CHAPTER XI

GIFTS

138. Hiba or gift.— A hiba or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter.

Whether a document is a gift deed or a will, can be gathered from the recitals in the document. Even the title given to it is not conclusive of its true nature. Therefore, the terms, conditions and recitals alone determine the nature of the disposition. They are to be taken as a whole. Where the disposition of the right, title and interest accrues *in praesenti* it cannot be treated as will because in a will the disposition is carried into effect after the death of the maker. When once it is clear from the recitals that the ownership has been transferred *in praesenti* absolute it is a gift and any condition imposed on the enjoyment of the property is invalid. The gift must be accepted and completed by such delivery of possession as the nature of the property admits *(a)*.

Hedaya, 482; Baillie, 515. See Transfer of Property Act, 1882, sec. 122, and also sec. 129.

139. Persons capable of making gifts.— Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

Hedaya, p. 524. As to minority, see notes to sec. 115.

140. Gift with intent to defraud creditors.— There must be in every gift a bona fide intention on the part of the donor to transfer the property from the donor to the donee *(b)*. A gift made with intent to defraud the creditors of the donor is voidable at the option of the creditors. Such intention however cannot be *inferred* from the mere fact that the donor owed some debts at the time of the gift. *(c)*.

See Transfer of Property Act, 1882, sec. 53.

141. Gift to unborn person.— A gift to a person not yet in existence is void *(d)*.

Provision for maintenance of donee and his male heirs.— It has been held by the Chief Court of Oudh that a gift by one person to another of a *guzara* (maintenance allowance) for the lifetime of the donee and after his death to his male heirs, is a valid gift under the Mahomedan law *(e)*. It would, however, not be valid, if none of the male heirs of the donee was in existence at the date of the gift.

A gift does not fail in its entirety if it is made in favour of living persons and also in favour of unborn persons. It is void only to the extent to which interest is created in favour of unborn persons. If the gift is made through the medium of a trust, the same conditions must be satisfied as for an ordinary gift *(f)*.

142. Extent of donor's power.— A gift as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir.

"The policy of a Mahomedan law appears to be to prevent a *testator* interfering by *will* with

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(a) Ibadat Ali v. *Baldia Co-operative Bank* 1968 II A.L.T. 124.

(b) Sultan Miya v. *Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497.

(c) Azim-un-nissa v. *Dale* (1871) 6 Mad. H.C. 455, 468-469; *Abdul Hye* v. *Mir Mohamed* (1868) 11 I.A. 10 Cal. 616; Macnaghten p. 217 (case 15), p. 510 (case 44), Ameer Ali, 4th ed. I., pp. 51-54.

(d) Abdul Cadur v. *Turner* (1884) 9 Bom. 158; *Mahomed Shah* v. *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I.C. 291; *Imam Sahib* v. *Ameer Sahib*, 68 Mad. L.W. 219; (1955) 1 M.L.J. 449, ('55) A. Mad. 621.

(e) Mt. Sartaj v. *Muhammad* (1931) 6 Luck. 423, 129 I.C. 322, ('31) A.O. 6.

(f) Mrs. Khalida Adib Begum v. *S.A. Bashirunnissa Begum* (1970) II, M.L.J. 98; *Hafiz Abdul Basit* v. *Hafiz Ahmad Mian* ('73) A. Delhi 280 D.B.; *Sujaythi Nuluku* v. *Nandini* (1975) 1 A.P.L.J 211.

the course of the devolution of property according to law among his *heirs (g)*, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law *by giving in his lifetime the whole or any part of his property* to one of his sons, provided he complies with certain forms" *(h)*.

A gift in favour of minor children and unborn children is void only to the extent of the interest created in favour of the unborn children and not as to the rest. Mahomedan law permits a man to gift away his entire property during his lifetime so as to even disinherit his heirs. *Hafiz Abdul Basit* v. *Hafiz Ahmad Mian* ('73) A. Delhi 280. The observations of the Privy Council in *Khajooroonisa* v. *Rowshan Jehan* may be seen.

A Mahomedan may dispose of the whole of his property by *gift* in favour of a *stranger*, to the entire exclusion of his *heirs*. The only restraint is the rule which invalidates death-bed gifts *(i)*.

143. Power of appointment.— A power given to a legatee to appoint a successor is invalid under Mahomedan law *(i)*.

In Nawazish Ali Khan v. *Ali Raza Khan (j)*the testator, who was a Shia Mahomedan, bequeathed his property to three persons successively for life and then provided as follows. "The last devisee shall have power to nominate as his successor any one whom he might consider fit from amongst the descendants of each of the three successors." It was held by the Privy Council that the power of appointment was invalid. Their Lordships said: "If the successor is to take absolutely, the power operates upon the corpus, and in their Lordships' view is clearly inconsistent with principles of Muslim law. It would interfere with the Muslim law of succession, and would involve that the heirs took the corpus of the property for a term, not merely of limited, but of uncertain, duration." Although this was a Shia case, it would apply equally to Sunnis.

144. Gift of actionable claims and incorporeal property.— Actionable claims and incorporeal property may form the subject of gift equally with corporeal property.

A gift may be made of debts, negotiable instruments, or of Government promissory notes *(k)*; of *malikana (l)* or of zemindari *(m)* rights; also of property let on lease *(n)*, and property under attachment *(o)*. Similarly; a gift may be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine *(p)*. So also an insurance policy may be assigned and the mere fact that the money was to be realized in future is not enough to make it a gift in *futuro (q)*. In short a gift may be made of anything which comes within the definition of the word "*mal*", that is, property, including actionable claims *(r)*.

"*Hiba* in its literal sense signifies the donation of a *thing from which the donee may derive a benefit*"; *Hedaya*, 482. "Gift, as it is defined in law, is the conferring of a *right of property* in something specific, without an exchange": Baillie, 515.

The case cited above would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or physical possession was necessary in *all cases* to constitute a valid gift. Following that notion, it was contended in those cases that corporeal property alone could form the subject of gifts, as that was the only kind of property that was capable of *khas* or physical possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of gift is not capable of physical possession as in the case of choses in action or

(g) Sardar Ahmad Khan v. *Zamroot Jan* ('50) P. Pesh. 45.

(h) Khajooroonissa v. *Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291, 307; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All. 439, 449, 33 I.A. 68, 75; *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104; *Lala* v. *Rasula* ('57) A.J.&K. 3.

(i) Nawazish Ali Khan v. *Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.PC. 134.

(j) (1948) 75 I.A. 62 ('48) A.PC. 134.

(k) Mullick Abdool Gaffoor v. *Muleka* (1884) 10 Cal. 1112, 1125.

(l) Ib., p. 1125.

(m) Ib., p. 1126.

(n) Ib., p 1125.

(o) Anwari Begum v. *Nizam-ud-din Shah* (1898) 21 All. 165, 167.

(p) Ahmad-ud-din v. *Illahi Bakhsh* (1912) 34 All. 465, 14 I.C. 587.

(q) Sadiq Ali v. *Zahida Begum* (1939) All. 957, (1939) A.L.J. 1103, ('39) A.A. 744.

(r) Mirza Abid Husain v. *Munnoo Bibi* (1927) 2 Luck. 496, 102 I.C. 72, ('27) A.O. 261.

incorporeal rights, the gift may be completed by any act on the part of the donor showing a clear intention to divest himself of ownership in the property. Note that debts, negotiable instruments and Government promissory notes are all choses in action, or, to use the language of the Transfer of Property Act, actionable claims. See sec. 150 below.

It has been held in a case from Gujarat that the provisions of sec. 130 of the Transfer of Property Act, 1882, over-ride the Mahomedan law in the case of a gift of an actionable claim and once it is established that the gift has been created by an instrument in writing, the necessity of establishing acceptance by the donee as required by the Mahomedan law would not arise *(s)*.

Assignment of Insurance Policy.— Under sec. 38(7) of the Insurance Act, 1938, notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policy-holder and an assignment in favour of the survivor or survivors of a number of persons shall be valid. It has been held that the words "any law or custom" are wide enough to cover Mahomedan Law. The gift, therefore, is not invalid because of any of the above conditions in the deed of Assignment *(t)*.

145. Gift of equity or redemption.— (1) A gift may be made by a mortgagor of his equity of redemption.

When the property is subject to an usufructuary mortgage, the gift is completed by authorising the donee to redeem the mortgage, thus making a gift of the equality of redemption. In such a case there is no question of physical delivery of property. *Shahalam Khatoon* v. *Amir Ali* ('72) A.A.P. 241. See also *Amir Ali Khan* v. *Shah Alam* (1973) 1 All. W.R. 337.

(2) There is a conflict of opinion whether a gift of an equity of redemption, where the *mortgagee* is in *possession* of the mortgaged property at the date of the gift, is valid. The High Court of Bombay has held that it is not *(u)*. On the other hand, it has been held by the High Court of Calcutta, that it is valid *(v)*. The latter, it is submitted, is the correct view. It has been so held by the High Courts of Patna and Allahabad *(w)*.

Thus in the case of a gift by the grandfather to his minor grandsons represented by the father of property under mortgage, directing the father to pay off the mortgage from the income of the property the condition derogating from the gift, was held to be void. *Md. Naziruddin* v. *Govindrajulu Appah* ('71) A. Mad. 44

The Bombay High Court does not hold that an equity of redemption cannot form the subject of a gift in any case. What it does hold is that a gift of an equity of redemption is not valid if the mortgaged property at the time of a gift is *in possession of the mortgagee*. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift, and the mortgagor cannot deliver possession if the mortgagee is in possession. It is true that delivery of possession, by the donor to the donee is necessary to validate a gift. But it is equally well established that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership to the donee (s. 150). When the mortgagor himself is in possession of the mortgaged property, a gift of the equity of redemption is not valid unless he delivers possession of the property to the donee. But where the mortgagee is in possession, the mortgagor *cannot* deliver possession to the donee, and the gift, it is submitted, may in that event be completed by

(s) H.H. Iqbal Mohd. Khan v. *Controller of Estate Duty, Ahmedabad*. 1964 Guj. 452 Foll. *Yocoob Sahib* v. *Pacha Bibi* (1932) 34 Bom. L.R. 837.

(t) Sudiq Ali v. *Zahida Begum* (1939) All. 957, ('39) A.L.J. 1103, ('39) A.A. 744.

(u) Ismail v. *Ramji* (1899) 23 Bom. 682; *Mohinuddin* v. *Manchershah* (1882) 6 Bom. 650.

(v) Tara Prasana v. *Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A.C. 422; *Muhar Bibi* v. *Maharulla Mondal* (1933) 57 Cal. L.J. 375, 146 I.C. 803, ('33) A.C. 785.

(w) Abdul Kabir v. *Jamila Khatoon* ('51) A.P. 315; *Mirza Mahdi Husain* v. *Sikandar Nawab* ('55) A.A. 255.

some other appropriate method. The Bombay decisions, it is submitted, are not sound. The correctness of these decisions was questioned by the High Court of Allahabad *(x)*, and they have been dissented from by the High Courts of Calcutta, Madhya Pradesh and Saurashtra *(y)*.

Though ordinarily and in accordance with the literal understanding of the condition of hiba under the personal law of Muslims the delivery of possession which ordinarily would mean physical possession of the subject-matter of the gift is a condition precedent, yet it has been consistently held that such possession which the subject-matter is susceptible of and capable of at the time when the hiba is made, if given, would be a valid substitute and education for corporeal delivery or physical delivery of the corporeal subject-matter and even in such circumstances, the hiba would be a valid gift.

Delivery of possession if understood as the *sine quo non* under all circumstances of the subject-matter of the gift, then, on such a wordy understanding of one of the terms the principles underlying it. The Judicial Committee has observed that taking possession of the subject-matter of the gift by the donee either actually or constructively was sufficient to complete the gift. Sufficient inroads were made in very early times into the necessity to deliver physical possession of the subject-matter of the gift in order to make it a valid gift. Equity made a sufficient dent upon the necessity to deliver physical possession of properties in order to make a complete and valid gift. Therefore, it follows, that constructive possession of the subject-matter of the gift provided, it could be made out in a given case would be sufficient to make a *hiba* valid notwithstanding the fact that physical delivery of the same has not been given. It is only such possession as the subject matter is capable of or susceptible of that could be thought of and once if such available possession is given by the donor to the donee and as a follow-up, the donee exercises rights of ownership over the property taken over by him, though constructively, that would be sufficient evidence to establish that there was a valid *hiba* as is known to Mahomedan Law. [T. Ramaprasada Rao and M. A. Sathar Sayeed, JJ.] *Fathima Bibi* v. *Bhavasa Maracair* (1979) 1 M.L.J. 409.

A owns six immovable properties. He mortgages three with possession to *M*. He then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*. The High Court of Bombay has held that in such a case the gift of all the six properties is valid *(z)*. So has the High Court of Madras *(a)* although the properties were situated in different talukas.

146. Gift of property held adversely to donor.— A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor obtains and delivers possession thereof to the donee [ill. (z)], or does all that he can to complete the gift so as to put it within the power of the donee *to obtain possession* [ill. (a)].

(a) *A* executes a deed of gift in favour of *B*, conferring upon him the proprietary right to certain lands then in the possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A*'s death *B* sues *Z* to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to *B: Meherali* v. *Tajudin* (1888) 13 Bom. 156; *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1; Macnaghten, p. 201, case 6; *Fakir Nynar* v. *Kandaswamy* (1912) 35 Mad. 120, 128-131, 14 I.C. 993.

(b) *A* executes a deed to gift of immovable property in favour of *B*. At the date of the gift the property is in possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a party defendant. *A* by his written statement *admits B's claim*. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and no possession was ever given to *B*. The gift is valid though no possession was delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be

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(x) Rahim Baksh v. *Muhammad Hasan* (1888) 11 All. 1, 10; *Anwari Begam* v. *Nizam-ud-din Shah* (1898) 21 All. 165, 170, 171.

(y) Tara Prasanna v. *Shandi Bibi* (1922) 49 Cal. 68; 75 I.C. 319, ('22) A.C. 422; *Munni Bai* v. *Abdul Gani* ('59) A.M.P. 225; *Kasam Umar* v. *Sipoy Gulab* ('56) A. Sau. 20.

(z) Chandsaheb v. *Gangabai* (1921) 45 Bom. 1296, 64 I.C. 21, ('21) A.B. 248.

(a) Mohammad Ayisha Beevi v. *Samankatha* (1944) 2 Mad. L.J. 267, 220 I.C. 103, ('45) A.M. 94.

observed that in this case the dispute as to the validity of the gift is not between the donee and the donor. . . . . The person who disputes it claims adversely to both. *The donor has done all that she can to complete the gift and is a party to the suit, and admits the gift to be complete": Kalidas* v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I.A. 218, 229, a case under the Hindu law, but followed in *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 701-702, 15 I.A. 81 which was a Mahomedan case. In the last-mentioned case their Lordships of the Privy Council (at p. 93) said—

"In this case it appears to their Lordships that the lady [donor] did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanamah itself authorizes the donees to take possession and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi [donor] had not possession, and that she herself did not give possession at the time" *(b)*.

Following the above observations it has been held that a *gift* of immovable property by a purchaser at a sale in execution of a decree, though made before confirmation of the sale and before acquisition of possession by him, is valid, if the donee is authorized by the donor to obtain possession *(c)*. See Code of Civil Procedure, 1908, sec. 65.

There can be a valid gift of property in possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. The view that a property in the possession of a usurper cannot be given away, is too rigid. The donor may make a valid gift of a property in the possession of a trespasser provided he either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

A gift of property in the possession of a trespasser is not established by mere declaration by the donor and acceptance by the donee; there must also be either delivery of possession or some overt act by the donor to put it within the power of the donee to obtain possession: *Maqbool Alam* v. *Khodaija*, ('66) A.S.C. 1194.

147. Writing not necessary.— Writing is not essential to the validity of a gift either of movable or of immovable property *(d)*.

Under Mohammadan Law writing is not essential for the validity of a gift either of movable or immovable property. There are three essentials of a gift under Mohammadan Law, namely, (1) a declaration of gift by the donor; (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are fulfilled the gift is complete. [T.S. Misra, J.] *Abdul Sattar* v. *The Fifth Additional District Judge.* 1978 All. L.J. 543.

Secs. 122-129 (Chapter VII) of the Transfer of Property Act, 1882, deal with gifts. By sec. 123 of the Act it is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of sec. 123 do not apply to Mahomedan gifts (see s. 129 of the Act). It has been held by the Patna High Court that the rules of Mahomedan law regarding gifts are based on reasonable classification and s. 129 exempting Mahomedans from certain provisions of the Transfer of Property Act is not hit by Art. 14 of the Constitution: *Bibi Maniran* v. *Mohd. Ishaque* ('63) A.A.P. 229. The Transfer of Property Act does not apply to gifts made by Muslims. In their case all that is necessary is: declaration, acceptance and delivery of possession: *Azaz Ahmed* v. *Krishnpaid* 1971 An.W.R. 542 *Ghulam Ahmed Sufi* v. *Mohd. Sidiq* ('74) A. J. & K. 59 *R. K. Rao* v. *M. S. Meyappan* ('74) A. Mad. 57

A gift under the Mahomedan law is to be effected in the manner prescribed by the Mahomedan law. If the formalities prescribed by that law (s. 150 below) are complied with, the gift is valid even though it is not effected by a registered instrument and though, where effected by an

(b) Followed in *Maqbal Hussain* v. *Zainul Nisa Bibi* (1939) A.L.J. 235, 182, I.C. 742, ('39) A.A. 435.

(c) Mirza Abid v. *Munno Bibi* (1927) 2 Luck. 496, 100 I.C. 72, ('27) A.O. 61.

(d) In *Kamar-un-nissa Bibi* v. *Hussaini Bibi* (1880) 3 All. 266, the Privy Council upheld a verbal gift. See also Baillie, 509; and *Kulsum Bibi* v. *Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

instrument, the instrument is not attested *(e)*. But if the formalities are not complied with, the gift is not valid even though it may have been effected in the manner prescribed by sec. 123 of the Transfer of Property Act. See notes to sec. 150, below.

The rule that a Mahomedan can make an oral gift is a general rule applicable to property of any kind; it must therefore give way to any special rules relating to a gift of any particular kind of property. Thus it was held by the Patna High Court that a Mahomedan could not transfer his occupancy holding by oral gift in contravention of the provisions of s. 26A read with s. 12 of the Bihar Tenancy Act, 1885, requiring transfers to be effected by a registered instrument, as that Act embodied special rules dealing with gifts of occupancy holdings: *Bibi Sharifan* v. *Sheikh Salahuddin* ('60) A.P. 297. *Chotauddan Saheb* v. *Masthan Bi* ('75) A. A.P. 27.

According to the Mahomedan Law, there can be a valid gift, if three essentials of the gift are satisfied: (1) a declaration of the gift by the donor; (2) the acceptance of the gift express or implied by or on behalf of the donee; and (3) delivery of possession of the subject of gift by the donor to the donee. It is not necessary that there should be deed of gift to make it a valid gift.

The present possession of the donee or the fact that the person who disputed the oral gift kept silent for one year and allowed the donee to enjoy the property or the fact that the donee had discharged the debts of the donor and was managing the properties of the donor or that he had spent moneys for the ceremonies after the death of the donor and the fact that the Panchayat Board had issued notices to him to pay house tax are not decisive of the question of validity and binding nature of the oral gift. [*Venkatrama Sastry, J.*] *Chota Uddandu Sahib* v. *Masthan Bi.* A.I.R. 1975 A.P. 271.

In order that a declaration of gift is established it must be shown that the donor either in the presence of witnesses or otherwise made a public statement that he gifted the property in favour of the donee and that he divested himself of the ownership of the property by delivering such possession as the property is capable of to the donee who accepted the gift. It is inconceivable that a declaration of gift can be made unilaterally by a Mohammadan without making a public statement of the gift. Declaration of a gift for the purpose of law has a definite connotation in the sense that a person making a gift, must declare by some means to give public notice that he gifted the property to the donee and divested himself of the ownership of the property. It is unknown to law that a Mohammadan can make an oral gift within the confines of his houses and without the presence of anybody else and canvass the plea that making such a declaration allegedly by the gift, the valid requirements of a gift are satisfied. If evidence is lacking on any of the requirements of a valid gift, law cannot presume that a valid gift has been orally made by a Mohammadan in favour of the donee. [Anjanayulu, 1]. *Ratanlal Bora* v. *Mohd. Nabiuddin* (1984) 2 An W.R. 201.

148. Relinquishment by donor of ownership and dominion.— It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift *(f)*.

Relinquishment of control over the subject is necessary to complete the gift *(g)*, and book entries in themselves do not amount to delivery of possession *(h)*. A gift with a reservation of possession of property by the donor during his life is void *(i)*.

The Mahomedan Law requires the gift of corpus itself and if there is anything repugnant to such a gift such a repugnant condition would be invalid. But it is necessary that the gift should be of the corpus. If the donor reserves to himself the right to be in possession of the corpus and the right to enjoy the same, there cannot be a valid gift under the law. A.I.R. 1948 P.C. 134, A.I.R. 1947 P.C. 97, 1959 Ker. L.T. 624 and 1963 Ker. L.T. 226, Ref.

Certain documents of settlement, made by a Mohammedan provided that till the death of the

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(e) Karam Ilahi v. *Sharf-ud-Din* (1916) 38 All. 212, 35 I.C. 14; *Abdul Hamid* v. *M. Abdul Ghani* (1934) 148 I.C. 801, ('34) A.O. 163.

(f) Musammat Bibi v. *Sheik Wahid* (1928) 7 Pat. 118, 114 I.C. 204, ('28) A.P. 183.

(g) Musa Miya v. *Kadar Bux* (1928) 55 I.A. 171, 52 Bom. 316, 149 I.C. 31, ('28) A.PC. 108.

(h) Mahomed Husain v. *Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

(i) Mahomed Aslam Khan v. *Khalilul Rehman* (1947) 51 C.W.N. 832, 231 I.C. 55, ('47) A.PC. 97; *Kunju Mamathu* v. *Asikutty* (1959) Ker. L.T. 624; *Pichakannu* v. *Aliyar Kunju* (1963) Ker. L.T. 226.

executant he would have no right of alienation of the property or properties mentioned in each of the documents, but he will have the right to possess the said property or properties and enjoy the same by taking usufructs and that after his death the respective property or properties may be possessed and enjoyed by the executee as he likes with right of alienation etc. and in that manner the property is settled upon the executee: It was held that the gifts were bad under the Mahomedan Law and that the same could not confer on the respective executee any right in respect of the property stated to have been gifted thereunder. [Bhaskaran and George Vedakkal, JJ.] *Beepathumma* v. *Mohamed Nakoor Meera Rowther* A.I.R. 1977 Ker. 54.

