimat, civil administration, 140.
tanzīl, substitution (passive), 119, 147.
Thākūr (Hindi), a lord—a Rajput title, 22.
thaniya, in modern Maliki law, a mortgage by conditional sale, 198.
thawāb, recompense; esp. that reward which God gives for obedience to his will, 201.

'udūl, pl. of 'adl, 30, 76.
'uqūd, pl. of 'aqd, 182.
umm-ul-muminīn, mother of the faithful, 146.
'urf, custom, 12.

Wahābi, Wahhābi, follower of Abdul Wahhāb (the word Wahhāb, from the same root as hiba, gift, is a name of God, the Giver), 63.
wājib, worthy, 2, 36.
vakīl, the holder of a mandate, an ambassador or attorney, or the subhead of an institution, 38.
walad, child, 90, 97, 147.
walad u'z zinā, child of criminal intercourse, 90, 97.
walī, one near, guardian, any person vested with a legal power of protection, 30, 40, 106, 176.
wālī (wā'l a refuge), a person of refuge, so a governor (cf. the Mughal title, 'ālam panāh (Persian), refuge of the world) 106.
waqf, foundation, 7, 11, 105, 169, 206.
waqf 'āda, customary foundation, 208.
waqf ala'l aulād, foundation for the children, 11, 170, 212.
waqf shar'i, foundation according to sacred law, 17, 208.
waqfiya, a declaration of waqf written or unwritten, 215.
waqfnāma (nāma (Persian), a book), a written waqfiya, 217.
wāqif, a founder, 206.
waṣfan (adverb), in its attributes (waṣf), 127, 184.
wasi (wasiyy), administrator or executor; Al Waṣi, a title given by the Shias to Ali, 29, 57, 105, 150.

waṣīyat, a declaration of a testator's wishes, 56, 169.
waṣīyatnāma (nama (Persian), a book), a will, 168.
vilāyat, guardianship (walī); also a governorship or province,[1] 105.
wilāyat-ul-ijbār, guardianship with the power to compel, 57.
wilāyat-ul-māl, guardianship of property, 106.
wilāyat-ul-nikāḥ, guardianship for marriage, 54, 106.
vyavāhār-i (Sanskrit-Hindi), a man of affairs, 22.

yad, a hand, occasionally used for 'possession' (qabḍa being the usual word), 190.

zā'id, largesse or excess, 71.
zakāt, the compulsory alms of one fortieth, 79, 165.
zarūrat [ḍarūrat], necessity, 12.
zawi'l qarābat, holders of a right of kindred, 147.
ẓihār, divorce by unlawful comparison, 73, 82.
zimmi [dhimmi], a non-Moslem subject of a Moslem state, 12, 31, 86.
zinā, criminal intercourse, fornication, 90, 91, 97.
For zu, zawi, see above dhu, dhavī.
zu'l farḍ, pl. zawi'l furūḍ, holders of commandments, 113.
zu'l raḥm, pl. zavi'l arḥām, holders of a right of cognation, 131, 138, 142, 150, 228.

[1] Hence 'Blighty'. Early Moslem invaders of India talked of returning to their own land or *vilayat*: Englishmen returning home have taken over the phrase, which has undergone further transmogrification in Bombay-Hindustani and barrack slang.

# INDEX OF CASES AND ENACTMENTS CITED

## A. CASES

*Appendixes to Law Reports cited on questions of Custom*



## B. ENACTMENTS

*Somaliland.*

The Somaliland Marriage Regulation, 1902.
The Somaliland Natives Betrothal and Marriage Regulation, 1928.

*Zanzibar.*

The Treaty of 1886.
The Probate and Administration Decree, 1919, Cap. 64.
The Evidence Decree, Cap. 53.
The Majority Decree, Cap. 57.
The Arab and African Guardianship Decree No. 20 of 1927.
The Insolvency Decree, Cap. 63.
The Courts Decree 1923 (formerly Cap. 6).
The Wakf Property Decree, Cap. 53, as amended by No. 21 of 1927.
The Zanzibar Courts Decree No. 20 of 1923.
The Transfer of Property Decree, Cap. 61, 1917.
The Marriage and Divorce (Muhammadan) Registration Decrees, No. 11 of 1922, and No. 34 of 1925.
The Marriage Decree, Cap. 46.

*Kenya.*

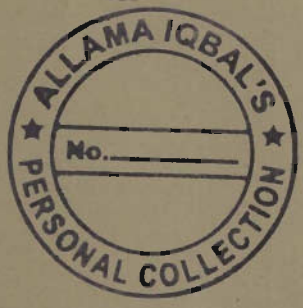
The Marriage Ordinance, Cap. 167.
The Muhammadan Marriage, Divorce, and Succession Ordinance, Cap. 171.
The Muhammadan Marriage and Divorce Registration Ordinance, Cap. 172.
The Wakf Commissioners Ordinance, Cap. 28 (1900 and 1910).

*Uganda.*

The Marriage and Divorce Ordinance 1906, Cap. 51.
The Native Marriages Ordinance, Cap. 52.
The Muhammadan Marriage and Divorce Ordinance, Cap. 53.

*Tanganyika.*

Tanganyika Order in Council, 1920.
The Deceased Natives Estates Ordinance 21 of 1922.
The Asiatics Marriage, Divorce, and Succession Ordinance 12 of 1923.
The Marriage Ordinance 12 of 1921.
Tanganyika Laws, vol. 1, p. 23, sec. 3 (a notice under martial law).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By C. K. Allen. Second edition, revised and enlarged. 1930. Demy 8vo, pp. 434. 21s. net.

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