"A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it": Macnaghten, p. 51, sec. 8.

The mere fact that a deposit was in the joint names of father and daughter cannot raise a presumption of advancement without proof of intention to make a gift *(j)*.

149. The three essentials of a gift.— It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in sec. 150. If these conditions are complied with, the gift is complete *(k)*.

The three essential requisites for a valid gift are, (1) the offer of the gift (2) acceptance there of (3) delivery of possession in pursuanse there under. In this case, it is established as a fact that the appellant made an offer of gift over the appellant made an offer of gift over the plaint schedule property to the respondent as guardian, accepted the offer on behalf of the respondent. She has been in possession and enjoyment ever since the delivery of the plot. Therefore, the gift is complete on talking possession of the plaint schedule property. Therefore, the revocation deed is invalid and not binding on the respondent. [*Ramaswamy, J.*]. *Tateef Khan* v. *Abdul Basifh Khan.* (1984) An. W.R. 72.

See:— The reservation of the usufructs in favour of the donor during his life with authority to collect rents and profits as the agent of the donees did not make the gifts void under Mohammedan Law. *M. T. Khalid* v. *P. M. Sainabi*, A.I.R. 1981 Ker. 230. It must be established that it was accepted by the donee. *Wali Mohd.* v. *Faqir Mohd.* A.I.R. 1978 Jammu & Kashmir 92. See: *Md. Hesabuddin* v. *Md. Hesaruddin* A.I.R. 1984 Gauhati 41.

Baillie, 515; *Hedaya,* 482. This section should be read subject to what is stated in sec. 140.

150. Delivery of possession.— (1) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of *(l)*. As observed by the Judicial Committee, "the taking of possession of the subject-matter of the gift by the donee, either actually or constructively," is necessary to complete a gift *(n)*. See secs. 145, 146, 152, 154.

(j) Mujtabai Begum v. *Mehboob Rehman* ('59) A.M.P. 359.

(k) Mohamad Abdul Ghani v. *Fakhr Jahan Begum* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.PC. 281; *Amjad Khan* v. *Ashraf Khan* (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.P.C. 149; *Sultan Begum* v. *Ara Begum* (1933) 57 Cal. L.J. 459, 143 I.C. 309, ('33) A.PC. 164; *Munni Bai* v. *Abdul Gani* ('59) A.M.P. 225; Pakistan:— *Agha Mir Ahmad Shah* v. *Aga Mir Yaqub Shah* ('57) P. Kar. 238; *Iman Ali* v. *Furkun Ali* P.L.D. 1960 Dacca 3. *Mohd. Mustafa Ghazipur* v. *C.I.T.* 1970, I.T.J. 449; See also *Sitesh Chandra Choudhury* v. *Poziruddin Ahmed* ('73) A. Gau. 96.; Mian Jalal-Ud-Din. C.J., Dr. A. S. Anand and G. M. Mir. JJ.] *Wali Mohammad* v. *Faqir Mohamad.* A.I.R. 1978 J&K. 92 (F.B.). *Md. Hesabuddin* v. *Md. Hesaruddin*, A.I.R. 1984 Gauhati 41.

(l) Sadik Husain v. *Hashim Ali* (1916) 43 I.A. 212, 221-222, 38 All. 627, 645-646, 36 I.C. 104; *Khajooroonisa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291, 307; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All. 439, 449, 33 I.A. 68, 75; *Tara Prasanna* v. *Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A.C. 422; *Jamil-un-nissa* v. *Mohammad Zia* (1937) All. 609, (1937) All. L.J. 486, 170 I.C. 824, ('37) A.A. 547; *V. N. Annamalai Reddiar* v. *Gulsun Bibi* ('55) A.M. 600, 68 M.L.W. 397.

(n) Mohammad v. *Fakhr Jahan* (1922) 49 I.A. 195, 209, 44 All. 301, 315, 68 I.C. 254, ('22) A.PC. 281; *Nazir Din* v. *Mahomed Shah* (1936) 161 I.C. 365, ('36) A.L. 92; *Halimbi* v. *Rahmatali* (1941) Nag. 669, 188 I.C. 181, ('40) A.N. 70. Pakistan:—*Safi Ullah* v. *Ghulam Jabbar* (1955) Lah. 57, ('55) P. Lah 191.

Delivery of possession of a gift may be actual or constructive. When physical delivery of possession is not possible such possession as the property admits may be delivered. The donor must of course divest himself of his possession, to complete the gift. *Hafiz Abdul Basit* v. *Hafiz Ahmad Mian* ('73) A. Delhi 280.

A document, embodying a declaration that the property gifted has been delivered, if given and accepted by the donee is tantamount to accepting delivery of the gifted property. *Abu Khan* v. *Moriam Bibi* (1974) 40 C.L.T. 1306. Mere admission of delivery of possession in the deed cannot be taken as evidence of delivery. To do so would nullify the principles of Mahomedan Law. *Atmaram* v. *Dr. Girdharilal* 1972 An. W.R. 125.

But see Also:— When the document embodying the declaration of the gift is delivered by the donor to the donee and accepted by him, it would amount to acceptance of the gift. [S. K. Ray, J.] *Abu Khan* v. *Moriam Bibi*. It is a fundamental rule of Mohammedan Law as regards gifts that there must be a declaration of gift by the donor, an acceptance of the gift, express or implied, by or on behalf of the donee and delivery of such possession of the subject of the gift to the donee as it is susceptible of. The ownership of the property is transferred to the donee only on completion of these three essential requirements. [S. K. Ray. J.] *Abu Khan* v. *Moriam Bibi*.

According to Mohammedan Law, once a valid gift is brought into existence, the gift becomes irrevocable and nothing short of a decree of Court would revoke the gift. Therefore, mere cancellation of the deed of gift by the donor would not onerate as a revocation of the gift. S. K. Ray, J.] *Abu Khan* v. *Moriam Bibi*. A declaration made by the donor in the deed followed by handing over of that deed to the donee and acceptance of the donee would be amply sufficient to establish transfer of possession, without any physical departure or formal entry. Delivery of possession may be either actual or constructive. Possession can be shown not only by acts of enjoyment of the land itself, but also by ascertaining as to in whom the actual control or the thing is to be attributed or the advantages of possession is to be credited even though some other person is in apparent occupation of the land. In one case, it would be actual possession and in the other case it would be constructive possession [S. K. Ray. J.] *Abu Khan* v. *Moriam Bibi*.

But see Also:— [*M. N. Chandurkar, J.*] *Hayatuddin Haji Shujauddin* v. *Abdul Gani Abdul Hafiz* 1975 Mah. L.J. 345.

As the intention of the donor to divest himself of his interest was manifest, the gift of his share is valid and operative in view of the fact that there can be a gift of an undivided share. [*M. N. Chandurkar, J.*] *Hayatuddin Haji Shujauddin* v. *Abdul Gani Abdul Hafiz*. 1975 Mah. L.J. 345.

(2) *Registration.*— Registration of a deed of gift does not cure the want of delivery of possession.

A executes a deed of gift of a dwelling house belonging to him in favour of *B*. The deed is duly registered, but possession is not delivered to *B* The gift is incomplete, and therefore void: *Mogulsha* v. *Mahamad Saheb* (1887) 11 Bom. 517; *Ismail* v. *Ramji* (1899) 23 Bom. 682; *Vahazullah* v. *Boyapati* (1907) 30 Mad. 519; *Saira Bai* v. *S. S. Joshi* ('60) A.M.P. 260.

(3) If it is proved by oral evidence that a gift was completed as required by law [secs. 149 and 150], it is immaterial that the donor had also executed a deed of gift, but the deed has not been registered as required by the Registration Act, sec. 17(a) *(o)*.

(4) A declaration in a deed of gift that possession has been given binds the heirs of the donor *(p)*. But such a declaration is not conclusive and a recital in

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(o) Nasib Ali v. *Wajed Ali* (1926) 44 Cal. L.J. 490, 100 I.C. 296, ('27) A.C. 197; *Abdul Rahman* v. *Gaya Prasad* (1930) 5 Luck. 384, 124 I.C. 354, ('29) A.O. 435; *A. Rowther* v. *Manahapra* ('72) A. Ker. 27.

(p) Muhammad Mumtaz v. *Zubaida Jan* (1889) 16 I.A. 205; *Jamil-un-nissa* v. *Mohammad Zia* (1937) All. 609, (1937) All. L.J. 486, 170 I.C. 824, ('37) A.A. 547; *Mst. Azizi* v. *Sona Mir* ('62) A.J. & K. 4; See *Nurbai* v. *Abraham Mahomed* (1939) 41 Bom. L.R. 825, ('39) A.B. 449 which seems to have been decided on its facts.

a deed of gift that possession has been given to a minor nephew (without the intervention of a father or guardian—sec. 156) was on the facts held to be insufficient to support a gift as against the heirs of the donor *(q)*.

The requirements of a gift of immovable property under the Mahomedan Law are: (1) declaration by the donor; (2) acceptance by the donee and (3) delivery of possession by the donor to the donee. Where the execution of the gift deed by the donor was followed by delivery of possession to the donee the gift would be valid. The categorical statement in the gift deed that possession had passed to the donee and the donor had not retained any right whatever in the property coupled with the tax receipts in the name of the donee soon after the date of execution of the gift deed and before the death of the donor would show that possession of the property was actually given to the donee. A.I.R. 1933 Mad. 86 and A.I.R. 1964 S.C. 275. Expl. [K. Bhaskaran. J.] *P. Kunheema Umma* v. *P. Ayissa Umma* A.I.R. 1981 Ker. 176.

Hedaya, 482; *Baillie*, 520-522.

Constructive possession.— Where the donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to *constructive* possession of the property on the part of the donee and the gift is completed by such possession *(r)*.

Mutation of names.— No mutation of names is necessary to complete the transfer of possession in the case of the gift *(s)*. Nor is mutation of names a valid substitute for delivery of possession *(t)*.

Under the Mahomedan law the three essential requisites to make a gift valid are: (1) declaration of the gift by the donor: (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 Transfer of Property Act, excludes the rule of Mahomedan law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.

Where in the case of gift of land by the Mahomedan mother in favour of her son gift deed written on ordinary unstamped paper recited that by the deed the executant was making a gift of her land to her son who was maintaining and looking after her and that her other children were neglecting her, it cannot be said that because a declaration is contained in the document it must have been registered in order to make the gift valid. Since the gift deed was written on ordinary unstamped paper has to be taken as a form of declaration by the donor and cannot be said to be a formal instrument of gift so as to require registration under Section 17. When the donee had been possessing the land and got his name mutated in the revenue records with respect to the land it is implied that there was acceptance on behalf of the donee and also that the possession of the property was delivered to the donee by the donor. Therefore, the gift would be valid without registration of the gift deed. A.I.R. 1973 Gauhati 105, Referred to. [*S. M. Ali, J.*] *Md. Hesabuddin* v. *Mohammed Hesaruddin* A.I.R. 1984 Gasu. 41.

One Rafiullah gifted property to Noor Jehan Begum (wife of his son) by a gift deed in 1916. There was no mutation of names till 1942. After application for mutation was made Rafiullah died during the pendency of the proceedings.

It was held that the gift was made and was also accepted. On the question of delivery of possession it was held that it was not proved. The recitals in the deed only raised a rebuttable presumption. Subsequent conduct was held material. Rafiullah continued to manage the property

(q) Jhumman v. *Husain* (1931) 129 I.C. 161, ('31) A.O. 7. *Johara Bibi* v. *Subera Bibi* ('64) A.M. 373.

(r) Mohammad v. *Fakhr Jahan* (1922) 49 I.A. 195, 210, 44 All. 301, 313, 68 I.C. 254, ('22) A.PC. 281.

(s) Muhammad Mumtaz v. *Zubaida Jan* (1889) 16 I.A. 205, 217; *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 13, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13.

(t) Mohammad Azim v. *Saadat Ali* ('31) A.O. 177, 136 I.C. 642.

and appropriate profits. Parties lived far apart and therefore, there was no possibility of physical delivery. The gift was held to be invalid. *Mst. Noor Jehan Begum* v. *Mufikhar Dad Khan* ('70) A. All. 170.

In the gift by a sister in favour of her brother when the brother was already in possession and there was no subsequent conduct inconsistent with delivery of possession it was held that where the donee is already in possession of the undivided share in immovable property gifted to him there is no further act or retaking of possession necessary. From the moment the deed is executed, the donee is deemed to be in possession to the exclusion of the donor. *Takkadi Syed Mohamed* v. *Ahmed Fathummal* ('73) A. Mad. 302.

Burden of proof.— "By the Muhammadan law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction show very clearly that those forms have been complied with. It may be by deed of gift simply. [That is, *hiba*], or by deed of gift coupled with consideration. [That is *hiba-bil-iwaz*, as to which see sec. 168.] If the former, unless accompanied by delivery, of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in praesenti* of the property, and to confer it upon the donee, must also be proved" *(v)*.

Where in a suit for declaration that the plaintiff, a Muslim was entitled to a certain share in the suit property, based upon a settlement deed made by the ancestor of both the parties, it was held that the plaintiff was entitled to a decree prayed for, when the settlement deed relied upon by the plaintiff was proved to be true and valid and was acted upon and accepted by the donees and possession of the properties was also transferred to the donees. It was more so when, it was proved that the earlier settlement deed relied upon by the opposite parties was not acted upon. Case law discussed. *S.A. Hamila Bivi* v. *Fatima Bivi*, A.I.R. (1987) Mad. 129.

Subsequent delivery of possession.— A gift is not complete unless possession is taken at the time of gift, that is at the time of declaration and acceptance *(w)*. Possession taken at a subsequent date is sufficient if it was taken with the donor's consent *(x)*.

Who can challenge the validity of the gift?— The question whether possession has been delivered is relevant only when an issue is raised between the donor or those claiming under him on one side, and the donee or those claiming under him on the other. A stranger cannot invoke the rule that the gift is bad because there has been no delivery of possession *(y)*. Once the donee accepts the gift and stood by it a stranger cannot question its validity on the ground of want of delivery of possession. [Kodancaramayya, J.] *Sayed Eqbal* v. *Rabia Bee* (1984) 1 An.W.R. 300.

151. Gift through the medium of trust.— (1) A gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees [sec. 149], and possession also should be delivered to the trustees *(z)* [sec. 150].

(2) A Mahomedan cannot through the medium of a trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a trust create an estate nor recognized by the law of gifts

(v) Chaudhri Mehdi Hasan v. *Muhammad Hasan* (1906) 28 All. 439, 448-449, 33 I.A. 68, 75-76; *Khajooroonissa* v. *Rowshan Jehan* (1876) 3 I.A. 291, 307, 2 Cal. 184, 197; *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104; *Gulam Jafar* v. *Masludin* (1881) 5 Bom. 238, 242.

(w) See (1916) 43 I.A. 212, 222-223, 38 All. 627, 646-647, 36 I.C. 104, *infra*; *Mulani* v. *Maula Bakhsh* (1924) 46 All. 260, 262-263, 78 I.C. 222, ('24) A.A. 307.

(x) Macnaghten, p. 50, s. 4, and case 14, p. 215; *Jhumman* v. *Husain* ('31) A.O. 7, 129 I.C. 161.

(y) Kairun Bai v. *Mariam Bi* ('60) A.M. 447, A.I.R. October 1960.

(z) Sadik Husain v. *Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104; *Mossabhai* v. *Yacoobbhai* (1904) 29 Bom. 267, 274-276, [a Khoja case]; *Jairabai* v. *Sethna* (1910) 34 Bom. 604, 6 I.C. 513; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 259-260, 12 I.C. 225 [A Khoja case]; *Ram Charan* v. *Fatima Begam* (1915) 42 Cal. 933, 938, 30 I.C. 686 (a case of wakf); *Mirza Haashim* v. *Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255 ('28) A.R. 323; *Sugrabai* v. *Mahomedali* (1934) 36 Bom. L.R. 1151, 154 I.C. 984, ('35) A.B. 34.

(a) Ram Charan v. *Fatima Begam* (1915) 42 Cal.

governing the sect to which he belongs. Thus neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a trust settle property in favour of an unborn person. Life estates and vested remainders are unknown to Muslim Law, but life estates may be construed as an interest in the usufruct (see sec. 55). Successive life-interests, however, may be created both under the Sunni and the Shia law in favour even of unborn persons by means of a wakf.

[*A*, a Shia Mahomedan, executes a deed purporting to transfer certain immovable properties to *B*, *C* and *D* as trustees for the benefit of his wife and children. The deed is executed by *A* and it is registered. It is not executed by *B*, *C* and *D* or any of them. None of the properties is transferred to the names of the trustees, and *A* continues to be in receipt and enjoyment of the rents as before. Here there is no acceptance of the trust by the trustees, nor is there any delivery of possession to the trustees. The gift is therefore void: *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104].

The introduction of trustees is merely the employment of machinery whereby the gift is carried into effect *(a)*. Acceptance of a trust by trustees is indicated by their executing the deed of trust. In the case put above, the deed was not executed by the trustees, and hence there was no acceptance.

As in the case of a gift to the donee direct, so in the case of a gift through the medium of a trustee, the donor should divest himself of all control over the corpus of the property. If he does not do so, the gift is invalid *(b)*.

In a Bombay case *(c)* a single Judge took the view that according to Shia law a gift could be made through the medium of a trust to an unborn person provided a life-estate in favour of a person existing at the date of the trust intervened. It is submitted that the test relied on related to settlements by way of wakf, and the basis of the decision, namely, that life-estates and vested remainders are recognised by Shia law, is after the decision in *Nawazish Ali Khan* v. *Ali Raza Khan (d)* no longer good law.

152. Delivery of possession of immovable property.— (1) *Where donor is in possession.*— A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession *(e)*.

A recital in the deed of gift that the donor has divested himself and put the donees in possession binds the donor's heirs even if one of the heirs is later found in possession. Such a gift is valid.

Ismail v. *Idrish* A.I.R. 1974 Pat. 54 D.B.

If the donor has done all in his power to divest himself and put the donee in possession, that is enough. *Ismail* v. *Idrish* ('74) A. Pat. 54 D.B. *Basirul Huq* v. *Mohammad Alimuddin* ('81) A. Pat. 291.

(2) *Where property is in the occupation of tenants.*— A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee *(f)*, or by delivery of the title

933, 938, 30 I.C. 686.

(b) Mirza Hashim v. *Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R. 323 [where the condition that the trustees should not sell the property without the consent of the donor was held to render the gift invalid].

(c) Gulamhusein v. *Fakir Mahomed* (1946) 48 Bom. L.R. 733, ('47) A.B. 185, dissenting from *Mirza Hashim* v. *Aga Abdul* (1927) 5 Rang. 252, 103 I.C. 189, ('27) A.R. 242. Baillie II, p. 214.

(d) (1948) 75 I.A. 62, ('48) A.PC. 134 [In this case a passage from Ameer Ali was cited in arguendo at p. 711.]

(e) Macnaghten, p. 231, Prec. XXII.

(f) Shaik Ibrahim v. *Shaik Suleman* (1884) 9 Bom. 146, 150; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468, 477; *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291. 308; *Allah Rakha* v. *Ali Mahommad* (1928) 9 Lah. 567. 108 I.C. 741. ('29) A.L. 45; *Khair Mahomed Urs* v. *Bachi* (1940) Kar. 319 (attornment not proved). But see *Anjuman Islamia* v. *Ashiq Hussain*, P.L.D. 1967 Lah. 336; (Where

deed or by mutation in the Revenue Register or the landlord's *sherista (g)*. But if the husband reserves to himself the right to receive rents during his lifetime and also undertakes to pay Municipal dues, a mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete *(h)*.

Since for a valid gift under the Mohammedan Law delivery of such possession as the nature of the property gifted was susceptible was enough and constructive possession was also permissible, gift of tenanted property would not be invalid as violating the rule that the subject matter of the gift should be unencumbered. *Ibrahim Shah Mohamad* v. *Noor Ahmad Noor Mohamed*, A.I.R. 1984 Gujarat 126.

Where immovable property is in possession of tenants, the gift is completed by asking tenants to attorn to the donee. Where, however, both the donor and donee reside in the property some overt act is necessary. *Hayatuddin Haji Shujauddin* v. *Abdul Gani Abdul Hafiz* ('76) A. Bom. 23.

Delivery of a house in possession of tenants is completed by delivery of title deeds and asking the tenants to attorn to the donee. *Sujaythi Nuluku* v. *Nandini* (1976) 1 A.P.L.J. 211; *K. Adib Begum* v. *S.A.B.B.* (1970) 2 M.L.J. 98

(3) *Where donor and donee both reside in the property.*— No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift *(i)*. The principle for the determination of questions of this nature was thus stated by West, J., in a Bombay case *(j)*. "When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession ..... without any physical departure or formal entry."

When a father makes a gift of the dwelling house to his sons, and both the father and the donees (sons) are residing in the house, there is no need for delivery of possession. [*Nirmal Chandra Mukherji* and *Bankim Chandra Ray, JJ.*] *Abdul Sattar Ostagar* v. *Abu Bakkar Ostagar* A.I.R. 1977 Cal. 132.

It is no doubt correct that it is essential for the validity of a gift under the Mahomedan Law that the donor should divest himself completely of all ownership and dominion over the subject of the gift. The gift with reservation of possession of property by the donor during his lifetime is void. In the instant case, there is no evidence that there was any reservation of the possession of the property by the donor during his lifetime the statement made by the daughter that her father can stay in the property till his lifetime does not amount to reservation of possession.

Further, when both the donor and the donee reside in the property at the relevant time when the gift was declared, it was not necessary for the purposes of effecting delivery of possession that the donor must physically depart from the premises with all his goods and chattels and a formal

although the gift deed contained a recital that possession had been delivered, the gift was held incomplete as there was no express request or permission of the donor for the tenants to attorn to the donees.)

(g) Gani Mia v. *Wajid Ali* (1935) 39 Cal. W.N. 882, 61 Cal. L.J. 328, 156 I.C. 563, ('35) A.C. 393. (A full treatment of the subject by Mitter. J.) *Shaik Khanum Bibi* v. *Mohd. Zahina Bi* (1956) Andh. W.R. 771.

(h) Jayanabibi v. *Jayarabi* (1950) 1 M.L.J. 209, ('50) A.M. 761.

(i) Shaik Ibrahim v. *Shaik Suleman* (1884) 9 Bom. 146; *Abdul Majidkhan* v. *Husseinbu* (1920) 22 Bom. L.R. 229, 55 I.C. 952; *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147 (aunt to nephew); *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468 (gift to daughter-in-law and her children); *Kandath* v. *Musalium* (1907) 30 Mad. 305 (mother do daughter); *Jamil-un-nissa* v. *Mohammad Zia* (1937) All. L.J. 486, 170 I.C. 824, (37) A.A. 547; *Mt. Kanizan* v. *Mt. Lalifan* (1939) 183 I.C. 71, ('39) A.P. 316; *Mt. Naurozi* v. *Najat Ali Shah* (1939) 184 I.C. 508, ('39) A.P. 321; *Mst. Azizi* v. *Sona Mir*. ('62) A.J. & K. 4; *Ayeeshee Bivi* v. *Mohd. Alim* ('64) A.M. 309; (donor-donee living together—donor's physically parting with property not necessary).

(j) (1884) 9 Bom. 146, 150, *supra.*

(k) ('60) A.M.P. 60; see also *Maitheen Bivi Umma*

entry be effected by the donee on the premises. In such circumstances, mere declaration of the person previously in possession puts the donee into possession without any physical act or departure or formal entry.

When it has been established beyond doubt that after the declaration of the gift, and handing over of the possession by the donor to the donee, an application was made on the same day to the Land Records Authority, for mutation of the property from the name of the donor to the name of the donee and that the statements of both the parties were recorded in which the factum of delivery of possession was admitted and in consequence, the Land Records Authority actually mutated the property from the name of the donor to the donee, this overt act by the donor and the donee establishes compliance with the requisite condition of the delivery of possession of the property. [B. K. Metha, J.] *Ibrahim Haji Musa Haji Rasul Samol* v. *Sugrabibi* (1978) 19 G.L.R. 1136.

Where the donor and donee reside together in a house, it is not necessary to depart from the house but some overt act showing that the donor has divested himself of the property is sufficient. In the cited case papers were handed over and the donor consented to record the name of the donee in the Municipal records, it was held that the condition about delivery of possession was satisfied. *S.M.S. Saleem Hashmi* v. *Syed Abdul Fateh* ('72) Pat. 279.

Illustrations to Sub-section (3)

(1) A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred to the name of the nephew, and the rents were recovered in his name. Held that the gift was complete, though there was no formal delivery of possession: *Humera Bibi* v. *Najm-un- nissa* (1905) 28 All. 17.

(2) A Mahomedan lady executed a deed of gift in favour of her son of a house in which she and her son were both living. The son continued to live with her in the house after the execution of the deed. The deed recited that possession was given to the son and the son paid Municipal taxes after the execution of the deed. *Held* that the gift was complete although there was no physical departure or formal entry: *Abdul Razak* v. *Zainab Bi* (1933) 63 Mad. L.J. 887, 141 I.C. 843, ('33) A.M. 86.

(3) A Mahomedan lady executed a deed of gift in favour of her nephew of a house in which they both resided. the nephew continued to live with her in the house after the execution of the deed. The deed contained no recital that possession was given. The deed was not delivered to the nephew and the lady paid Municipal, taxes after execution of the deed. *Held* that the gift was invalid and ineffective: *Qamar-ud-din* v. *Mt. Hassan Jan* (1935) 16 Lah. 629, 159 I.C. 968, ('35) A.L. 795. Where there was no attornment by tenants, nor even delivery of deed of gift, the gift was held invalid; *Hussaina Bai* v. *Zohra Bai (k)*.

(4) A Mahomedan whose daughter-in-law is living in his house declares in unequivocal language that he has divested himself of the ownership of half the house and authorizes the daughter-in-law to take possession of that half. The daughter-in-law continues to reside in that half as before. *Held* that the gift was complete although there was no mutation of names in the Municipal Register: *Baldeo Prasad Balgovind* v. *Shubratan* (1936) All L.J. 590, 164 I.C. 720.

(5) A Mahomedan lived in the house of his sister and made a gift of his estate to the sister's son. There was no delivery of possession of the estate and it was *held* that the gift was invalid. *Mt. Hajra* v. *Dost Mohammad* (1946) All L.J. 410, 228 I.C. 72, ('47) A.A. 180.

(6) A paternal grand-mother gifted property to the defendant by the deed of settlement, but property was not delivered to the donee. The settlor and settlee lived together in the house. There was a clear intention to gift the property and hold it on behalf of the settlee. As the minor could get possession for himself and he lived in the house, a reservation by the donor of the right of residence did not detract from the gift. The boy was aged 15 years and could accept the gift. It was, therefore not necessary that the property should be handed over to the natural guardian. A donor

v. *Ithappiri Varkey* ('56) A. Trav.-C. 292.

can constitute himself as the guardian or indicate some other person and hand over possession to him. There should be a clear intention to make a gift and to deliver possession. Where the donor and the donee reside together an overt act only is necessary. *Ibrahim Bivi* v. *K.M.M. Pakkir Rowther* ('70) A. Mad. 17.

(7) A Muslim gifted certain funds to his minor daughter and grand-daughter. He made appropriate entries in his books of account. This was held to be delivery of the funds to the donees. When it is the father or legal guardian a *bonafide* intention to gift is enough and no change of possession is necessary. If the donor is not the father nor the legal guardian (e.g. the grandfather when the father is alive), acceptance can be constructive. If the father withdrew interest on the funds, there is constructive acceptance. Although the donor must divest himself of possession *in praesanti*, acceptance may be express or implied. *Qhamrunnissa Begum* v. *Fathima Begum* ('68) A. Mad. 367.

153. Gift of immovable property by husband to wife.— The rule laid down in sec. 152(3) applies to gifts of immovable property by a wife to the husband *(l)*, and by a husband to the wife, whether the property is used by them for their joint residence *(m)*, or is let out to tenants *(n)*. The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account *(o)*.

Gift from husband to wife.— In *Amina Bibi* v. *Khatiji Bibi (p)*, the gift was from a husband to the wife, and the gift consisted of a house in which the husband and wife lived together, and of a chawl (adjoining the house) which was let out to tenants. Sir M. Sausse, C.J., said: "In my opinion, the relation of husband and wife and his legal right to reside with her and to manage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba* (gift), and in the husband generally receiving the rents of the chawl annexed to that house." In *Ma Mi* v. *Kallander Ammal (q)*, the gift was by a husband to the wife, and mutation of names was duly effected in public records and the wife's name was entered as proprietress. Dealing with this case their Lordships of the Privy Council said: "It must therefore be taken that mutation was effected by Moideen [husband] himself, and in the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own." But no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife, and the deed is handed over to her and retained by her *(r)*.

When a husband following the Hanafi School makes a gift of immovable properties to his minor wife by a registered deed and the wife has attained puberty and discretion, and the gift is accepted on her behalf by her mother in whose house both the spouses are living at the time and the father of and father's father of the wife are not alive and there is no executor of one or the other, such a gift is valid and complete. In the case there was no doubt that ownership was divested on the part of the husband and the gift deed was handed over to the mother of the wife, in whose care and charge both the donor and the donee were at the time. *Katheessa Umma* v. *N. Kunhamu* ('64) A.S.C. 275. Gift of Immovable property by father to minor son — Minor's grandfather, guardian under law, alive — Possession given to the mother will not invalidate the gift. *Ibrahim Shah Mohamad* v. *Noor Ahmed Noor Mohamed*, A.I.R. 1984 Gujarat 126.

(l) Macnaghten, p. 51, s. 9.

(m) Amina Bibi v. *Katija Bibi* (1864) 1 Bom. H.C. 157; *Azim-un-nissa* v. *Dale* (1868) 6 Mad. H.C. 455.

(n) Emnabai v. *Hajirabai* (1888) 13 Bom. 352.

(o) Ma Mi v. *Kallander Ammal* (1927) 51 I.A. 23, 5 Rang. 7, 100 I.C. 32 ('27) A.PC. 22, approving (1864) 1 Bom. H.C. 157, 162, *supra; Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13; (1888) 13 Bom 352, 354-355, *supra; Bibi Maniran* v. *Mohd. Ishaque*, ('63) A.P. 229.

(p) (1864) 1 Bom H.C. 157, 162, *supra*.

(q) (1927) 54 I.A. 23, 30, 5 Rang. 7, 100 I.C. 32, ('27) A.PC. 22.

(r) Mohammad Sadiq v. *Fakhr Jahan* (1932) 59 I.A. 1 13, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13.

(s) Mullick Abdool Guffoor v. *Muleka* (1884) 10

In the case of gift of immovable property no physical departure or formal entry is required, where the property is used by the husband and wife for their joint residence, or is let out to tenants. The fact that the husband continued to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the residence was on account of matrimonial obligation and that the rents are collected by the husband on behalf of the wife and not on his own account. It has also been held that no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife and the deed is handed over to her and retained by her.

Noohu Pathuammal v. *Ummathu Ameena*, A.I.R. 1980 Madras 66.

See also s. 156.

154. Delivery of possession in case of incorporeal property and actionable claims.— When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself *in praesenti* of the property, and to confer it upon the donee.

(a) A gift of Government promissory notes may be completed by endorsement and delivery to the donee: *Nawab Umjad Ally Khan* v. *Mohumdee Bagum* (1867) 11 M.I.A. 517, 554.

(b) A gift of zamindari rights, held under Government, may be completed by mutation of names in the books of the Collector: *Sajjad Ahmad Khan* v. *Kadri Begum* (1895) 18 All. 1.

(c) *A* hands over to his wife a receipt passed to him by a bank in respect of money deposited by him with the bank, and says "after taking a bath I will go to the bank and transfer the papers to your name." The receipt contains in the margin the words "not transferable." *A* dies before the transfer is effected. The gift is not complete : *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 17. The receipt being "not transferable," the donor's right to receive the money from the bank cannot be transferred by a mere delivery of the receipt.

As regards delivery of possession, a distinction ought to be made between cases where, from the nature of the subject of the gift, actual possession cannot be given to the donee and cases where such possession can be given to the donee. Thus where lands are let on leases, no *khas* or actual possession can be delivered. In such a case a gift of the lands is valid though possession is not delivered *(s)*. There is no doubt that the principle of Mahomedan law is that possession is necessary to make a good gift, but the question is, possession of what? If the donor does not transfer to the donee, *so far as he can*, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Mahomedan law to prevent the gift of a *right* to property. The donor must, *so far as it is possible for him*, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a *right to propert* forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself doe not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divestin himself *so far as he can*, of the whole of what he gives" *(t)*.

155. Gift to a minor by father or other guardian.— No transfer c possession is required in the case of a gift by a father to his minor child or by guardian to his ward. All that is necessary is to establish a *bonafide* intention t give *(u)*.

Hedaya, 484; Baillie, 538; Macnaghten, p. 51, sec. 9. "Where there is on the part of a father or other guardian a real and bona fide intention to make a gift, the law will be satisfied without

Cal. 1112.

(i) Anwari Begam v. *Nizam-ud-din Shah* (1898) 21 All. 165, 170- 171.

(u) Ameeroonissa v. *Abadonissa* (1875) 15 Beng. L.R. 67, 78, 2 I.A. 87, 04; *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13 (bona fide intention proved): *Sultan Miya* v. *Ajibakhaton Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497 (bona fide intention not proved); *Fatima Bibi* v. *Ahmed Baksh* (1904) 31 Cal. 319, 330; *Khaliq Bux* v. *Mahabir Prasad* (1931) 6 Luck. 403, 129 I.C. 335, ('31) A.O. 19; *Mohammad Hassan* v. *Safdar Mirza* (1933) 14 Lah. 473, 144 I.C. 45, ('33) A.L. 601; *K. Veerankutty* v. *Pathumakutty* (1956) Mad. 1004. *Munni Bai* v. *Abdul Gani* (59) A.M.P. 225 (gift to a minor 'practically adopted as a son').

(v) Musa Miya v. *Kadar Bux* (1928) 55 I.A. 171, 52

change of possession, and will presume the subsequent holding of the property to be on behalf of the minor": *Ameeroonnissa* v. *Abadoonnissa* (1875) 15 Beng. L.R. 67, 78, L.R. 2 I.A. 87, 104. When a father gifts property to his child, the position is peculiar. While it is true that law does not find anything wrong for the father to gift his property to his child, the difficulty arises from a twofold position. Firstly, a minor may not be physically able to be in possession of the property except through his guardian and, secondly the father is himself the guardian of the property of his minor child. Delivery of possession by a Mahomedan father to his minor child is, for all practical purposes, delivery by right hand to the left hand. *Kadderanbi* v. *Fatimabi,* A.I.R. 1981 Bombay 406.

See also:—

Abdul Sattar v. *Abu Bakkar,* A.I.R. 1977 Cal. 132.

This section will not apply, and it is necessary to transfer possession, if there are other donees besides the minor child, e.g., a trust for the benefit of a minor daughter and her adult husband: *Sugrabai* v. *Mahomedali* (1934) 36 Bom. L.R. 1151, 154 I.C. 984, ('35) A.B. 34.

The guardian referred to in this section is the guardian of the *property* of the minor. The following persons are entitled, in order, to the guardianship of the property of a minor, namely, (1) the father, (2) his executor, (3) the father's father and (4) his executor. No change of possession is necessary in the case of a gift by a father to his minor son for the father himself is the person to receive possession as the guardian of his son. Similarly no change of possession is necessary in the case of a gift by a grandfather to his minor grandson *if the father is dead,* for the grandfather is then the person to take delivery on behalf of his grandson as his guardian. *But if the father is alive and has not been deprived of his rights and powers as guardian,* there must be a delivery of possession by the grandfather to the father as guardian of his minor sons, otherwise the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession *(v)*.

The mother is not in law the guardian of the property of her infant child; therefore, a gift by a *mother* to her infant child *does* require transfer of possession from her to the child's father, and, if the father be dead, to his executor, and if there be no executor, to the child's father's father, and if he be dead, to his executor. But if there be none of these, no change of possession is necessary in the case of a gift by a mother to her infant child or in the case of a gift by any other person to a minor under his care (sec. 156).

Where delivery and possession of a gift to a minor is effected to a person specified by the donor as guardian (other than the father) and the father accepts, or acquiesces in, such an arrangement, the gift is valid. *Azeshabai* v. *Kathoonbi* ('66) A.M. 462.

156. Gift to a minor by a person other than his father or guardian.— A gift to a minor or to a lunatic by a person other than his father or guardian may be completed by delivery of possession to the father or guardian *(w)*. A gift will also be complete when a minor, who has attained discretion, himself takes possession *(x)*.

Mohamedan Law does not dispense with the necessity for acceptance of the gift even in cases where the donees are minors. In the case cited there was not even a recital in the deed that possession was handed over and no evidence to show that the deed was handed over to whom. *S. N. Usman Ali* v. *O.B.V. Kubendra Bai* 1973 Mad. 280.

"When the donee is a minor, or insane, the right to take possession for him belongs to his guardian, who is, first his father, then his father's executor, then his grandfather, then his executor." If there be none of these, possession may be taken for the minor by any person under whose power he may happen to be (s. 361): Baillie, 539; *Hedaya,* 484; Macnaghten, p. 15, sec. 10. Of course, no change of possession is necessary where the guardian himself is the donor. See notes to s. 155.

Bom. 316, 109 I.C. 31, ('28) A.PC. 108.

(w) Musa Miya v. *Kadar Bux, supra, Jhumman* v. *Hussain* ('31) A.O. 7, 129 I.C. 161 (gift by maternal uncle – no possession delivered gift held invalid).

(x) Mt. Fatma v. *Mt. Autun* (1944) Kar. 151 ('44) A.S. 195. *Muni Bai* v. *Abdul Gani* ('59) A.M.P. 225, 226; *Assankutty* v. *Mohd. Kurikkal* 1961 Ker. L.T. 959; *Katheessa Umma* v. *Narayanath Kuhamu* ('64) A.S.C. 275.

(y) Suna Meah v. *S. A. S. Pillai* (1933) 11 Rang. 109,

For instances of cases where the strict rule requiring the giving of possession to one of the stated guardians of the minor was not regarded as a condition of the validity of a gift; See the judgment of the Supreme Court in *Katheessa Umma* v. *Narayanath Kunhamu* ('64) A.S.C. 275. See also *Abdul Rahim* v. *Zeenath Bi* ('63) A.M. 186, where it was held that there was no legal impediment preventing a person other than a legal guardian, *e.g.* a trustee or a person acting as such trustee, from accepting a gift on behalf of a minor and taking possession.

The mother is not the legal guardian and therefore possession given to her when one of the stated guardians is alive is ineffectual *(y)*. But where a husband made a gift of properties, including immovable property, by a registered deed, to his minor wife who had attained puberty and discretion, and the gift was accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor's father and the father's father were not alive and there was no executor of the one or the other, the gift was held by the Supreme Court to be valid and complete. *Katheessa Umma* v. *Narayanath Kunhamu (supra)*.

157. Gift to a bailee.— Where the subject of the gift is already in the possession of the donee as bailee, the gift may be completed by declaration and acceptance, without formal delivery of possession.

[(a) A gift of property in the possession of a bailee, lessee, pledgee or mortgagee may be completed without formal transfer of possession: *Hedaya*, 464: Baillie, 552.

(b) *A* makes a gift of a house to a servant in his employ for the collection of *rents*. There is no evidence of any "overt act showing transfer of possession of the property." The gift is void, for a servant or an agent for the collection of rents cannot be said to be in "possession" of the *house* of which he collects the rents: *Valayet Hossein* v. *Maniran* (1879) 5 C.L.R. 91.

158. Mushaa defined.— Mushaa is an *undivided* share in property either movable or immovable.

Mushaa means undistributed or common; in legal language it refers to undivided portions of property and in particular to such property which forms the subject matter of a gift. 'Mushaa' is derived from 'Saay u' which means: The confusion contemplated appears to the probable confusion regarding the enjoyment of the property by other cosharers as a result of the gift of a share by one or more cosharers. If, by the very nature of the property or by the relationship of the contracting parties, the gift of a definite share cannot lead to a confusion of enjoyment in future, the 'mushaa' rule shall not be applied with all its rigidity. The exceptions laid down by judicial precedents indicate that if the gift of the undivided share cannot affect the normal enjoyment of the property or if a physical partition may determentally affect the enjoyment of the property, a gift shall not fall because it is the transfer of an undivided share in the property. Apart from pressing into service the 'mushaa' rule, the defendants have not specifically pleaded that by the transaction confusion will be caused in the matter of undivided property. In the absence of the necessary facts constituting the basis upon which the 'mushaa' rule can be applied to the suit property, it cannot be held that the gifts should be avoided by the application of the 'mushaa' rule. The appellants have no case that the gift of 'mushaa' property is void *ab initio* because it is well-settled that the gift can be perfected by a subsequent partition and delivery of possession of the share dealt with by the gift deed. There are exceptions to the above principle of subsequent division. Where the donor has made a gift of his entire interest to the donee which was a share in a property, it is not possible for the donor to voluntarily effect a division and then deliver his share to the donee. In such cases the donee has a right to sue for partition. In this case, the 4th defendant has conveyed his entire share to the plaintiff by the gift deeds and so the suit for partition by the plaintiff donee is perfectly competent. [N.D.P. Namboodiripad, J.] *Kunhimoideekutty* v. *Abdulkhader*. (1977) K.L.T. 193.

159. Gift of mushaa where property indivisible.— A valid gift may be made of an undivided share (*mushaa*) in property which is *not capable* of partition.

[*A*, who owns a house, makes a gift to *B* of the house and of the right to use a stair-case used

143 i.C. 823, ('33) A.R. 155; *Abdul Raheman* v. *Mishrimal* (1959) 61 Bom. L.R. 761; but see; *Katheessa Umma* v. *Narayanath Kunhamu, supra.*

(z) Ibrahim Goolam Arif v. *Saiboo* (1907) 35 Cal.

by him jointly with the owner of an adjoining house. The gift of *A*'s undivided share in the stair-case, though it is a gift of a mushaa, is valid, for a stair-case is *not capable* of division: *Kasim Husain* v. *Sharif-un-Nissa* (1883) 5 All. 285. A gift of a share in the business of a Turkish bath is valid, for the *Hammam* is not capable of division and would be ruined if it were divided by metes and bounds: *Fayyaz-ud-din* v. *Kutab-ud-din* (1929) 10 Lah. 761, 116 I.C. 899, ('29) A.L. 309. A gift of an undivided share of the banks of a tank is valid if the banks are regarded as indivisible: *Ala Baksa* v. *Mahabat Ali* (1935) 61 Cal. L.J. 209, 159 I.C. 678, ('35) A.C. 739.]

Gift to joint donees is valid notwithstanding the doctrine of *Mushaa: Kollanchil P. Abdul Rahim* v. *Kunhimohammad:* ('75) A. Ker. 150.

160. Gift of mushaa where property divisible.— A gift of an undivided share (*mushaa*) in property which is *capable of division* is irregular (*fasid*), but not void (*batil*). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated [ill. (a)].

Exceptions.— A gift of an undivided share (*mushaa*), though it be a share in property *capable of division,* is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:—

(1) where the gift is made by one co-heir to another [ill. (b)];

Kanij Fatima v. *Jai Narain* (1944) 23 Pat. 216, ('44) A.P. 334 (a case of gift by mother to daughter of two anna share in lands, the daughter having taken joint possession).

(2) where the gift is of a share in a zemindari or taluka [ill. (c)];

(3) where the gift is of a share in freehold property in a large commercial town [ill. (d)];

(4) where the gift is of shares in a land company (*z*).

[(a) *A* makes a gift of her undivided share in certain lands to *B*. The share is not divided off at the time of gift, but it is *subsequently* separated and possession thereof is delivered to *B*. The gift, though irregular in its inception, is validated by subsequent delivery of possession: *Muhammad Mumtaz* v. *Zubaida Jan* (1889) 11 All. 460, 16 I.A. 205; *Mohomed* v. *Cooverbai* (1904) 6 Bom. L.R. 1043; *Mohib Ullah* v. *Abdul Khalik* (1908) 30 All. 250; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635; *Mofezzudin Talukdar* v. *Abed Ali Sheikh* (1935) 62 Cal. L.J. 424.

A gift of Mushaa is not invalid if the donor divests himself of all his interest in the property and puts the donee in such possession as the property admits: *Masoom Sab* v. *Madan Sab;* (1973) 1 A.P.L.J. 97.

A gift of a *Kaimi raiyati* land (undivided share) is valid and the doctrine of *Mushaa* is not applicable. *Ismail* v. *Idris* ('74) A. Patna, 54 D.B.

A gift of an undivided share of the banks of a tank if regarded as property capable of division is validated by admission of the donee to possession: *Ala Baksa* v. *Mahabat Ali* (1935) 61 Cal. L.J. 209, 159 I.C. 678, ('35) A.C. 739.

A makes a gift of an undivided share of land to *B*, who is not a cosharer, and there is no subsequent partition. The gift is not validated: *Said Hussan* v. *Shah Hussain* ('47) A.L. 272.

When at the time of the execution of the gift deed, co-sharers are in joint possession of a house, the physical possession of some co-sharers will be deemed to be on behalf of the others who will be regarded as in constructive possession. If there has been a gift of an undivided share in a house, so held to be in constructive possession, and the donor divests himself or herself of possession at the time of making the gift and delivers constructive possession to the donee, then the gift is not hit by the doctrine of *Mushaa*. There must be evidence of constructive possession. Each case will be decided on its own facts. *Sk. Aftab Husain* v. *Smt. Tayebba Begum* ('73) All. 54. *Said Hassan* v. *Shah Hussain* ('47) A. Lah. 272 not followed.

(b) A Mahomedan female dies leaving a mother, a son and a daughter as her only heirs. The

1, 34 I.A. 167.

mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter; *Mahomed Buksh* v. *Hoosseini Bibi* (1888) 15 Cal. 684, 701, 15 I.A. 81.

(c) *A, B* and *C* are co-sharers in a certain zemindari. Each share is separately assessed by the Government, and has a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the tenants. *A* makes a gift of his share to *Z without* a partition of the zemindari. The gift is valid, for it is not a gift strictly of a *mushaa,* the share being *definite* and marked off from the rest of the property: *Ameerroonnissa* v. *Abadoonnissa* (1875) 15 B.L.R. 67, 2 I.A. 87; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635; *Jiwan* v. *Imtiaz* (1878) 2 All. 93; *Kasim v. Sharif-un-Nissa* (1883) 5 All. 285; *Zahuran* v. *Abdus Salam* (1930) 5 Luck. 597, 123 I.C. 857, ('30) A.O. 71, ('37) A.C. 500; *Jahar Ali Khan* v. *Nasimannessa Bibi* (1937) 65 Cal. L.J. 34; *Kairom Bi* v. *Mariam Bi* ('60) A.M. 447; *Mst. Azizi* v. *Sona Mir* ('62) A.J. & K. 4.

(d) *A*, who owns a house in Rangoon, makes a gift of a third of the house to *B*. The gift is valid, the property being situated in a large commercial town: *Ibrahim Goolam Ariff* v. *Saidoo* (1907) 35 Cal. 1, 34 I.A. 167; *Mt. Natho* v. *Hadayat Begum* ('49) A.L. 238.

(e) *A*, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B: Hedaya* 483; Baillie, 529-530.]

Where the share of the donor in the assets of the partnership on the date of the gift was not insufficient to support the gift of the donated amount, the debit entry in the account of the donor partner and the credit entries in the accounts of the donee partners were a sufficient declaration of the gift by the donor, a sufficient acceptance of the gift by the donees and a delivery of such possession as the subject of the gift was susceptible of. *Md. Kassim* v. *Controller of Estate duty,* ('67) A Ker. 130.

Hedaya, 483, 484; Baillie, 523-530. "A gift of part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid," the reason being that the thing being divisible, "a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of."

The term *"mushaa"* is derived from *shuyuu*, which signifies confusion. An undivided share is called *mushaa,* because of the confusion that is likely to arise in the enjoyment of the property if a gift were made of an undivided share in the property by one co-sharer to a *stranger.* No such confusion can arise, if the gift is by one co-sharer to another *co-sharer.* The result is that a gift by one of several heirs of his undivided share in property which is capable of division to a stranger is irregular, but a gift of such a share in favour of a co-heir is valid.

Doctrine of mushaa unadapted to a progressive state of society.— In *Muhammad Mumtaz* v. *Zubaida Jan,* (1889) 11 All. 460, 16 I.A. 205, 215, upon which illustration (a) is based, their Lordships of the Privy Council said: "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." This principle was applied by their Lordships of the Privy Council in the case cited in ill. (d). It was also applied by the Allahabad High Court in a case where a sister made a gift to her husband of her share in six houses and three fields by a registered deed of gift. The property was divisible, but the gift was held to be valid as the donor who had only constructive possession had done all she could to put the donee in possession *(a)*. In *Ala Baksh* v. *Mahabat Ali (b)* the same principle was applied. It was considered that the gift of an undivided share is valid in anything which can be used to better advantage in an undivided condition.

Doctrine of Mushaa in Madras.— In a Madras case *(c)*, Benson, J., observed that the doctrine of *mushaa* did not apply in the Madras Presidency, but it was held in a later case that that view was erroneous *(d)*.

(a) Hamid Ullah v. *Ahmed Ullah* (1936) All. L.J. 292, 163 I.C. 558, ('36) A.A. 473.

(b) (1935) 61 Cal. L.J. 209, 159 I.C. 678, ('35) A.C. 739; *Jahar Ali Khan* v. *Nasimanessa* (1937) 65 Cal. L.J. 34 ('37) A.C. 500, citing *Fayyazuddin Kutab-ud-din* (1929) 10 Lah. 761, 116 I.C. 899, ('29) A.L. 309; *Kalu Beg* v. *Gulzarbeg* (1946) Nag. 510; 224 I.C. 583, ('46) A.N. 347.

(c) Alabi Koya v. *Mussa Koya* (1901) 24 Mad. 513.

(d) Vahazullah v. *Bayapati* (1907) 30 Mad. 519.

Doctrine of mushaa does not apply to transfers for consideration. The rule laid down in this section applies only to gifts; it does not apply to transfers for consideration *(e)*.

Device to get over doctrine of mushaa.— It has been held by the High Court of Allahabad that though a valid gift cannot be made to an undivided share (*mushaa*) in property which is capable of division, the difficulty may be overcome by the donor selling the undivided share at a fixed price to the person to whom the gift is intended to be made, and then releasing that person from payment of the debt representing the price *(f)*. If this decision were correct, delivery of possession in the case of a gift could be dispensed with in every case by the donor making a pretence of a sale to the donee and afterwards releasing the donee from the obligation to pay the price.

Shia law.— A gift of an undivided share is valid, though it be a share in property capable of partition *(g)*: Baillie, II, 204.

161. Gift to two or more donees.— A gift of property which is capable of division to two or more persons without specifying their shares or without dividing it is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him or if there is a subsequent arrangement between all the donees with regard to the possession of the property gifted. This rule does not apply to the case mentioned in the third Exception to sec. 160 *(h)*, nor, it is conceived, to the cases mentioned in the other Exceptions.

A makes a gift of a house to *B* and *C* without making any division of the property at the time of gift. Subsequently *B* and *C* divide the property and each takes possession of the portion allotted to him with the consent of the donor. Is the gift valid? According to Macnaghten [p. 50. s. 7, p. 201, case 5], it is not, the reason given being that the division should have taken place simultaneously with the transfer. According to Baillie (p. 524), the gift is not void in its inception and it may be rendered valid by subsequent division between the donees. The latter seems to be the better opinion. See also *Hedaya*, p. 485. The Bombay High Court has held that the rule is obsolete and that a gift can be made to two donees, although they are to hold the property as tenants in common *(i)*. The Patna *(j)* and Nagpur *(k)* High Courts have taken the view that a subsequent arrangement between the donees with regard to the property gifted would validate the gift.

[The Jammu and Kashmir High Court has held in a recent case that a gift to the donor's wife and child of the whole of certain property where the share of each of the donees is specified, is valid; and that it could not be considered invalid merely because an actual partition of the gift had not been made *(l)*.

In view of the way in which this rule has been interpreted, the scope for its operation is very narrow. However the reason for the rule against a gift of a *mushaa* is based on the intention to avoid difficulty and confusion in ascertaining what precise property has been given in gift to a donee; and even where it is clear what the property gifted is, difficulty may still arise where there are two or more donees and their shares are not specified. In such a case the gift would be irregular *(fasid)* unless it is validated in one of the ways referred to above.] See also s. 159 *supra*.

Shia law.— Under the Shia law a gift of property to two or more donees is valid, though no division is made either at the time of gift or subsequently: Baillie, II, 205.

162. Gift in futuro.— A gift cannot be made of anything to be performed *in futuro* [ills. (a) and (b)], nor can it be made to take effect at any future period

(e) Ashidbai v. *Abdullah* (1906) 31 Bom. 271.

(f) Ahmadi Begam v. *Abdul Aziz* (1927) 49 All. 503, 100 I.C. 644, ('27) A.A. 345.

(g) Sadik Husain v. *Hashim Ali* (1916) 43 I.A. 212, 221-222, 38 All. 627, 646, 36 I.C. 104.

(h) Ibrahim Goolam Ariff v. *Saiboo* (1908) 35 Cal. 1, 34 I.A. 167.

(i) Ebrahim Alibhai v. *Bai Asi* (1933) 58 Bom. 254, 35 Bom. L.R. 1148, 149 I.C. 225, ('34) A.B. 21; *Mahammad Yusuf* v. *Hasina Yusuf* ('48) A.B. 61. *Musa Baba* v. *Badesahab* ('38) A.B. 84; *Assan Kutty* v. *Mohd. Kurikkal* 1961 Ker. L.T. 959. See *Kasim Ali* v. *Rama Manikka Mudaliar* (1938) M.W.N. 403, ('38) A.M. 677.

(j) Kaniz Fatima v. *Jai Narain* (1944) 23 Pat. 216, 218 I.C. 443, ('44) A.P. 334.

(k) Kalu Beg v. *Gulzarbeg* (1946) Nag. 510, 224 I.C. 583 ('46) A.N. 357.

(l) Mst. Azizi v. *Sona Mir* 1962 A. J. & K. 4.

whether definite [ill. (c)] or indefinite *(m)*.

[(a) *A* makes a gift to *B* of "the fruit that may be produced by his palm tree this year." The gift is void as being a gift of future property: Baillie, 516.

(b) A Mahomedan executes a deed in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain Jaghir villages. The gift is void, as being a gift of a portion of the future revenue of the villages: *Amtul Nissa* v. *Mir Nuruddin* (1896) 22 Bom. 489; *Anwar Reza* v. *Hachinur Reza* (1944) 1 Cal. 680, 221, I.C. 262, ('45) A.C. 189. But the Madras High Court has held that now a gift of future revenue, being in the nature of usufruct, is valid: *Duriesh Mohideen* v. *State of Madras* ('57) A.M. 577. [See also, illustration (c) under sec. 165, below.]

(c) *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to anyone, but after my death, you will be the owner." The gift is void, for it is not accompanied by delivery of possession and it is *not to operate until after the death of A: Yusuf Ali* v. *Collector of Tipperah* (1882) 9 Cal. 138. See also *Chekkonekutti* v. *Ahmed* (1886) 10 Mad. 196, at p. 199.

(d) *A* is entitled to receive a specified share in the offerings made by pilgrims at a certain shrine. *A* may make a valid gift of the right to receive such share. Here the thing gifted is "the *right* of the donor to receive a fixed share in the offerings after they have been made" (see s. 144): *Ahmad-ud-din* v. *Ilahi Bakhsh* (1912) 34 All. 465, 14 I.C. 587; *Anwari Begam* v. *Nizam-ud-din Shah* (1898) 21 All. 165, at pp. 170-171.]

Macnaghten, p. 50, secs. 3 and 5; Baillie, 516. The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift: Baillie, 516.

163. Contingent gift.— A gift cannot be made to take effect on the happening of a contingency *(n)*.

"A gift must not be dependent on anything contingent, as the entrance of Zeyd, or the arrival of Khalid": Baillie, 515- 516, 549-550. A gift by a Shia Mahomedan to *A* for life, and, *in the event of the death of A* without leaving male issue, to *B*, is as regards *B* a contingent gift, and therefore void *(o)*. In a Privy Council case a gift was made by a Shia Mahomedan to his wife for life, and after her death to *such of his children as may be living at his death.* Their Lordships observed that the gift to the children was contingent, but they refrained from expressing any opinion as to its validity *(p)*. In a similar case it was held by the Bombay High Court that the gift was contingent and therefore invalid *(q)*. In *Nawazish Ali Khan* v. *Ali Raza Khan (r)* a Shia testator bequeathed his estate to *A* for life, if he was living, then to *B* for life, if he was living, on *A*'s death, and then to *C* for life, if he was living, on *B*'s death. The last devisee was given a power of appointment. It is submitted that the bequest of life estates to *B* and *C* were contingent, but neither of the parties to the litigation was interested in raising the point. As to alternative bequests, see sec. 126. and see Family Law and Social Change, p. 17 *et seq.*

164. Gift with a condition.— When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it *(s)*.

"All our masters are agreed that when one has made a gift and stipulated for a condition that

(m) Chekkonekutti v. *Ahmed* (1887) 10 Mad. 196, 199; *Phul Bee Bee* v. *R. M. P. Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038.

(n) Macnaghten. p. 50, sec. 3; Baillie, 515-516; *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 342, 345.

(o) Cassamally v. *Currimbhoy* (1911) 36 Bom. 214, 257-258, 12 I.C. 225.

(p) Sadik Hussain v. *Hashim Ali* (1916) 43 I.A. 212, 219-221; 38 All. 627, 643-644, 36, I.C. 104.

(q) Ashraf Alli v. *Mahomed Alli* (1946) 48 Bom. L.R. 642; ('47) A.B. 122.

(r) Nawazish Ali Khan v. *Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.PC. 134.

(s) Nizamuddin v. *Abdul Gafur* (1888) 13 Bom. 264, 275 affirmed on appeal to P.C. subnomine *Abdul Gafur* v. *Nizamuddin* (1892) 17 Bom. 1, 5, 19 I.A. 170, 178 [as to the last decision, see *Mahomed Ibrahim* v. *Abdul Latiff* (1913) 37 Bom. 447, 458, 17 I.C. 689]; *Suleman* v. *Dorab Ali* (1881) 8 I.A. 117, 122; *Abdoola* v. *Mahomed* (1905) 7 Bom. L.R. 306; *Mahomed Shah* v. *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I.C. 292; *Ma Hmyin* v. *R L. S. A. R S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

is *fasid* or invalid, the gift is valid and the condition is void": Baillie, 546.

Gift of a life-estate.— Life estates were considered to come under this principle with the result that the donee took an absolute interest. But in *Amjad Khan's* case *(t)* the Judicial Committee did not regard the principle as applicable to the facts. See sec. 55 and the cases there cited. "An *amree* (life grant) is nothing but a gift and a condition; and the condition is invalid; but the gift is not rendered null by involving an invalid condition": *Hedaya,* 489. In a later case the Privy Council *(u)* observed that there was no such thing as life estate or vested remainder in Mahomedan Law as understood in English Law, but a gift for life would be construed as an interest for life in the usufruct.

'Life estate' in the sense, that is, the transfer of the ownership of the property itself limited to the life of the donee, with a condition that the donee would have no right of alienation is not recognised by Mahomedan Law. But the view that once prevailed to the effect, that under the Mahomedan law, a life interest with such a condition is nothing but a gift with a repugnant condition, when the condition must fail and the gift must prevail as an absolute one, is no longer good law in view of later decisions of the Privy Council.

A grant, however, creating a limited interest which can be construed without any inconsistency as one limited merely to the use of the property and enjoyment of the usufruct thereof, is valid under the Mahomedan law. [A.K.Sen, J.] *Marzina Bibi* v. *Anjaman Bibi* 81 C.W.N. 1967.

"A life estate does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or his nominee does not detract from or violate the essence of a valid gift. If in a given illustration the subject-matter of the gift is sliced away by the donor, or the condition or restriction contemporaneously imposed by the donor is so obvious that one would understand the gift as taking away a portion of the corpus of the gift, then Mohamedan Law does not accept it as a valid gift. The reason is obvious. By imposing such a restriction as above, the entirety of the property which is the subject-matter of the gift is not given away but only a portion thereto. This is not possible to make it a valid gift. If however the restriction or the condition is such whereby a right to enjoy the income from the gifted property is contemplated, and whether such enjoyment is by the donor or by his nominee, it would not be tantamount to the taking away of a portion of the corpus of the property, but it is only a temporary right to enjoy the usufruct therefrom." *Jameela Beevi* v. *Sheik Ismail* A.I.R. (1979) Madras 193.

In *Mrs. Hazara Bai* v. *Mohamed Adam Sait* (1977) 1 M.L.J. 291. The donor intended to give only a life-estate to the plaintiff. The preamble to the gift deed used the word 'absolute' but the deed was not in favour of the plaintiff only. It was in favour of her children also, on whom absolute rights were conferred. The fact that the preamble did not mention the children would not make any difference. The operative clause showed that only a life estate was given to the plaintiff, while the children were given an absolute right. The document cannot be construed as conferring an absolute interest on the plaintiff with a condition against alienation. If, under Mahomedan law, life estate cannot be created by gift, then in this case it must be held that the plaintiff got nothing under the document. If the document in terms creates only a life estate, there is no warrant to construe the same as one creating an absolute estate with a condition against alienation, on the theory that life estates by way of gifts are unknown to Mahomedan law. If such theory holds good, under a document creating a life estate the donee would get nothing and not an absolute estate at all. It should be taken to be settled law that if, in a Mahomedan gift, a life-estate is created, it would take effect out of the usufruct. Therefore in the present case the plaintiff having been granted only a life estate it takes effect out of the usufructs of the property.

Mahomedan law makes a distinction between the corpus of the gift (*Ayn*) and the usufructs (*Manafi*). A reservation of rights in *manafi,* so long as the *ayn* is transferred, does not render the gift bad. If however, possession of the corpus is reserved, the gift will be bad. *Mundayat Vedake* v. *Chiru Kandan* 1971 K.L.J. 796.

"In general, Muslim Law draws no distinction between real and personal property and no authoritative work is found, which affirms that Muslim Law recognizes the splitting up of ownership

(t) (1929) 56 I.A. 213, 4 Luck. 305; 116 I.C. 405, ('29) A.P.C. 149.

(u) Nawazish Ali Khan v. *Ali Raza-Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

of land into estates, or in point of quality like legal and equitable estates, or in point of duration like estate in fee sample, in tail, for life or in remainder. What Muslim Law does recognize and insist on is the distinction between the corpus of the property itself (any) and the usufruct in the property (*manafi*). Over the corpus of the property, the law recognizes only absolute dominion heritable and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant, but interest limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests. [*V. R. Krishna Iyer, R. S. Sarkaria* and *A. C. Gupta, JJ.*] *Mohan Ali* v. *State of M.P.* (1975) 2 S.C.W.R. 511.

Where the donee reserved to himself the usufruct. It was held that such reservation does not detract from the validity of the gift, and does not make it void in law. [*G. Viswanatha Iyer* and *T. Kochu Thommen, JJ.*] *Madathil Thattantavita Khalid* v. *Palott Moothammantakath Sainabi* 1981 Ker. L.T. 621: A.I.R. 1981 Ker. 230.

Illustrations

(a) If a Sunni Mahomedan says, "this mansion is to *thee oomree* (for thy life), and when thou art dead it reverts to me," the gift is lawful, and the condition is void: Baillie, 517; *Hedaya*, 489.

The result is that the donee takes an absolute interest in the mansion, and not only a life-interest. this is the *legal effect* of the gift. Similarly, if a house is given to *A* for life, and after his death to *B*, the legal effect of the gift is that *A* takes the house absolutely, and *B* takes nothing. The same rule applies to a testamentary gift *(v)*. But if the gift is not of an absolute interest with a condition of defeasance but of a limited interest it would appear to be valid as a gift of the usufruct. See sec. 55(1).

(b) *A* makes a gift of Government promissory notes to *B*, on condition that *B* should return a *fourth part of the notes* to *A* after a month. the condition is void and *B* takes an absolute interest in the notes: see Baillie, 547; *Hedaya*, 488. (Here the condition relates to the *return* of part of the *corpus*.)

(c) *A* makes a gift of a house to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual, or that *B* shall give *some part of it in iwaz* or exchange. The condition is void, and *B* takes an absolute interest in the house: Baillie, 547. See sec. 165.

Restraint against alienation.— In the case of a gift, a restraint against alienation, whether absolute or partial, is void. In the case of a transfer for a consideration, it is valid if the restraint is partial, as where it is provided that the transferee shall not sell the property to any one but the members of the transferor's and transferee's family *(w)*, but void if the restraint is absolute. See Transfer of Property Act, sec. 10.

(d) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely: *Babu Lal* v. *Ghansham Das* (1922) 44 All. 633, 70 I.C. 84, ('22) A.A. 205.

Life-grant under Shafei law.— A gift for life is recognized among Shafeis, a sub-sect of Sunnis *(x)*. But see sec. 55.

Life-grant under Shia law.— The Shia law recognizes a gift of a life-estate *(y)*. Thus it is that in Baillie, II, 226, that if a man says, "I have bestowed on thee this mansion for thy life or my life," it is a valid gift. In *Nisar Ali Khan* v. *Mahomed Ali Khan (z)* the Privy Council construed a Shia will as creating a succession of life estates but did not have to consider the validity of the second and third life interests. But see sec. 55.

165. Condition in the nature of a trust.— Where property is transferred by

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(v) Abdul Karim v. *Abdul Qayum* (1906) 28 All. 342; *Ma Hymin* v. *P. L. S. A. R. S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

(w) Muhammad Raza v. *Abbas Bundi Bibi* (1932) 59 I.A. 236, 7 Luck. 257, 36 C.W.N. 774, 137 I.C. 321, ('32) A.PC. 158.

(x) Mahomed Ibrahim v. *Abdul Latiff* (1913) 37 Bom. 447, 458, 17 I.C. 689.

(y) Bano Begum v. *Mir Abed Ali* (1908) 32 Bom. 172; *Siraj Husain* v. *Mustaf Husain* (1921) O.C. 321, 49 I.C. 58.

(z) (1932) 59 I.A. 268, 7 Luck. 324, 34 Bom. L.R. 1299; 137 I.C. 539, ('32) A.PC. 172.

way of gift, and the donor does not reserve dominion over the *corpus*, of the property nor any share of dominion over the *corpus*, but stipulates simply for and obtains a right to the *recurring income* during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the *corpus* as in sec. 164 ills. (b) and (c). The stipulation may also be enforced as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated. It was so held by the Privy Council in *Nawab Umjad Ally* v. *Mohumdee Begum (a)* [ill. (a)] which was a Shia case and in *Mohammad* v. *Fakhr Jahan (b)* which was a Sunni case.

The principle of the above decision has been extended by the Courts in India to cases where a gift is made subject to the condition that the donee shall pay the income to a person or persons nominated by the donor during the life of such person or persons [ills. (b) and (c)].

Illustrations

(a) *A* transfers and endorses Government promissory notes into the name of his son *B*, and delivers them to *B* as a gift, with a condition that *B* should pay the income thereof to *A* during his life. Both the gift and the condition are valid, and *B* is bound to pay the income to *A* during *A*'s life: *Nawab Umjad Ally* v. *Mohumdee Begum* (1867) 11 M.I.A. 517, 547-548, a Shia case. The same principle applies to a gift by a Sunni Mahomedan: *Mohammad* v. *Fakhr Jahan* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.P.C. 281; *Zohara Khathum* v. *Mahaboob Bi* (1943) 2 M.L.J. 99. ('43) A.M. 677.

(b) *A* makes a gift of his house to his son *B* with a condition that *B* should give the income of one-third of the house to *A*'s grandson *C* during *C*'s life. both the gift and the condition are valid, and *B* is bound to pay the income to *C* during *C*'s lifetime: *Lali Jan* v. *Muhammad* (1912) 34 All. 478, 16, I.C. 105, a Sunni Case.

(c) *A* makes a gift of certain property to her son *B* with a condition that *B* should pay out of the income thereof Rs.40 every year to *C* during *C*'s life and divide the remaining income equally between him *(B)* and *(D)* during *D*'s life. Both the gift and the condition are valid, and *B* is bound to pay Rs.40 per annum to *C* and divide the remaining income equally between himself and *D* until *D*'s death: *Tavakalbhai* v. *Imatiyaj Begam* (1916) 41 Bom. 372, 39 I.C. 96, a Sunni case. Where a Mahomedan made a *hibanama,* gifting the corpus of his properties to his two sons *A* and *B*, and out of the usufruct thereof an allowance of Rs. 350 annually to his daughter, *C*, and after her life, to that lady's heirs and successors permanently, the gift was held as creating a valid obligation on *A* and *B* to pay the annual allowance to *C: Duriesh Mohideen* v. *State of Madras* ('57) A.M. 577.

(d) A Mahomedan lady transfers certain immovable properties by way of gift to her nephews upon condition that they should pay her Rs.900 every year for her maintenance. She also reserves a right of residence for herself in a portion of one of the properties. The deed of gift contains a stipulation that if the payments are not regularly made, she should be at liberty to recover them by a suit. This is not a valid gift, for the payment of Rs.900 is not made dependent upon the profits of the *corpus* being sufficient to meet it, as in ills. (a), (b) and (c); the consideration for the transfer is the promise to make the payment *in any event: Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 767, 105 I.C. 67. ('27) A.C. 808.

(e) A Mahomedan executed a deed of trust of part of his property for the benefit of his sons with the condition that he was to remain in possession so long as he lived with power to deal with the rents and profits and that the legal estate was to pass to his sons after his death.—Held that

(a) (1867) 11 M.I.A. 517, 547-548; *Mirza Hashim* v. *Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R. 323 (where it was held that the donor had not divested himself completely of all dominion over the property in that the deed of trust contained a condition that the trustees should not sell the property without the consent of the donor, and that the reservation of a life-interest by the donor to himself was therefore invalid).

(b) (1922) 49 I.A. 195, 208-210, 44 All. 301, 314-416, 68 I.C. 254, ('22) A.P.C. 281.

the condition was invalid as the donor reserved the legal and beneficial interest during his lifetime; that the gift was invalid as possession was not given to the sons; and that the gift was also invalid as it was to take effect *in futuro: Phul Bee* v. *R.P.M. Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038.

(f) *A* makes a gift to *B* of the whole of his property on condition that *B* shall pay all *A*'s debts. The gift is valid and the condition is valid to the extent of the property gifted. Section 128 of the Transfer of Property Act is not in violation of any rule of Mahomedan law: *Krishna Behari* v. *Mt. Ahmadi* (1925) 11 Luck. 199. 155, I.C. 303, ('35) A.O. 432.

(g) *A* makes a gift of land to *B*, who is not related within the prohibited degrees, subject to the condition that *B* maintains *A* for his life. The gift is valid, but if *B* fails to maintain *A*, *A* may file a suit for revocation of the gift: *Ali Jan* v. *Praguni* ('50) A.P. 300.

(h) The Nawab Nazim of Bengal, a Shia, deposited certain sums of money with the British Government for the benefit of his seven daughters for life. The Government issued promissory notes in favour of the daughters and continued to pay interest to them. On a suit by the successor to the Nawab Nazim it was held that the life interests created in favour of the daughters were valid under Mahomedan law and the daughters were only entitled to the income during their lives, after which the property passed to the heirs of the grantor. *Anjumanara Begum* v. *Nawab Asif Kadar* (1955) 2 Cal. 109.

A limited estate may be created by family arrangement provided it is supported by consideration. This is not repugnant to Mahomedan Law. *Jainulabdeen Rowther* v. *Pappathi Ammal* I.L.R. (1968) 1 Mad. 477.

Note.— The transaction in each of the illustrations (a), (b), (c) and (f) is in substance a *hiba-ba-shart-ul- iwaz*, as to which see sec. 169 below.

166. Gift over.— The Chief Court of Oudh has held that a gift of property to *A* and *B* in equal shares with a condition that if either of them died without leaving male issue his share should go to the other, is valid according to the Shia law *(c)*. But the reasoning in *Nawazish Ali Khan* v. *Ali Raza Khan* would indicate that the gift over would be void and *A* and *B* would take absolutely *(d)*.

According to the Sunni law, the condition would be void, and *A* and *B* would each take his share of the property absolutely, and it would descend on his death to his heirs; see sec. 164.

167. Revocation of gifts.— (1) A gift may be revoked by the donor at any time before delivery of possession. The reason is that *before* delivery there is no completed gift at all.

(2) Subject to the provisions of sub-sec. (4), a gift may be revoked even after delivery of possession except in the following cases—

(a) when the gift is made by a husband to his wife or by wife to her husband;

(b) when the donee is related to the donor within the prohibited degrees;

(c) when the donee is dead;

(d) when the thing given has passed out of the donee's possession by sale *(e)*, gift or otherwise;

(e) when the thing given is lost or destroyed;

(f) when the thing given has increased in value, whatever be the cause of the increase *(f)*;

(g) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding *(g)*;

(c) Musammat Wahibunnisa v. *Mushaj Husain* (1927) 2 Luck. 187, 95 I.C. 113, ('27) A.O. 328.

(d) (1948) 75 I.A. 62, ('48) A.PC. 134.

(e) Wali Bandi v. *Tabeya* (1919) 41 All. 534, 50 I.C. [illegible] All. 260, 781 C. 222. ('24) A.A. 307.

(f) Ibid.

(g) Maqbul v. *Ghafur-un-nissa* (1914)36 All. 333, 24 I.C. 225. *Abdur Rehman* v. *Khalilur Rehman* P.L.D. 1966 (W.P.) Pesh. 121 (right of revocation of

(h) when the donor has received something in exchange *(iwaz)* for the gift [see secs. 168 and 169].

(3) A gift may be revoked by the donor, but not by his heirs after his death *(h)*. It is the donor's law that will apply to a revocation and not that of the donee *(i)*.

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a *decree* is passed, the donee is entitled to use and dispose of the subject of the gift *(j)*.

Hedaya, 485; Baillie, 533-537. The reason why a gift to a person other than a husband or wife or to a person other than one related within the prohibited degrees may be revoked is thus stated in the *Hedaya*, p. 486: "The object of a gift to a *stranger* is a return:— for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that he may obtain an equivalent;—and such being the case it follows that the donor has power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment. Mere cancellation of the gift deed does not cancel the gift. For the cancellation of a gift, a decree of the court is required. *Abu Khan* v. *Moriam Bibi* (1974) 40 C.L.T. 1306.

A stranger cannot challenge the validity of a gift even if not followed by delivery of possession. Such an inquiry can only be between the donor and his donee, or between those claiming under them. *Masoom Sab* v. *Madan Sab* (1973) 1 A.P.L.J. 97 *Karim Bi* v. *Mariam Bi* ('60) A. Mad. 447 see also, 46 A. Nag. 57.

A gift by an uncle to sister's son is revocable *(k)*. A gift by a brother to a brother is irrevocable, for if they had belonged to opposite sexes, they could not have married each other *(l)*. There is a conflict in the reasoning of these two cases.

See: *Kuttialikutty Marakkar* v. *Kandakutty* ('67) A. Ker. 78. (It is a rule of Shafei Law that the revocation of a gift to a child by the father must be express and cannot be by implication of a subsequent dealing of the property by the donor.)

Reservation of power of revocation.— Where a settlor reserves to himself the power of revocation, the question arises whether a gift made through the medium of a trust is valid and, if valid, whether the settlor is entitled to exercise the power of revocation. Beaman, J., was of the opinion that the reservation of the power of revocation detracted from the completeness of the gift. In such a case the donor could not be said to have parted with all control over the subject of the gift and therefore there was no valid gift *(m)*. See sec. 126 of the Transfer of Property Act, 1882.

Shia law.— The Shia law differs from the Hanafi law in the following particulars:—

(a) a gift to any blood relation, whether *within the prohibited degrees or not,* is irrevocable after delivery of possession;

(b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, *revocable* (Baillie, II, 205-206);

(c) a gift may be revoked *by a mere declaration* on the part of the donor without any proceedings in Court [Baillie, II, p. 205, f.n. (10)] *(n)*.

168. Hiba-bil-iwaz (gift with exchange).— (1) A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration. It is in reality

gift dies with the death of the donor).

(h) Mahboob Khan v. *Abdul Rahim* ('64) A. Raj. 250.

(i) Someshwar v. *Barkat Ullah*, ('63) A.M. 469.

(j) See *Mahboob Khan* v. *Abdul Rahim (supra).*

(k) Ghulam Mohammad v. *Din Mohammad* (1936) 166 I.C. 230, ('36) A. Pesh. 208.

(l) Tajju Khan v. *Mazhar Khan* ('52) A.A. 614.

(m) Cassamally v. *Currimbhoy* (1911) 36 Bom. 214, 248-249, 12 I.C. 225. (The head note is erroneous.) See also *Miraz Hashim* v. *Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R. 323.

(n) Someshwar v. *Barkat Ulla* ('63) A. All. 469.

a sale, and has all the incidents of a contract of sale. Accordingly possession is not required to complete the transfer as it is in the case of a *hiba,* and an undivided share *(mushaa)* in property capable of division may be lawfully transferred by it, though this cannot be done in the case of a hiba *(o)*. Two conditions, however, must concur to make the transaction valid, namely, (1) actual payment of consideration *(iwaz)* on the part of the donee, and (2) a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the property and to confer it upon the donee *(p)*. The adequacy of consideration is not material; but whatever its amount, it must be *actually and bona fide* paid *(q)*. Such a transaction is called the *hiba-bil- iwaz* of India as distinguished from "true" *hiba- bil-iwaz* dealt with in the notes below. It was introduced by the Muslim lawyers of India as a device for effecting a gift of *mushaa* in property capable of division *(r)*.

(2) The High Courts of Calcutta, Madras, Lahore, Allahabad, Patna and Nagpur have held that a transaction of this character is nothing but a sale; therefore, where the property is immovable and is of the value of Rs.100 and upwards, it must be effected by a registered instrument as a required by sec. 54 of the Transfer of Property Act, 1882, which relates to sales *(s)*. As a sale, it also gives rise to a right of pre-emption *(t)*.

(3) The Chief Court of Oudh *(u)* has held that where a Mahomedan husband by a document transfers immovable property to his wife in lieu of her dower, the transaction is not a sale. This view has been dissented from by the Allahabad High Court *(v)* and it is to be noted that in *Mahabir Prasad* v. *Mustafa Hussain (w)*, a case from Oudh, the Privy Council observed that such a transaction was a sale. The Bombay High Court has held that where in lieu of money land is gifted by the husband to the wife at the time of marriage, a registered document is not necessary, and if delivery of possession is given, the transaction amounts to a *hiba* but is subject to the doctrine of *mushaa (x)*. This view has been followed by the High Court of Hyderabad *(y)*.

(a) *A* and *B*, the two Mahomedan brothers, own certain villages which are held by them as tenants-in-common. *A* dies leaving his brother *B* and a widow *W*. Some time after *A*'s death, *B*

(o) Baillie, 122-123; Macnaghten, pp. 51-52, ss. 14 and 15; *Hitendra Singh* v. *Maharaja of Darbhanga* (1928) 55 I.A. 197, 7 Pat. 500, 109 I.C. 858, ('28) A.PC. 112; *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808; *Fateh Ali* v. *Muhammad* (1928) 9 Lah. 428, 119 I.C. 258, ('28) A.L. 516; *Mohammad Hassan* v. *Safdar Mirza* (1933) 14 Lah. 473, 144 I.C. 45, ('33) A.L. 601; *Mt. Aimna* v. *Lakshmichand* ('34) A.L. 705, 154 I.C. 979; *Tajunnissa Bibi* v. *Rahmath Bibi* ('59) A. Mad. 630.

(p) Mt. Khairunnissa v. *Karamtulla* (1933) 142 I.C. 42, ('33) A.O. 99, *Mt. Bashiran* v. *Mohammad Husain* (1941) 16 Luck. 615. (1941) O.W.N. 249, 193 I.C. 161, ('41) A.O. 284.

(q) Khajooroonissa v. *Roshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291; *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All. 439, 33 I.A. 68; *Mohan Lal* v. *Mahmud* (1922) 44 All. 580, 67 I.C. 67, ('22) A.A. 347.

(r) Baillie, p. XXXV.

(s) Abbas Ali v. *Karim Bakksh* (1909) 13 C.W.N. 160, 4 I.C. 466; *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808; *Saburannessa* v. *Sabdu Sheikh* (1934) 38 Cal. W.N. 747, 152 I.C. 422, ('34) A.C. 693; *Gopaldas* v. *Sakina Bibi* (1936) 16 Lah. 197, 156 I.C. 70, ('36) A.L. 307; *Mohammad Usman* v. *Amir Mian* (1949) 26 Pat. 561, ('49) A.P. 237; *Zainab Bi* v. *Jamalkhan* (1949) Nag. 426; *Masum Vali* v. *Illuri Modin* ('52) A.M. 671; *Ghulam Abbas* v. *Razia Begum* (1950) All. L.J. 30, ('51) A.A. 86 [F.B.].

(t) Satyendra Nath v. *Kulsom Bibi* (1932) 36 C.W.N. 486, 139 I.C. 403, ('32) A.N. 625.

(u) Bashir Ahmed v. *Zubaida Katun* ('26) A.O. 186; *Abdul Hamid* v. *Abdul Ghani* (1934) 148 I.C. 801, ('32) A.O. 163.

(v) Ghulam Abbas v. *Razia Begum* (1950) All L.J. 30, ('51) A.A. 86 [F.B.]

(w) (1937) 39 Bom. L.R. 990, 168 I.C. 418, ('37) A.PC. 174.

(x) Jaitunbi v. *Fatrubhai* (1947) 49 Bom. L.R. 669, ('48) A.B. 114.

(y) Mohammad Hashim v. *Aminabai* ('52) A. Hyd. 3.

(z) Serajuddin v. *Isab* (1922) 49 Cal. 161, 70 I.C. 203,

executes a deed whereby he grants two of the villages to *W*. Two days after the date of the grant, *but as part of the same transaction, W* executes a writing whereby *in consideration* of the grant to her of the two villages she gives up her claim to her husband's estate in favour of *B*. The transaction is a *hiba-bil-iwaz,* and it is valid though possession may not have been delivered: see *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25.

(b) A Mahomedan executes a deed in favour of his wife whereby he grants certain immovable property to her *in lieu* of her dower. Possession of the property is not delivered to the wife. The transaction is nevertheless valid as *hiba-bil-iwaz: Muhammad Esuph* v. *Pattamsa Ammal* (1889) 23 Mad. 70. The same rule applies to a deed of settlement in consideration of a promise of marriage: *Tajunnissa Bibi* v. *Rahmath Bibi* ('59) A. Mad. 630.

Ismail Beevi v. *Sulaikkal Beevi*, ('67) A.M. 250 (Gift in consideration of promise of marriage and subject to condition that debts due on the property to be discharged by the donee—valid).

(c) A Mahomedan lady, who owns an undivided share *(mushaa)* in an immovable property which is capable of division, executes a deed whereby she transfers her share in the property by way of gift to her two nephews in consideration of the nephews paying Rs.900 to her every year for her maintenance. The deed provides that if they fail to make the payments regularly she should be at liberty to recover them by a suit. The deed is duly registered. The transaction is not a *hiba,* and it is valid though it is a transfer of a *mashaa: Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808. See also ill. (d) under section 165.

True nature of transaction.— Though a transaction may be described in the plaint as a *hiba-bil-iwaz*, it is open to the plaintiff to show that it was in fact a simple *hiba* provided that the point is raised at an early stage of the proceedings *(z)*.

(d) A Mahomedan dies leaving two brothers and a daughter. Subsequently each brother relinquishes his share in the estate of the deceased in favour of the daughter in consideration of the other doing so. The transaction is not a *hiba,* the relinquishment by one brother being the consideration for relinquishment by the other, and delivery of possession to the daughter is not necessary to validate the transaction *(a)*.

(e) A gift made by the donor in favour of an employee who was already paid adequate for his services, would not be a *hiba- bil-iwaz. Someshwar* v. *Barkat Ullah.* ('63) A.M. 469].

A gift "in consideration of your being my cousin" is not a gift for a consideration or a *hiba-bil-iwaz*. Such a transaction is a *hiba* or gift simple, and delivery of possession is necessary to validate the gift *(b)*. Similarly a gift "for having with cordial affection and love rendered service to me, and maintained and treated me with kindness and indulgence, and shown all sorts of favour to me," is a *hiba* or gift simple. Such a transaction is not a *hiba-bil-iwaz*, there being no *iwaz* or consideration, and delivery of possession is necessary to validate the gift *(c)*.

Adequacy of Consideration.— In *Khajooroonissa* v. *Rowshan Jehan (d)* which is the leading case on the subject, their Lordships of the Privy Council said: "Undoubtedly the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually a *bona fide* paid." It would seem to follow from this, that however small the consideration for a *hiba-bil-iwaz* may be, the transaction would be valid if the consideration was actually a *bona fide* paid. A mere promise to pay is not sufficient *(e)*. In a Bombay case, decided before the above Privy Council case, there was a grant by *A* to *B* of property, and the consideration for the grant was stated to be Rs.10. It was held that the consideration being only Rs.10, the transaction could not be sustained as a *hiba-bil-iwaz (f)*. This decision can no longer be regarded as good law. Even a copy

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('22) A.C. 258; *Sardar Khatun* v. *Secretary of State* (1939) Kar. 348, 179 I.C. 252 ('39) A.S. 9.

(a) Ashidbai v. *Abdulla* (1906) 31 Bom. 271.

(b) Jafar Ali v. *Ahmed* (1868) 5 Bom. H.C.A.C. 37.

(c) Rahim Baksh v. *Muhammad Hasan* (1881) 11 All. 1; *Ewaz Mahammad* v. *Gafoor Khan* (1934) 147 I.C. 867 ('34) A.O. 27.

(d) (1876) 2 Cal. 184, 197, 3 I.A. 291, 308.

(e) Mohammad Yahya Ali Shah v. *Sardar Ali Shah* (1939) P.L.R. 267, 184 I.C. 556, ('39) A.L. 292.

(f) Rujabai v. *Ismail* (1870) 7 Bom. H.C.O.C. 27, 30.

(g) Abbas Ali v. *Karim Baksh* (1909) 13 Cal. W.N.

of the Koran *(g)*, or a prayer carpet and rosary *(tasbih) (h)* is a good consideration for a *hiba-bil-iwaz*.

Intention to transfer in praesenti.— When property was transferred to a donee *subject* to a reservation of the possession and enjoyment to the donor and his wife during their lives, it was held by their Lordships of the Privy Council that there was no intention on the part of the donor to divest himself *in praesenti* of the property and that the transaction could not be upheld as a *hiba-bil-iwaz (i)*. Where in a registered deed of gift it was stated that the donor made the gift in favour of his wife in lieu of her dower debt and that he had put the donee in possession of the land gifted from the date of its execution and it was further stated that he had no further concern with the land gifted, and that all his rights were thereafter to be enjoyed by the donee, the gift was held to be valid although the possession of the land was not delivered *(j)*.

True hiba-bil-iwaz.— *Hiba-bil-iwaz* means, literally, a gift for an exchange. It is of two kinds, one being the true *hiba-bil-iwaz,* that is, *hiba-bil-iwaz* as defined by the older jurists, and the other *hiba-bil-iwaz* of India. In the former there are two acts, namely, (1) the *hiba,* which is followed by (2) an independent and uncovenanted *iwaz (return-gift,* that is, an *iwaz* not stipulated for at the time of *hiba.* In the latter there is only one act, the *iwaz* or exchange being involved in the contract of gift as its *direct consideration:* Baillie, 122. In the true *hiba-bil-iwaz,* the *hiba* and *iwaz* are both governed by the law of gifts. There must be delivery of possession both of the *hiba* and *iwaz*, and they are both subject to the doctrine of *mushaa.* The donor may even after delivery revoke the gift [s. 167] at any time before the *iwaz* is delivered to him, but after delivery of the *iwaz* neither party can revoke his gift. The transaction consists of *two distinct acts of donation* between two persons each of whom is alternately the donor of one gift and the donee of the other. Thus if *A, without having stipulated for any return,* makes a gift of a ring to *B* and delivers it to him, and *B*, without having promised it, subsequently makes a gift of a watch to *A*, saying that it is the *iwaz* or return for the gift of the ring, and delivers the watch to him, the transaction is a true *hiba-bil-iwaz*, and neither *A* nor *B* can revoke the gift. But if *B* delivers the watch to *A* without saying that it is the *iwaz* or return for his gift, the transaction does not amount to a *hiba-bil-iwaz*. The case is then one of two *hibas,* and either party may revoke his *hiba* [s. 167]. If *A* makes a gift of a ring to *B* saying "I have given this to you for *so much,*" it is a *hiba-bil-iwaz* of India. It is in reality a sale, while a true *hiba-bil-iwaz* is not a sale either in its inception or completion *(k)*.

169. Hiba-ba-shart-ul-iwaz.— Where a gift is made with a *stipulation (shart)* for a return, it is called *hiba-ba-shart-ul-iwaz*. As in the case of a *hiba* (simple gift), so in the case of a *hiba-ba-shart-ul-iwaz*, delivery of possession is necessary to make the gift valid, and the gift is also revocable (s. 167). But the gift becomes irrevocable on delivery by the donee of the *iwaz* (return) to the donor *(l)*.

The main distinction between the *hiba-bil-iwaz* of India, and *hiba-ba-shart-ul-iwaz* is that delivery of possession is not necessary in the former case, while it is necessary in the latter case.

The main distinction between *hiba-bil-iwaz* as defined by the older jurists and *hiba-ba-shart-ul-iwaz* is that in the former the *iwaz* proceeds *voluntarily* from the donee of the gift,

160, 4 I.C. 466.

(h) Jerafat Mondal v. *Kamrezvan Bibi* (1955) 1 Cal. 144.

(i) Chaudhri Mehdi Hasan v. *Muhammad Hasan* (1906) 28 All. 439, 453, 33 I.A. 68 (it was also found that no consideration passed from the donee to the donor); *Moosa Adam Patel* v. *Ismail Moosa* (1909) 12 Bom. L.R. 169, 194, 5 I.C. 946; *Mt. Bashiran* v. *Mohammed Hussain* (1941) 16 Luck. 615, 193 I.C.161, ('41) A.O. 284; *Mohammad Yahya Ali Shah* v. *Sardar Ali Shah* (1939) P.L.R. 267, 184 I.C. 556, ('39) A.L. 292.

(j) Mt. Bashiran v. *Mohammad Husain* (1941) 16 Luck. 615, 193 I.C. 161, ('41) A.O. 284; *Mohammad Kazim Husain* v. *Mt. Nadri Begum* (1941) O.W.N. 532, 194 I.C. 87 ('41) A.O. 348.

(k) Baillie, 122-123, 541-543; *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1; *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808; *Kulsum Bibi* v. *Bashir Ahmed* (1937) All. 285, 166 I.C. 439, ('37) A.A. 25; *Kulsum Bibi* v. *Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

(l) Baillie, 534-544; *Hedaya*, 488; *Mogulsha* v. *Mahammad Saheb* (1887) 11 Bom. 517 (having regard to the decision that possession was necessary, the transaction is wrongly described in the judgment as *hiba-bil-iwaz*).

(m) Muhammad Faiz v. *Ghulam Ahmad* (1881) 3

while in the latter it is expressly *stipulated* for between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in its first stage, but it partakes of the character of a sale after possession has been taken by the donee of the thing given and by the donor of the *iwaz*, so that the transaction, when completed, is exposed to *shufaa* or pre-emption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of pre-emption and the right to return a thing for a defect, are two of the incidents of the contract of sale in the Mahomedan law. As *hiba-ba-shart-ul-iwaz* is not common in India, it is unnecessary to pursue the matter further. As to the incidents of sale in Mahomedan law, the student is referred to Baillie's Digest, 2nd ed., Introduction to the Chapter on Sale, pp. 775-783.

See ills (a), (b) and (c) to sec. 165, and notes.

170. Areeat.— The grant of a license, resumable at the grantor's option, to take and enjoy the usufruct of a thing, is called *areeat (m)*.

Hedaya, 478.

A *hiba* is a transfer of *ownership* without consideration. A *hiba-bil-iwaz* is a transfer of *ownership* for a consideration. An *areeat* is not a transfer of *ownership*, but a temporary *licence* to enjoy the profits so long as the grantor pleases, and is defined by the author of Durrul Mukhtar as "making another the owner of the usufruct without any consideration". A *hiba* is revocable except in certain cases (s. 167). A *hiba-bil- iwaz* is not revocable in any case. An *areeat* is revocable in every case.

In *areeat* it is not necessary for the donor to be of age, nor that the thing given should not be undivided *(mushaa)*. The prohibitions governing gifts do not extend to *areeats*, for ownership is not conveyed by the latter transaction *(n)*.

171. Sadaqah.— A *sadaqah* is a gift made with the object of acquiring religious merit. Like *hiba*, it is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share in property capable of division [sec. 160]. But unlike *hiba*, a *sadaqah*, once completed by delivery, is not revocable; nor is it invalid if made to two or more persons all of whom are *poor* [s. 161].

Baillie, 554-556; *Hedaya*, 489. the distinction between *hiba* and *sadaqah* lies in the object with which it is made. In the case of *hiba*, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of *sadaqah*, the object is "to acquire merit in the sight of the Lord." A gift of property even to the rich would be a *sadaqah* if made with the object of acquiring religious merit.

Sadaqah and wakf are two different concepts and the plaint must clearly allege one or the other. One of the differences is that in a *sadaqah* the corpus of the gift may be consumed but in a wakf only the usufruct can be used. A *sadaqah* is not complete without delivery of possession but a wakf can be completed by a declaration only. *Nabi Hassan* v. *Gajadhar Singh* ('74) A. Patna 141 *Banubi* v. *Narsingrao* 31 Bom. 250.

Sadaqah distinguished from wakf.— In the case of a *sadaqah*, the *corpus* may be consumed; in the case of a wakf, the *income* only can be spent *(o)*. See ss. 207 and 208 *below*.

What is material is the intention to create a 'wakf' and it is not necessary that the express words 'dedication of property in favour of God' should be used. The document must be construed as whole and the intention must be gathered from the words used. Surrounding circumstances may be looked into for purpose of finding out the intention expressed. *Sadaqah* and wakf are

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All 490, 8 I.A. 25, 38; *Mumtaz-un-Nissa* v. *Tufail* (1906) 28 All. 264, as explained in *Khalil Ahmad, in the matter of* (1908) 30 All. 309; *Muhammad Siddiq* v. *Risaldar* (1927) 2 Luck, 216, 95 I.C. 220, ('26) A.O. 360; *Naziruddin* v. *Khairat Ali* (1938) 13 Luck. 713, 172 I.C. 384 ('38) A.O. 51.

(n) Shaikh Mastan Bi v. *Shaikh Bikari Saheb* (1958) 2 An. W.R. 473, ('58) A. Andh. Pra. 751.

(o) Ramanadham v. *Vada Levvai* (1911) 34 Mad. 12, 14; *Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 369, 127 I.C. 401, ('30) A.B. 191. *Gulam Ali* v. *Sultan Khan*, ('67) A. Ori. 55 (distinction between *sadaqah* and wakf).

distinguishable from the way the corpus of the property, is to be dealt with. In *sadaqah* the corpus may be consumed but in a wakf the corpus is to be preserved and only the income utilized. Where the wakf deed prohibits alienation of property any alienation is invalid. *Sk. Mamtaj* v. *Alli* ('68) A. Ori. 208. (Essentials of *sadaqah* set out.)

172. Gift by a Mahomedan governed by Marumakkatyam law to a tawazhi.— A *tawazhi* consists of a mother and *all* her children and descendants in the female line. It is a corporate unit, and capable of holding property as such. Therefore, where a Mahomedan who follows the *Marumakkatyam* law, makes a gift of property to his wife and *all* her children constituting a *tawazhi*, without any expression of intention as to how they are to hold and enjoy it, the gift will be deemed to be a gift to the *tawazhi*, and the donees will take the property subject to the incidents of an ordinary *tarwad* or *tawazhi* property, one of which is impartibility *(p)*. But when the gift is to the wife and her children by him, to the exclusion of her children by a former husband, the gift cannot be deemed to be one to a *tawazhi*, and the donees will take the property as tenants-in-common in equal shares with power to alienate their respective interests *(q)*.

(p) Kunhacha Umma v. *Kutti Mammi* (1893) 16 Mad. 201; *Chakkra Kannan* v. *Kunhi Pokker* (1916) 39 Mad. 317, 30 I.C. 755.

(q) Moithiyan Kutty v. *Ayissa* (1928) 51 Mad. 574, 110 I.C. 480, ('28) A.M. 870.

CHAPTER XII

WAKFS

173. Wakf as defined in the Wakf Act.— "Wakf means the permanent (s. 174) dedication by a person professing the Mussalman faith of any property (ss. 175-177) for any purpose recognized by the Mussalman law as religious, pious or charitable (s. 178)."

The above is the definition of wakf as given in the Mussalman Wakf Validating Act, No. VI of 1913, s. 2. That Act came into force on the 7th March 1913. It has a retrospective effect, and applies to all wakfs, whether created before or after that date: see sec. 199 below. Referring to the above definition the Judicial Committee observed that it was a definition for the purposes of the Act, and not necessarily exhaustive *(a)*. See also Section 182.

Wakf as defined by Mahomedan jurists.— The term wakf literally means *detention.* The legal meaning of wakf, according to Abu Hanifa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yusuf and Muhammad, *wakf* signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind." Baillie, 557-558. See *Hedaya,* 231, 234. A wakf extinguishes the right of the wakif or dedicator and transfers ownership to God. The mutawalli is the manager of the wakf, but the property does not vest in him, as it would in a trustee in English law *(b)*. The expression "vested in trust" in section 10 of the Limitation Act does not apply to the mutawalli of a wakf *(c)*: and it was for this reason that the section was amended by s. 2 of the Limitation Act, 1929. It is also for this reason that the Indian Trusts Act, 1882, exempts from its scope the rules of law applicable to wakfs *(d)*. A wakf, however, is a trust for the purposes of s. 92 of the Code of Civil Procedure *(e)*.

A *wakf* may be made in writing or the dedication may be oral. There must, however, be appropriate words to show an intention to dedicate the property. The use of the word *'wakf'* is neither necessary nor conclusive. The word *'wakf'* means detention or stoppage. There is extinction of the proprietor's ownership and detention in the implied ownership of God. *Mariam Bai* v. *Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

By dedication and declaration the property in the wakif is divested and vests in the Almighty. *Ahmed G. H. Ariff* v. *Commr. of Wealth-tax* ('71) A.S.C. 1691.

To constitute a wakf it is not necessary that the word 'wakf' should be used. A grant to a *Kazi* for the purpose of his performing a religious or pious duties constitutes a wakf. *Yarakareddi Mallereddi* v. *Sayed Amanulla* (1972) 2 A.W.R. 327 D.B.

As pointed out by the Privy council— ". . . the Mahomedan Law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the trying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewun Doss* v. *Shah Kubeer-ood-deed* (1840) 2 M.I.A. 390, that a dedication to a pious or charitable purpose is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit." *Vidyavaruthi* v. *Balusami* 48 I.A. 302; ('22) A.P.C. 123.

(a) Ma Mi v. *Kallander Ammal* (1927) 54 I.A. 23, 27, 5 Rang. 7, 100 I.C. 32, ('27) A.P.C. 22; *Mst. Peeran* v. *Hafiz Mohd.* ('66) A. All. 201. See also: *Mst. Mundaria* v. *Shyam Sunder* ('63) A.P. 98.

(b) Muhammad Rustom Ali v. *Mustaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329. See also: *Zain Yar Jung* v. *Director of Endowments* ('63) A.S.C. 985.

(c) Mt. Allah Rakhi v. *Shah Mohammad Abdur Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 867, ('34) A.P.C. 77.

(d) Per Ameer Ali J., in *Vaidya Varuti* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.P.C. 123.

(e) Mahomed Kazim v. *Syed Abi* (1932) 11 Pat. 238. 136 I.C. 417, ('32) A.P.C. 33.

There is no prohibition in Muslim law to create a charitable trust as in English law. Distinction between a wakf and an English Charitable trust pointed out. *Mariam Bai* v. *Mohd. Jaffar (supra).*

To constitute a valid wakf, whether religious or charitable, except in the case of donations to neighbours or charitable public utilities, the beneficiaries should be Muslims *(f)*. *Sk. Mamtaj Ali* v. *Sk. Alli* ('68) A. Ori. 208. (See under S. 171 same case).

174. The dedication must be permanent.— The dedication must be permanent. A wakf, therefore, for a limited period, *e.g.*, twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character.

Baillie, 565; *Hedaya*, 234. See sec. 197 below.

The dedication is not permanent and the wakf is invalid, if the wakfnama contains a condition that in case of mismanagement the property should be divided among the heirs of the settlor *(g)*. Nor can the dedication be permanent if the wakif is only a usufructuary mortgagee and has no permanent control over the property *(h)*. The wakf of a house standing on land leased for a fixed term has been held to be invalid as the dedication could not be said to be of property of a permanent character *(i)*.

175. Subject of wakf.— The subject of wakf under the Wakf Act may be "any property." A valid wakf may, therefore, be made only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money *(j)*.

In case before the Wakf Act, there was a conflict of opinion whether a valid wakf could be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf could not be made of movables, unless the movables were accessory to immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom *(k)*. This was in accordance with the view taken by Mahomedan jurists on the subject: Baillie, 570-571; *Hedaya*, 234-235. On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid *(l)*. Such a wakf would be valid under the Wakf Act. In a Privy Council case the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground *(m)*. It has been held that a wakf of a money decree is not valid, as the decretal amount may not be realised *(n)*.

176. Subject of wakf must belong to wakif.— The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication *(o)*. A person who is in fact the owner of the property but is under the belief tha he is only a mutawalli thereof is competent to make a valid wakf of the property. What is to be seen in such cases is whether or not that person had a power o

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(f) See *Kassimiah Charities* v. *M.S.W. Board* ('64) A.M. 18.

(g) *Habib Ashraff* v. *Syed Wajihuddin* (1933) 144 I.C. 654, ('33) A.O. 222.

(h) *Rahiman* v. *Bagridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

(i) *Mst. Peeran* v. *Hafiz Mohd.* ('66) A. All. 201.

(j) *Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 369-370, 127 I.C. 401, ('30) A.B. 191. Cf. *Syed Ali Zamin* v. *Syed Akbar Ali Khan* (1937) 64 I.A. 158 (a Shia case); *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92. ('44) A.M. 504.

(k) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 Cal. W.N. 449; *Fatmabai* v. *Gulam Husen* (1907) 9 Bom. L.R. 1337; *Kadir Ibrahim* v. *Mahomed* (1909) 33 Mad. 118, 4 I.C. 136.

(l) *Abu Sayid* v. *Bakar Ali* (1901) 24 All. 190; se *Hashim Haroon* v. *Gounsalishah* (1942) Kar. 17 ('42) A.S. 137.

(m) *Mohammad Sadiq* v. *Fakhr Jahan Begar* (1932) 59 I.A. 1, 17-18, 6 Luck. 556, 136 I.C. 385, ('3 A.P.C. 13.

(n) *Ghulam Mohiuddin* v. *Hafiz Abdul* (1947) A 334, ('47) A.A. 127.

(o) *Masihuddin* v. *Ballabh Das* (1912) 35 All. 6 17 I.C. 471; *Ehsan Beg* v. *Rahmat Ali* (1934) 10 Luc 547. 152 I.C. 798 ('35) A.O. 47; *Mahomed Ali Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W. 718. ('40) A.C. 417; *Commissioner of Wakfs* v. *Mohammad Mohsin* ('54) A.C. 463, 48 C.W.N. 25

disposition over the property *(p)*.

Baillie, 562.

Wakf of property subject to mortgage or lease.— A valid wakf may be made of property though it is subject to a mortgage *(q)* or lease *(r)*: Baillie, 563-564.

Usufructuary mortgagee.— A usufructuary mortgagee cannot make a valid wakf of his rights for he is not the owner and the mortgage is an evasion of the Mahomedan law against usury *(s)*.

Groveholder.— A Groveholder has permanent dominion and full proprietary right over the trees. A wakf of full groveholder's rights is therefore valid *(t)*.

Property agreed to be purchased by wakif.— A valid wakf may be made of property, of which the wakif has been put in possession under a contract for the purchase thereof by him, provided the sale is eventually completed *(u)*.

Wakf in fraud of heirs.— A wakfnama executed by a widow as part of a transaction which is a fraud on the heirs of her husband is altogether void and not effective even against the share which she inherits *(v)*.

Dower debt.— A dower debt which may or may not be paid to the widow at the option of the residuaries cannot be made the subject of a wakf *(w)*.

177. Wakf of mushaa.— A *mushaa* or an undivided share in property may, according to the more approved view, form the subject of wakf, whether the property be capable of division or not *(x)*.

Exception.— The wakf of a *mushaa* for a mosque or burial ground is not valid, whether the property is capable of division or not.

Hedaya, 233; Baillie, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a *mushaa* in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawalli* is a condition necessary for the validity of a wakf; see sec. 186 below. But though Abu Yusuf holds that a wakf of a *mushaa* is valid though the property may be capable of partition, he has declared that a wakf of a *mushaa* for *a mosque or burial ground* is invalid. He gives two reasons, one of which is that "the continuance of a participation in anything is repugnant to its becoming the exclusive right of God."

It follows from what is stated above that one of several heirs of a deceased Mahomedan cannot make a valid wakf of his undivided share of the inheritance *for a mosque or burial ground* though he may do so for other purposes. In a Rangoon case *(y)*, however, it was held, relying on a passage in Wilson's Anglo-Muhammadan Law, 6th ed., para 321, and on the judgment of the Privy Council in *Muhammad Mumtaz* v. *Zubaida Jan (z)*, that if one of several heirs takes possession of the *whole* property and delivers possession of it to the trustees of a mosque for the benefit of the mosque, though it be without the consent of the other heirs, the wakf is valid to the extent of *his own share*. The passage referred to above is in these terms: "But if a wakf is valid as in the cases noted in n. 1 above, they are valid for the endowment or construction of mosques or burial grounds." This passage appears for the first time in the 6th ed., and the cases referred to there are cases of a wakf of a *mushaa* for purposes *other than a mosque* or *a burial ground*. The Privy Council case referred to above is a case of a *gift* of a *mushaa*. A wakf of a *mushaa* for a mosque or burial ground is invalid

(p) Haider Husain v. *Sudama Prasad* (1940) 15 Luck. 30. (1939) O.W.N. 858. ('40) A.O. 18.

(q) Shahazadee v. *Khaja Hossein* (1869) 12 W.R. 498; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429.

(r) Hashim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under the Shia Law).

(s) Rahiman v. *Bagridan* (1936) 11 Luck. 735. 160 I.C. 495, ('36) A.O. 213; *Abdul Qavi* v. *Asaf Ali* ('62) A. All. 364.

(t) Haji Amir Ahmed v. *Mahomed Ejaz Hussain* (1936) 58 All. 464. 160 I.C. 354. ('36) A.A. 15.

(u) Mussammat Bismilla v. *Mohammad Ali* ('27) A.O. 162, 102 I.C. 77.

(v) Har Prasad v. *Fayaz Ahmad* (1933) 60 I.A. 116, 55 All. 83. 142 I.C. 271. ('33) A.PC. 83.

(w) Nosh Ali v. *Shamsunnissa Bibi* (1939) All. 322, 1939 A.L.J. 138. 183 I.C. 379, ('39) A.A. 319.

(x) Mohammad Badrul v. *Shah Hason* (1935) All. L.J. 400, 159 I.C. 37. ('35) A.A. 278; *Mohamed Ayub Ali* v. *Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76 ('39) A.C. 268.

(y) Abdul Rahman v. *Maung Mutu* ('32) A.R. 65, 138 I.C. 851.

(z) (1889) 11 All. 460, 16 I.A. 205.

for the specific reasons stated by Abu Yusuf. However, it has been held by the Calcutta and Allahabad High Courts that a wakf of *Mushaa* for maintenance of a mosque is valid *(a)*.

See also:—

A *mushaa* or an undivided share in property may not be dedicated by way of wakf for a mosque or burial ground irrespective of whether the property is or is not capable of division. The wakf of *mushaa* for purpose like a mosque or burial ground is invalid for the reasons that the continuance of participation in anything is repugnant to its becoming the exclusive right of God.

In the instant case, a Mahomedan died leaving behind a widow, two sons and three daughters as heirs to his property. The widow created a wakf of *mushaa* or undivided share in the property for purpose of a mosque.

Held, inasmuch as there could be no wakf of a *mushaa* or undivided share in the property for a purpose like a mosque, the creation of the wakf by the widow was invalid.

Execution of the wakf by the mother for and on behalf of the minor was illegal and void, inasmuch as a *de facto*, guardian had no right to alienate the minor's property and it was not the case of the mother that she had been appointed by the Court, moreover, had no power, without the previous permission of the Court under the Guardians and Wards Act, 1890, to make transfer including by way of wakf. No such permission was claimed to have been sought in the present. It follows, therefore, that the mother in the instant case was not competent to execute wakf as guardian for or on behalf of the minor child, and wakf so executed was illegal and void. *Gyasuddin* v. *Allah Tala Wakf Mausama*, A.I.R. 1986 Allahabad 39.

178. Objects of wakf.— The purpose for which a wakf may be created must be one recognized by the Mahomedan law as "religious, pious or charitable" [Wakf Act, s. 2(1)]. A wakf may also be created in favour of the settlor's family, children and descendants [Wakf Act, s. 3].

A. The following are valid objects of a wakf:—

(1) mosques and provision for imams to conduct worship therein *(b)*;
(2) colleges and provision for professors to teach in colleges *(c)*;
(3) aqueducts, bridges and caravanserais *(d)*;
(4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca *(e)*;
(5) celebrating the birth of Ali Murtaza *(f)*;
(6) keeping *tazias* in the month of Muharram *(g)*, and provision for camels and *duldul* for religious processions during Muharram *(h)*;
(7) repairs of imambaras *(i)*;
(7a) the maintenance of a khankah *(j)*;
(8) celebrating the death anniversaries *(barsi)* of the settlor and of the members of his family *(k)*;
(9) performance of ceremonies known as *kadam sharif (l)*;
(10) burning lamps in a mosque *(m)*;

(a) Mahomed Ayub Ali v. *Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76, ('39) A.C. 268; *Mst. Peeran* v. *Hafiz Mohd.* ('66) A. All. 201.

(b) Baillie, 574.

(c) Baillie, 574.

(d) Hedaya, 240.

(e) Hedaya, 240.

(f) Biba Jan v. *Kalb Husain* (1909) 31 All. 136, 1 I.C. 763; *Sayid Ismail* v. *Hamidi Begum* (1921) 6 Pat. L.J. 218, 235-236, 62 I.C. 455, ('21) A.P. 125; *Haji Abdul* v. *Haji Hamid* (1903) 5 Bom. L.R. 1010 [Cutchi Memon will].

(g) Ibid.

(h) Syed Ali v. *Syed Muhammad Ali* (1928) 7 Pat. 426, 116 I.C. 525. ('28) A.P. 441.

(i) See cases cited in foot-note *(i)*

(j) Mahomed Kazim v. *Syed Abi* (1932) 11 Pat. 288, 136 I.C. 417, ('32) A.P. 33. *Ghulam Rasul* v. *Chief Administrator of Auqaf*, P.L.D. 1966 Lah. 978, (upkeep and maintenance of Khankah).

(k) See cases cited in foot-note *(i)*; *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(l) Phul Chand v. *Akbar Yar Khan* (1896) 19 All. 211.

(m) Mazhar Husain v. *Abdul* (1911) 33 All. 400, 9 I.C. 753; *Gobinda Chandra* v. *Abdul Maijd* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(11) reading the Koran in public places, and also at private houses *(n)*;

(12) performance of annual *fateha* of the settlor and of the members of his family *(o)*;
[The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor.]

(13) the construction of a *robat* or free boarding house for pilgrims at Mecca *(p)*;

(14) maintenance of poor relations and dependents *(q)*;

(15) payment of money to *fakirs, i.e.*, the poor *(r)*;

(16) grant to an Idgah *(s)*;

(17) A durgah or shrine of a *pir* which has long been held in veneration by the public *(t)*.

Charitable trusts created with the object of starting a school or a college or constructing a mosque or establishing a hospital are not prohibited by Muslim law. *Mariam Bai* v. *Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

Where the deed is not clear, previous and subsequent conduct and attendant circumstances may be called in aid to clear the ambiguity. But this is only permissible to remove the ambiguity. *Mahomed Khan Rowther* v. *A. Rahman*, (1968) Ker. L.T. 564.

B. The following are not valid objects of a wakf:—

(i) objects prohibited by Islam, *e.g.*, erecting or maintaining a church or a temple; Baillie, 560;

(ii) the Madras High Court has held that if there is no distribution of alms, the reading of the Koran and the performance of ceremonies for the benefit of the soul of the deceased is not a valid object of a wakf *(u)*. This is on the ground that the object though religious and pious is not charitable: *sed quare*, for there is nothing in the Indian statutes of in Mahomedan law which draws a clear-cut distinction between religious and pious purposes on the one hand, and charitable purposes on the other *(v)*. In the Bombay High Court Mirza, J., has held that the performance of such ceremonies whether at the tomb of a saint or the grave or a private person is a valid object of wakf *(w)*;

(iii) the High Court of Allahabad has held, following the opinion of Ameer Ali, expressed in his Mahomedan law [4th ed., vol. I, p. 276], that a provision for the wages and pensions of servants and dependants is valid *(x)*. A similar question arose in a case before the Privy Council *(y)*, and it was argued, relying on the same passage in Ameer Ali's work, that a wakf for servants was valid, but the point, it would appear, was later on abandoned, and the Board said: "It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of 1913)." The Chief Court of Oudh has taken the view that a wakf providing for maintenance of servants is valid under Mahomedan law. In *Hashim Ali* v. *Iffat Ara Hamidi Begum*, the Calcutta High Court has taken the view that a provision for a small pension for three of the faithful servants would not render the wakf invalid, as the main purpose of the wakf in question

(n) Ibid, Sattar Ismail v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(o) Luchmiput Singh v. *Amir Alum* (1882) 9 Cal. 176; *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211; *Biba Jan* v. *Kalb Husain* (1909) 31 All. 136, see p. 139 of the report: 1 I.C. 763; *Mazhar Hussain* v. *Abdul* (1911) 33 All. 400, 9 I.C. 753, [*Stanly, C.J., dubitante*); *Mutu Ramanadhan* v. *Vava Levvi* (1917) 44 I.A. 21, 27, 40 Mad. 116, 122, 39 I.C. 235. See also *Salebhoy* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702.

(p) Mahomed Yusuf v. *Muhammad Sadiq* (1933) 14 Lah. 431, 144 I.C. 271, ('33) A.L. 501.

(q) Mukaram v. *Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223; *Abdul Karim* v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('48) A.B. 342.

(r) Abdul Karim v. *Pahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

(s) Kulsambi v. *Mohamam Abdul Satar* ('48) A.N. 183.

(t) Sunni Central Board of Wakf v. *Sirajul* ('54) A.A. 88. *Ghulam Ali* v. *Sultan Khan* ('67) A. Ori. 55.

(u) Kaleloola v. *Nusserudeen* (1894) 18 Mad. 201; *Kunhamutty* v. *Ahmed Musaliar* (1935) 58 Mad. 204, 154 I.C. 151, ('35) A.M. 29.

(v) Gholam Hossain Shah v. *Syed Muslim Hossain* (1934) 58 Cal. L.J. 356, 150 I.C. 124, ('34) A.C. 348.

(w) Abdulsakur v. *Abubakkar* (1930) 54 Bom. 358, 127 I.C. 401, ('30) A.B. 191; *Azimunnissa Begum* v. *Sirdar Ali Khan* (1927) 29 Bom. L.R. 434. 102 I.C. 129, ('27) A.B. 387 dissenting from *Fakr-ud-din* v. *Kiayat-ullah* (1910) 7 All. L.J. 1095, 8 I.C. 578.

(x) Ghulam Mohammad v. *Ghulam Husain* (1932) 59 I.A. 74, 85, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81.

(y) Ibid at p. 86.

was not to make a settlement on those servants *(z)*.

(iv) A wakf in favour of utter strangers was held to be invalid although there was an immediate and substantial gift to charity *(a)*.

(v) A provision in a wakf for the repair of the wakif's secular property is invalid according to Shia law *(b)*.

(vi) A direction to spend a certain sum of money for feasting Cutchi Memons every year on the anniversary of the settlor's death is not valid *(c)*.

It is fundamental for the creation of a valid wakf that there should be permanent dedication of the property forming the subject-matter of the wakf for any purpose recognised by the Musalman law as religious, pious or charitable. What is involved in the creation of the wakf is "the tying up of property in the ownership of God the almighty and the devotion of the profits for the benefit of human beings. As a result of the creation of a wakf, the right of wakf is extinguished and the ownership is transferred to the Almighty." In the instant case, under the deed Ext. A-2 there is no dedication at all of either the corpus or even the income of the property for any religious or charitable purpose. The ownership of the property is not transferred in favour of God the Almighty; on the other hand, it is expressly stipulated that the property shall remain as the joint property of executants Nos. 4, 5 and 6 and they are to hold that the property from generation to generation subject only to the restrictions that the property should not be alienated in favour of any strangers nor burdened with debts, attachments or injunctions and that from out of the income the recitation of Quran and reading of Moulood in the family house should be got performed. Since the basic requisite that there should be a permanent dedication of the property for religious or charitable purposes is not satisfied in the present case it must be held that no valid wakf has been created in respect of the plaint schedule property in question. 1965 S.C. 985, relied on.

The reading of Moulood in the private residence of the family and recital of the Quran at the said place cannot by themselves, be regarded as objects for which a wakf can be validly created. [Krishna Eradi and Narendran, JJ.] *Mariyumma* v. *Andunhi* 1979 K.L.T. 231.

179. Wakf void for uncertainty.— The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty [see note (1)]. But it is not necessary that the objects should be *named (d)*. Nor is it necessary, where the objects are specified, to name the sum to be spent on each object *(e)* [see note (2)].

By a deed of wakfnama, one Md. Safulla created a wakf-al-al-aulad for the maintenance and support of his family, children and descendants and ultimately "for such purpose or purposes as are recognised by the Mussalman law as religious, pious and charitable, as the then Mutwali shall think fit add proper". He appointed himself as the first mutwali during his life time and confined the succession to mutwaliship to the eldest male members of his descendants for the time being. He also reserved to himself the right to alter the terms of the wakfnama and the beneficiaries of the wakfnama, either by adding to their number or excluding some and to increase or reduce their shares. He directed the creation of certain reserve funds which in fact were not created. The Income-tax Authorities initiated certificates proceedings under the Bengal Public Demands Recovery Act, 1913 for the realisation of income-tax due from the said Safulla from the properties which were the subject-matter of the wakf. The certificate officer held that the wakf was a valid one and rejected the certificate. The Union of India thereupon brought the suit out of which the present appeal arose for a declaration that the deed of wakf was fraudulent, illegal and void and

(z) Mt. Akhtar Banu Begum v. *Kanhaiya Lal* (1941) 16 Luck. 769, (1941) O.W.N. 829, 195 I.C. 326, ('41) A.O. 492; *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 182.

(a) Ismail Haji Arat v. *Umar Abdulla* (1942) 44 Bom. L.R. 256, ('42) A.B. 155.

(b) Pulin Behary v. *M.A. Davar* (1946) 49 C.W.N. 721 224 I.C. 32, ('46) A.C. 83.

(c) Abdul Karim v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('48) A.B. 342.

(d) Sheikh Ramzan v. *Mussammat Rehmani* (1932) 7 Luck. 300, 135 I.C. 372, ('32) A.O. 71; *Gangabai* v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

(e) Mutu Ramanadan v. *Vava Levvai* (1916) 44 I.A. 21, 28-29, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86; *Syed Shah* v. *Syed Abi* (1932) 11 Pat. 288, 325-326, 136 I.C. 417, ('32) A.P. 33.

(f) (1804) 10 Ves. 522.

that the order of the certificate officer was not binding on the plaintiff. the lower Court held that the wakf was void for uncertainty, because the wakf did not divest himself of ownership and because it was not acted upon and that the order of the certificate officer was not binding upon the plaintiff. It was held:

(i) The wakfnama is not void for uncertainty, because the wakf has used general words of the proviso to S. 3 of the Mussalman Wakf Validating Act, 1913 in making the ultimate gift to charitable purposes.

(ii) Under the Muslim law, the wakif is entitled at the time of dedication to reserve to himself the power to alter the beneficiaries, either by adding to or excluding from their number and to increase or reduce their shares; the wakf was not, therefore, void on that ground;

(iii) when a wakf is found to be validly created, the failure of the first mutwali to carry out the terms of the wakfnama does not make the wakf invalid or void;

(iv) The suit was barred under S. 37 of the Bengal Public Demands Recovery Act, 1913; Ss. 10 and 55 of the said Act have no application to the facts of the present case.

(v) On sects it has to be held that the wakf was acted upon. [M.M. Dutt and R.K. Sharma, JJ.] *Ayesha Khatoon* v. *Union of India*, 83 C.W.N. 776.

Note (1).— According to the English law the object of a trust, whether private or public, must be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice* v. *The Bishop of Durham (f)*. In that case it was held by Lord Eldon that a bequest for "such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced. It has similarly been held that a trust for "charitable or benevolent purposes" *(g)*, or for "purposes charitable or philanthropic" *(h)*, or for "such charitable or public purposes as my trustee thinks proper" *(i)*, is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu for *dharam*, an expression equivalent to "charitable, religious or philanthropic purposes," is void for uncertainty *(j)*.

Turning now to Mahomedan cases, there appears to be a conflict of decisions. The High Court of Bombay expressed the opinion in an old case that a bequest by a Khoja Mahomedan for *dharam* was void for uncertainty *(k)*. In a later Bombay case, a bequest by a Mahomedan for *dharam, kherat, vigere,* was held to be void for uncertainty. The Gujarati word "kherat" it was said was derived from the Arabic "Khairat," and that "Khair" in Arabic means "good", and "khairat," means "good works, alms, charities" *(l)*. In a Punjab case it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty *(m)*. In an Allahabad case it was held that a *wakf* for *fateha* and for *amar-i-khair* including the maintenance of poor relations and dependants was not void for uncertainty *(n)*. In another Allahabad case the opinion was expressed that a trust for "khairat" or of "Khairati kam" was valid, and in such a case, specification of objects of charity is not necessary. But, if a trust is for *umure khair* or *kare khair,* it is a question of construction in what sense the expression is used, and if it is used in the sense of benevolent purposes or good purposes, the trust will be void for uncertainty *(o)*. So also *kar-kher* which means "any good act" *(p)*. But "amar-i-khair" means "khair" or "good" works, and if that is the correct meaning of the word [see *Mahammad Yusuf* v. *Azimuddin (o)* p. 174], the wakf would be void for uncertainty, unless it can be said that when a Mahomedan dedicates his property by way of wakf for "good works," it must be taken that the dedication is for "purposes recognized by the Mussalman law as religious, pious

(g) In re Riland (1881) W.N. 173.

(h) In re Macduff (1896) 2 Ch. 463.

(i) Blair v. *Duncan* [1902] A.C. 37; *Grimond* v. *Grimond* (1905) A.C. 124.

(j) Runchordas v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71.

(k) Gangabai v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

(l) Mariambi v. *Fatmabai* (1928) 31 Bom. L.R 135, 116 I.C. 242, ('29) A.B. 127.

(m) Shahab-ud-din v. *Sohan Lal* (1907) Punj. Rec. No. 75. See also *Advocate General* v. *Hormusji* (1905) 29 Bom. 375.

(n) Mukkaram v. *Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223.

(o) Mohammad Yusuf v. *Azimuddin* (1941) All. 443. (1941) A.L.J. 269. 196 I.C. 324, ('41) A.A. 235.

(p) Faqir Mohammad v. *Abda Khatoon* ('52) A.A. 127.

(q) Sheikha Ramzan v. *Mussammat Rahmani*

or charitable" within the meaning of sec 2(1) of the Wakf Act. This contention was accepted in an Oudh case *(q)*, but the Lahore High Court has dissented holding that the use of the general words of the proviso to sec. 3 of the Wakf Act "religious and charitable objects" is not a sufficient specification of the object *(r)*. But the Lahore High Court has dissented from this view and held that the words *mazhabi aur khairati kam*, meaning "religious and charitable works" were sufficient to uphold the validity of a wakf *(s)*. In appeal to the Privy Council, this view was upheld *(t)*. A Full Bench of the Chief Court of Oudh, however, has now taken the view that a dedication in general terms for "charitable purposes highly commendable according to the Hanafi school of Mussalman law" is not a valid dedication *(u)*. The High Court of Calcutta in a recent case has held that the use of the general words of the proviso to sec. 3 of the Wakf Act without specification of the object of charity does not invalidate a wakf as it contemplates an ultimate gift effective in law and that the ultimate benefit in a wakf alal-aulad can also be impliedly reserved for the poor or for any purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. In that case it was held that the wakf deed manifested an overriding intention to charity in the contingency of the failure of the descendants of the settlor and the ultimate gift of "proper acts of charity" was held to be valid, as these words would imply a gift to the poor, and the benefit to the poor is the prime concern of the Muslim jurists *(v)*. A dedication of the property for the benefit of the Mahomedan community on the occasions of rejoicings and mournings was held not to be void for uncertainty. It was construed with reference to the congested condition of the testator's town to mean the provision of a building for the accommodation of marriage and funeral parties *(w)*. A discretion to pay money to Sayyads, i.e., descendants of the Prophet, is void for uncertainty, as it would be impossible to ascertain who were genuinely the members of the Prophet's family *(x)*.

Note (2).— A bequest by a Khoja Mahomedan under a will in the English language of a fund "to be disposed of in *charity* as my executor shall think fit," is not void for uncertainty *(y)*.

The salient features of a document executed by a Muslim are: (a) The document is styled as a Wakf deed; (b) The charities mentioned therein and for reading of Koran five times a day, for imparting instructions in the school, for lighting, for drawing water from the tank, distribution of Narasa (Prasadam) of certain value at the end of every month and certain amount to be spent on dharamam by way of feeding annually, (c) the properties worth of Rs.3000 shall be subject to above charities; (d) During lifetime of executant be alone shall be muthavali and perform charities, paying kist, land cost etc. and (e) After death of the executant his son and thereafter his heirs according to law of primogeniture, shall take possession of and enjoy the properties and from and out of its income they are to perform abovementioned charitable as muthavallis without any power of alienation or creating encumbrances.

Where the document was executed by a pious Muslim in the year 1944 who, under normal circumstances, could not have thought of anything but a wakf to create a method by which there should be a perpetual performance of certain charities. The various classes show (1) that on and from the date of creation of the document, the executant ceases to own the properties in his personal capacity and he assumes the role of muthavalli. Therefore there is a clear divestiture; (2) The executant has no power of alienation, but has a mere power to enjoy; (3) The line of succession in relation to muthavalli is something which runs counter to Muslim law because it is stated very emphatically that the succession shall be according to the law of primogeniture; (4) Those muthavallis who would succeeed will have also no power of alienation, nor the power of creating

(1932) 7 Luck, 300, 135 I.C. 372, ('32) A.O. 71.

(r) Punjabi Sindh Bank v. *Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(s) Mohamnad Afzal v. *Din Mohammad* ('47) A.L. 117.

(t) Beli Ram v. *Mohammad Afzal* (1949) Lah. 1,50, Bom. L.R. 674, (48) A.PC. 168.

(u) Ahmadi Begum v. *Badrum Nisa* (1940) 15 Luck. 586, (1940) O.W.N. 689, 189 I.C. 391, ('40) A.O. 324 (F.B.) See *Mohammad Yusuf* v. *Azimuddin* (1941) All. 443, (1911) A.L.J. 269, 196 I.C. 324, ('41) A.A. 235.

(v) Hasim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under Shia Law); *Haji Ishak* v. *Faiz Mohomed* (1943) Kar. 166, ('43) A.S. 134; *Syed Ahmed* v. *Julaiha Bivi* (1946) 2 M.L.J. 335, ('47) A.M. 176.

(w) Fazal Din v. *Karam Hussain* (1936) 162 I.C. 404, ('36) A.L. 81.

(x) Abdul Karim v. *Rahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

(y) Gangabai v. *Thavar* (1863) 1 Bom. H.C.O.C. 71.

(z) Mazhar Husain v. *Abdul* (1911) 33 All. 400, 406, 9 I.C. 753; *Abdul Husain Moosaji* v. *Sugranbai* ('39)

an encumbrance. By a reading of all these clauses and the document as a whole one gains the only impression that this is a deed of wakf. Relying on certain words in the clause it cannot be contended that those words are clear enough to indicate the creation of a charge and the restraint on alienation is bad. If that clause only is taken into consideration all the other classes will be rendered as otiose or nugatory. The document has not the effect of creating a charge for the performance of charities. 5 Cal. 438 1941 Mad. 59:1 L.W. 223, A.I.R. 1974 S.C. 740, distinguished; A.P. No. 103 of 1972 dated 20th August, 1975 (Mad.). [S. Natarajan and S. Mohan JJ.] *Kani Ammal* v. *Tamil Nadu State Wakf Board.* (1982) 2 M.L.J. 196.

There is a distinction between an instrument creating a Wakf and a document recording a transaction in the nature of wakf which had taken place earlier by words of mouth. Where the executant had specifically stated in the document that she had created wakf of her properties, and the document did not say that the executant was creating a wakf in present through the instrumentality of the document itself, the document could be construed as a memo of wakf which had been orally created or a document appointing mutwallis, and hence did not require registration. A.I.R. 1921 P.C. 105; A.I.R. 1958 S.C. 532; A.I.R. 1966 S.C. 337; A.I.R. 1959 S.C. 620. Rel. on [S.J. Hyder, J.] *Anjuman Islamia* v. *Mohammad Khair Husain* 1981 All. L.J. 1120.

180. Objects partly valid and partly invalid.— Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the wakif (dedicator) *(z)*. Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid object of charity *(a)*.

181. Doctrine of cy-pres.— Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed *(b)*.

The doctrine is not applicable unless the original wakf is valid. A wakf that is void for uncertainty cannot be validated by the application of the doctrine *(c)*, nor can a wakf *alal-aulad* which fails and is invalid be turned into a public wakf by applying the doctrine *(d)*.

Shia law.— The same is the rule of Shia law: Baillie, II, 216.

182. Persons capable of making a wakf.— Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. As to majority, see notes to sec. 115 above.

It has been held that a non-muslim may also create a wakf for any purpose which is religious under the Mahomedan law provided it is also lawful according to his own religious creed *(e)*.

The definition of wakf in the Wakf Act, 1954 limits wakfs to dedication by persons professing Islam.

183. Form of wakf immaterial.— A wakf may be made either verbally or in writing. It is not necessary in order to constitute a wakf, that the term "wakf" should be used in the grant, if from the general nature of the grant itself such a dedication can be inferred *(f)*. Where it is not clear whether a grant constitutes

A.S. 322.

(a) Mt. Ruqia Begum v. *Sarajmal* (1936) All. L.J. 231, 163 I.C. 344 ('36) A.A. 404; *Sattar Ismail* v. *Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

(b) Kulsom Bibee v. *Golam Hossein* (1905) 10 C.W.N. 449, 484-485; *Salebhai* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702; *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

(c) Punjab Sindh Bank v. *Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(d) Mohamad Sabir Ali v. *Tahir Ali* (1954) 2 All. 556.

(e) Mst. Mundaria v. *Shyam Sunder* ('63) A.P. 98; *Kassimiah Charities* v. *M.S.W. Board* ('64) A.M. 18.

(f) Jewun Doss v. *Shah Kuber-ood-Deen* (1840) 2 M.I.A. 390; *Saliq- un-Nissa* v. *Mati Ahmad* (1903) 25 All. 418 [Shia law]; *Muhammad Hamid* v. *Mian Mahomud* (1923) 50 I.A. 92, 104, 4 Lah. 15, 28, 77 I.C. 1009, ('22) A.PC. 384; *Budrul Islam Ali Khan* v. *Mt. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251; *Ram Rup* v. *Saran Dayal* (1936) 160 I.C. 289, ('36)

a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration *(g)*.

Note that the provisions of the Indian Trusts Act II of 1882 do not apply to wakfs: see sec. 1 of the Act.

Though a wakf may be created orally, yet when the terms of a dedication ave been reduced to writing no evidence can be given to prove the terms except the document itself or secondary evidence of its contents *(h)*.

It is not absolutely necessary the the writing by which a Wakf is created should exist or that there should be direct evidence about the creation of a wakf and its terms. A wakf can be proved by showing immemorial user of the property as wakf *(i)*.

184. Wakf may be inter vivos or testamentary.— A wakf may be created by act inter vivos or by will [s. 185].

A wakf created by will is not invalid because it contains a clause that the wakf shall not operate if a child is born to the testator. The reason is that a testator has power in law to revoke or modify his will at any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf *(j)*.

Shia law.— It was held at one time that a Shia cannot create a wakf by will. But this view was erroneous, and it has been held by the Privy Council that a Shia may create a wakf by will *(k)*.

There is a distinction between a *wakf-bil-wasiyat*, i.e., a will which conveys the property on the death of the testator to the mutawalli as wakf and a *wasiyat-bil-wakf*, i.e., a will which makes a gift of the property with a direction to the donee to create the wakf desired. The distinction is of form not of substance. In the later case the property is not impressed with the character of wakf immediately *(l)*.

185. Testamentary wakf and wakf made in death-illness.— A Mahomedan may dedicate the whole of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

Hedaya, 233; Baillie, 612.

Shia law.— The same is the rule of Shia law *(m)*.

A testamentary wakf is no more than a *bequest* to charity, and it is subject to the same restrictions as a bequest to an individual *(n)*: see sec. 118 above.

186. Wakf how completed.— (1) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta *(o)*, Rangoon *(p)*, Patna *(q)*,

A.L. 283; *Mohammad Qasim* v. *Mohammad Mehdi* (1938) 13 Luck. 458, ('37) A.O. 465; *Haider Hussain* v. *Sudama Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) A.O. 18; *Khurshed Jahan Begum* v. *Qamquam Ali* ('47) A.O. 17.

(g) Muhammad Raza v. *Yadgar* (1924) 51 I.A. 192, 195, 51 Cal. 446, 80 I.C. 645 ('24) A.PC. 109.

(h) Shaikh Muhammad v. *Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410.

(i) Chief Administrator of Auqaf v. *Rashid-ud-daula* P.L.D. 1961 (W.P.) Lah. 993.

(j) Muhammad Ahsan v. *Umardaraz* (1906) 28 All. 633; *Abdul Karim* v. *Shofiannissa* (1906) 33 Cal. 853.

(k) Baqar Ali Khan v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

(l) Mahabir Prasad v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174; *Baqar Ali Khan* v. *Anjuman Ara Begam* (1902) 30 I.A. 94, 25 All. 236; *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429.

(m) Ali Husain v. *Fazal* (1914) 36 All. 431, 23 I.C. 291; *Budrul Islam Ali Khan* v. *Mt. Ali Begun* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251.

(n) Nanhoobeg v. *Gulam Husain* (1950) Nag. 633, ('51) A.N. 327.

(o) Deo dem Juan Beebee v. *Abdollah Barber* (1838) Fulton 345; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 485-488, 67 I.C. 77, ('22) A.C. 429; *Gobinda Chandra* v. *Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(p) Ma E Kin v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

(q) Muhammad Ibrahim v. *Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410.

(r) Muhammad Said v. *Mt. Sakina Begam* (1935) 16

Lahore *(r)*, Madras *(s)*, and Bombay *(t)*, and by the Oudh Chief Court *(u)*. According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [*Hedaya*, 233; Baillie, 550]. At one time the High Court of Allahabad *(v)* adopted this view, but a Full Bench decision of that Court has since decided that a mere declaration of endowment by the owner is sufficient to complete the Wakf *(w)*. The Nagpur High Court *(x)* has also adopted this view.

(2) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner to his name as mutawalli *(y)*. Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails *(z)*.

Intention.— Where there is neither a declaration of wakf nor delivery of possession, a *mere intention* to set apart property for charitable purposes is not sufficient, to create a wakf, even if the income of the property is applied to the intended purpose *(a)*. If the document purporting to create a wakf is invalid, subsequent conduct proving the intention to treat the property as wakf cannot render the endowment valid *(b)*.

If a wakf is created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. For if a wakf has been created it is immaterial that it has not been acted upon as that is only a matter of breach of trust *(c)*. But the settlor and those claiming under him are not precluded from showing that no wakf has been created at all and that the deed was not intended to operate as a wakf, but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such an enquiry subsequent conduct, if it is merely a continuation of conduct at the

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Lah. 432, 159 I.C. 250, ('35) A.L. 626; *Zaffar Hussain* v. *Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552.

(s) Pathu Kutti Umma v. *Nedungadi Bank Ltd.*, (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

(t) Abdul Rajak v. *Jimbabai* (1911) 14 Bom. L.R. 295, 300-301, 14 I.C. 988; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991.

(u) Rahiman v. *Baqridan* (1936) 11 Luck. 735, 160 I.C. 495, ('35) A.O. 213.

(v) Muhammad Aziz-ud-din v. *The Legal Remembrancer* (1893) 15 All. 321; *Muhammad Yunus* v. *Muhammad Ishaq* (1921) 43 All. 487, 62 I.C. 896, ('21) A.A. 103; *Muhammad Shafi* v. *Muhammad Abdul* (1927) 49 All. 391, 99 I.C. 1052, ('27) A.A. 255.

(w) Mohammad Yasin v. *Rahmat Ilahi* (1947) All. L.J. 85, ('47) A.A. 201 F.B.

(x) Zainab Bi v. *Jamalkhan* (1949) Nag. 426, ('51) A.N. 428.

(y) Beli Ram v. *Mohammad Afzal* (1949) Lah. 1, 50 Bom. L.R. 674, ('48) A.PC. 168; *Abdul Rajak* v. *Jimabai* (1911) 14 Bom. L.R. 295, 300, 14 I.C. 988; *Muhammad Rustom Ali* v. *Mushtaq Hussain* (1920) 47 I.A. 224, 227, 42 All. 609, 612, 57 I.C. 329; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991; *Jinjira* v. *Mohamm* (1922) 49 Cal. 477, 488, 67 I.C. 77, ('22) A.C. 42

Abdul Jalil v. *Obed-ullah* (1921) 43 All. 416, 62 I.C. 725, ('21) A.A. 165; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113; *Tafazzal* v. *Majid Ullah* (1924) 5 Lah. 59; 79 I.C. 120, ('24) A.L. 432; *Ailmunnissa Bibi* v. *Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485; *Mohammad Afzal* v. *Din Mohammad* (1946) L. 867, ('47) A.L. 117.

(z) (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113, *supra*; *Ghazanfar* v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Mohamed Abdul Aziz Khan* v. *Mahbub Singh* (1936) All. L.J. 488, 160 I.C. 48, ('36) A.A. 202.

(a) Banubi v. *Narsingrao* (1907) 31 Bom. 250; *Zaffar Hussain* v. *Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Rahima Bibi* v. *S. Mustafa* (1938) 178 I.C. 83, ('38) A.R. 264.

(b) Mahomad Safi v. *Khadim Ali* ('44) A.O. 291.

(c) Beli Ram v. *Mohammad Afzal* ('48) A.PC. 168; *Syed Zainuddin Hussain* v. *Moulvi Mohammad Abdur Rahim* (1933) 58 Cal. L.J. 259, 140 I.C. 799, ('33) A.C. 102; *Muhammad Said* v. *Mt. Sakina Begum* (1935) 16 Lah. 432, 159 I.C. 250, ('35) A.L. 626; *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C.W.N. 449, 484.

(d) Masuda Khatun v. *Muhammad* (1932) 50 Cal. 402, 133 I.C. 657, ('32) A.C. 93; *Ebratennessa Bibi* v. *Sarat Chandra* (1934) 37 Cal. W.N. 892, 150 I.C. 386.

time of execution, is relevant *(d)*. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not meant to be acted upon *(e)*. It has been held by the Privy Council that if a person executes a deed of wakf but without any intention of divesting himself of his ownership of the property the real intention being to utilise the document should it become necessary as a shield against any claims that any other person might have against him either then or at any future time, the deed cannot be given effect to as a wakf *(f)*.

Evidence of intention is always admissible if the wakf is not created by a document *(g)* or, if it is created by a document, the language used is ambiguous *(h)*. A creditor, of course, is always entitled to show that a wakf was created to defraud the creditors.

Importance of subsequent conduct and circumstances at the time of the execution of the wakf-deed: considered. See: *Official Receiver* v. *Kassim Moosa* ('67) A. Ker. 73. A wakf *inter vivos* is completed by a mere declaration of endowment by the owner. (Mulla 16th. Edn. page 178, article 186 approved).

Wakif may constitute himself as the first Mutawalli and no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the owner to his name as a mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon. The settlor and those claiming under him can however show that no wakf was created and the wakf was illusory or fictitious. Subsequent conduct if it is in continuation of conduct at the time of the execution of the deed is irrelevant. Note: In this case the Mussalman Wakf Act 1923 is wrongly referred to as the Mussalman Wakf Validating Act, 1923. Penalties of S. 10 held applicable only in those cases to which the Act of 1913 applied and the benefit for the time being was claimed by the wakif or any of his family. *Garib Das* v. *Munshi Abdul Hamid* ('70) A. Sc. 1035.

Shafei law.— According to Shafei law delivery of possession is not necessary to validate a wakf *(i)*.

Shia law.— Under the Shia law, a wakf *inter vivos* cannot be created by a mere declaration; there must also be delivery of possession; Baillie, II, 212. Under the Shia law the wakif is entitled to constitute himself the first mutawalli and he is entitled to reasonable remuneration as a mutawalli, the ordinary rule being that he should not take more by way of salary than that which is fixed for other mutawallis *(j)*. No delivery of possession is necessary when the wakif constitutes himself the first mutawalli, but it is necessary in that case that the character of his possession should be changed from that of owner to that of mutawalli or custodian of the wakf. Where the ordinary means of showing change of possession is mutation of names in a public register the absence of change of names is significant and important; but mutation is not for this purpose the only method nor is it necessary as to every item of the property dedicated. In any case of doubt the settlor's conduct must be regarded broadly and as a whole. But where change of possession has been effected, the settlor's actions in dealing with the property as his own will not invalidate the wakf, but amount to breaches of trust *(k)*. If the wakf is testamentary a clear and unequivocal direction in the will dedicating specified property of God and "vesting" it in a mutawalli is sufficient *(l)*.

Under Shia law for the creation of a *Wakf* delivery of possession of property to a *mutawalli*

('34) A.C. 14; *Gobinda Chandra* v. *Abdul Majid* (1944) 1 Cal. 329, 216, I.C. 143, ('44) A.C. 163.

(e) Gobinda Chandra v. *Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

(f) Mohammad Ali v. *Mt. Bismillah Begam* (1930) 35 C.W.N. 324, 128, I.C. 647, ('30) A.PC. 255; *Beli Ram* v. *Mohammad Afzal* ('48) A.PC. 168.

(g) Salig Ram v. *Amjad Khan* (1906) All. W.N. 159; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058, 1067; *Muhammad Imdad* v. *Mt. Bishmillah* (1947) 227 I.C. 50, ('46) A.A. 468.

(h) Kulsom Bibee v. *Golam Hoosein* (1905) 10 C.W.N. 449, 484.

(i) Pathu Kutti Umma v. *Nedungadi Bank Ltd.* (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

(j) Hashim Ali v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

(k) Abadi Begum v. *Kaniz Zainab* (1927) 51 I.A. 33, 6 Pat. 259, 99 I.C. 669, ('27) A.PC. 2, approving *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257; *Syed Ali Zamin* v. *Syed Akbar Ali Khan* (1937) 64 I.A. 158 16 Pat. 344, 41 Cal. W.N. 709, 167 I.C. 884, ('37) A.PC. 127 reserving 7 Pat. 426.

(l) Badrul Islam Ali Khan v. *Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251.

(m) Muhammad Rustam Ali v. *Mushtaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329.

(n) (1920) 47 I.A. 224, 42, All. 609, 57 I.C. 329.

must be proved. If the wakif becomes the first *mutawalli,* he must change the nature of his own position accordingly. In case of oral dedications cogent evidence is required. *Jamaluddin* v. *Mosque Mashakganj* ('73) All. 328.

187. Registration.— A wakfnama by which immovable property of the value of Rs.100 and upwards is dedicated by way of wakf requires to be registered under the Indian Registration Act, 1908, though the wakif (dedicator) may have constituted himself sole mutawalli thereof, but a "trusteenama" by which he appoints additional mutawallis does not require registration if the document does not purport to transfer any interest in the property to them *(m).*

Every wakfnama, that is, a document creating a wakf, operates to *extinguish* the ownership of the wakif in the wakf property (see note to sec. 173), and therefore requires registration under sec. 17(1)(b) of the Registration Act. This was assumed in the Privy Council case of *Muhammad Rustom Ali* v. *Mushtaq Husain (n),* upon which the present section (s. 187) is founded. The facts of the case are more fully reported in 42 All. 609, than in 47 I.A. 224. In that case the wakif first executed a wakfnama by which he constituted himself as the first mutawalli, and reserved to himself the power to appoint additional mutawallis. By that document he defined the powers and duties of the mutawallis and the relation in which they were to stand to the property. After three months he executed another document called "trusteenama," by which he appointed additional mutawallis some to act jointly with him, and others to act after his death. He died after about a month, and the suit was brought by the mutawallis to recover possession of the property from his heirs. The wakfnama was registered in fact, but it was argued for the heirs that it was not *duly* registered as certain rules made under sec. 69 of the Registration Act were contravened. The Privy Council held that it was duly registered. The "trusteenama," however, was not registered, and it was argued that, not being registered, it did not confer upon the mutawallis any right of suit. But this argument was not accepted, and it was held that the document, even if read with the wakfnama, did not purport to assign the property to the mutawallis, and did not therefore require registration. See in this connection sec. 202 which defines the position of a mutawalli. See also the following case:

Document purporting to be a memo of Wakf which has already been orally created or a document appointing Mutawallis—Validity—If required to be registered. 1981 All. L.J. 1120.

188. Wakf by immemorial user.— If land has been used from time immemorial for a religious purpose, e.g., for a mosque, or a burial ground or for the maintenance of a Mosque, then the land is by user wakf although there is no evidence of an express dedication *(o).*

As a matter of law a wakf normally requires express dedication but if land has been used from time to time immemorial for a religious purpose then the land is by user wakf although there is no evidence of an express dedication.

Thus, where to the original mosque, which is proved to be a wakf property, an area is added by the mutawallis by way of construction of rooms and this area is used by the public for religious purposes alongwith the old mosque then if the area has been made into a separately demarcated compact unit for a single purpose, namely collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole becomes accordingly wakf by user. *Mohammad Shah* v. *Fasihuddin Ansari,* A.I.R. 1956 Supreme Court 713.

Baillie, 622.

Mosque.— Land used from time immemorial for the purpose of a masjid and for its courtyard which formed part and parcel of the masjid and for celebration of Moharram festival has been held to constitute a wakf by user *(p).* If a building has been set apart as a mosque it is enough to make it wakf if public prayers are said there with the permission of the owner. Both a mosque and a

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(o) Mazar Husain v. *Adiya Saran* (1948) 1 M.L.J. 259, ('48) A.PC. 42; *Mohd. Shah* v. *Fasihuddin* ('56) A.S.C. 713.

(p) Khaii v. *Mirza Hossain* ('62) A. Ori. 95.

(q) Syed Maher Husain v. *Haji Ali Mahomed* (1934) 36 Bom. L.R. 526, 152 I.C. 50, ('34) A.B. 257.

(r) Miru v. *Ram Gopal* (1935) All. L.J. 1269, 156

saint's tomb become wakf by user *(q)*. If a mosque has stood for a long time and worship has been performed in it, the Court will infer that it does not stand by leave and licence of the owner of the site but that the land is dedicated property and no longer belongs to the original owner *(r)*. If the entire premises can be regarded as one whole and members of the public have exercised acts on parts of it in assertion of their right to the whole, the whole property will be considered wakf *(s)*. Where to the original mosque, which is proved to be a *wakf* property, an area is added by the *mutawallis* by way of construction of rooms and this area is used by the public for religious purposes along with the old mosque, then it must be regarded as one unit and treated as such. The whole becomes, accordingly, *wakf* by user *(t)*. But it has been held that rooms occupied by a mullah or mouezin solely for his residential purposes with the leave and licence of a third party which are some distance away and not a part of the mosque construction did not become wakf property *(u)*. A platform used as a praying place, not by the general public, but by the Mahomedan inhabitants of an "ahata" is private property and cannot be appropriated for the building of a mosque *(v)*. In the absence of an intention to dedicate or of a dedication by the owner, user will not divest land of its private character and make it wakf *(w)*. The construction of a mosque in a private house does not by itself mean that the public are entitled to worship there. There must be proof of dedication or of user such as by the saying of prayers in a congregational manner *(x)*.

In order to create a valid dedication of a public nature, the following conditions must be satisfied: (1) the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder either express or implied; (2) the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or Imam of the mosque. Even if there is no actual delivery of possession the mere fact that members of the Mahomedan public are permitted to offer prayers with *azan* and *ikamat*, is sufficient to hold that the wakf is complete and irrevocable; and (3) the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

As regards the adjuncts, the law is that where a mosque is built or dedicated for the public, if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

The Mahomedans of village Vijayapuram, Tiruvarur District, Madras State, the plaintiffs' ancestors (who constituted the bulk of the Muslim population in the village) sought permission of the founder, the defendants' ancestors (being a small family in that village) for erecting a building for the purpose of worship on the land belonging to them. There was no mosque at all in the village which consisted of a substantial portion of the Muslim population. The idea of constructing the mosque originated from the plaintiffs' ancestors (the Rowthers). The agreement following the permission recited: (i) that the Rowthers (the plaintiffs' ancestors) were constructing a Pallivasal at the raised platform belonging to the Labbai M.K.A. Sahib (the founder or the owner) with his permission; (ii) that after completion of the construction which was described as a mosque in the agreement, the Rowthers would have no claim or right, except the right to worship therein; (iii) that the only rights which the Muslims would claim would be the right to worship, to light lamps and would also be responsible for the maintenance of the mosque; (iv) that the said construction was made purely for the purpose of worship; (v) that there should be a doorway and two windows affixed on the southern hall of the mosque and one doorway on the eastern side so as to serve as

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I.C. 942, ('35) A.A. 891; *Abdul Rahim* v. *Fakir Mohammad* (1946) Nag. 518 ('46) A.N. 401.

(s) Abdul Rahim v. *Fakir Mohamed* (1946) Nag. 588, ('46) A.N. 401; *Busquid* v. *Newaj Ahmed Khan* (1929) 119 I.C. 116, ('29) A.C. 533; *Maher Hussein* v. *Ahonahmed* (1934) 152 I.C. 50 ('34) A.B. 257.

(t) Mohd. Shah v. *Fasihuddin* ('56) A.S.C. 713.

(u) State of Madras v. *Mohd. Sahib* ('63) A.M. 39.

(v) Mt. Mamik Devi v. *Habib Ullah* ('36) A.L. 876.

(w) Zaffar Hussain v. *Mohomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Faiz Modh.* v. *Kanahiyalal* 1964. Raj. L.W. 567.

(x) Musaheb Khan v. *Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238; *Khalil Ahamed* v. *Sheikh Md. Askari* ('65) A. All. 320.

(y) Shevoraj Chamar v. *Mudee Khan* (1934) 149 I.C. 797, ('34) A.A. 868.

(z) Quadir Baksh v. *Saddullah* (1938) 173 I.C. 260,

entrances. It was held: that the document unmistakably evidenced the clear intention of the founder to consecrate the mosque for public worship and amounted to a declaration of a public wakf.

Once the mosque was constructed, it stood dedicated to God and all the right, title and interest of the owner got completely extinguished.

Once there was a complete dedication to the mosque, as a place of public worship, any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. However, the so-called stipulation by the plaintiffs, ancestors at the time of erecting the prayer hall not to claim any right or interest in the mosque could not be construed as an assertion that the mosque was not a public wakf. Reading the statements made in the agreement as a whole what the plaintiffs' ancestors meant was that the mosque would be undoubtedly a public wakf meant 'for the purpose of public worship' and that they would not interfere with the management of the same. This does not mean that if the founder's descendants indulged in mismanagement of the mosque, the plaintiffs as members of the Mahomedan community could not take any action under the law against the defendants. A.I.R. 1937 Lah. 552; A.I.R. 1963 S.C. 985 and A.I.R. 1956 Nag. 257, Disting:

Held further: As regards the adjuncts of the mosque which were built by the Mahomedan community from time to time for the purpose of the mosque or by way of gift to the mosque, the question of the person who actually made the construction is wholly irrelevant, because all the constructions made by any person used for religious purposes, incidental to offering prayers in the mosque, would be deemed to be accretions to the mosque itself. [P.K. Goswami and S. Murtaza Fazl Ali JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

In the absence of a custom or usage to the contrary, the Mahomedan Law does not favour the hereditary rights of being an Imam, because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. This, however, is a matter for the entire Muslim community to decide, because an Imam is normally chosen under the Mahomedan Law by the Muslim community. [P.K. Goswami and S. Murtaza Fazl Ali JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

Graveyard.— The Oudh Chief Court, relying on a decision of the Allahabad High Court *(y)* has held that the question whether a plot of land is a graveyard or not is primarily a question of fact *(z)*. In an earlier decision the same court took the view that the question whether a certain property is private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact *(a)*. In a later case *(b)* it was held by the same court that whether a building is a private or public mosque is not a question of fact but a question of law. That is a question of a legal inference to be drawn from the proved facts. In *Hasansab* v. *Mohidinsab (c)* the Bombay High Court held that the question whether a particular building is a public mosque or not is a question of fact. The Sind Chief Court has held that whether instances of burial proved in any particular case are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact. It is submitted that the proper legal effect of a proved fact is essentially a question of law and the view taken by the Oudh Chief Court in the later decision is correct and supported by the observations of the Privy Council in *Dhanna Mal* v. *Moti Sagar (d)*. A description in a settlement register of a site as a *kabaristan* is *prima facie* evidence that it is a public graveyard in the sense known to Mahomedan law *(e)*, and long user makes such evidence conclusive for a wakf may be established by user *(f)*, but the mere fact of a few burials many years ago has been

('38) A.O. 77.

(a) Hari Kishen v. *Raghubar* (1926) 1 Luck. 489, 97 I.C. 853, ('26) A.O. 578.

(b) Musaheb Khan v. *Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238.

(c) (1923) 70 I.C. 850, ('23) A.B. 42.

(d) (1927) 8 Lah. 573, 54 I.A. 178, ('27) A.PC. 102.

(e) Ballabh Das v. *Nur Mahomed* (1936) 40 Cal. W.N. 499, 70 Mad. L.J. 55, 160, I.C. 579 ('36) A.PC. 83 affirming 7 Luck. 198; *Imam Baksha Munawar Din* v. *Narasingh Puri* (1938) 175 I.C. 1005, ('38) A.L. 246.

(f) Court of Wards v. *Ilahi Baksh* (1912) 40 Cal. 297, 40 I.A. 18, 17 I.C. 744; *Mehraj Din* v. *Ghulam* (1931) 12 Lah. 540, 134 I.C. 492, ('31) A.L. 607; *Mehar Din* v. *Hakim Ali* (1935) 157 I.C. 561, ('35) A.L. 912; *Jhao Lal* v. *Ahmadullah* (1934) All. L.J. 248, 149 I.C. 966, ('34) A.A. 335; *Abdul Rahim* v. *Fakir Mohamed* (1946) Nag. 518, ('46) A.N. 401; *Ramzan Momin* v. *Dasrath Raut* ('53) A.P. 138; *Gulam Mohideen Khan* v. *Abdul Majid Khan* 1956 Andh. W.R. 922; 1956 Andh. L.T. 673; ('57) A. Andh. Pr. 941.

(g) Raushan Din v. *Mahomed Shariff* (1936) 161 I.C. 650, ('36) A.L. 87; *Quadir Baksha* v. *Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77.

(h) Quadir Baksha v. *Saddullah* (1938) 173 I.C. 260,

held to be no evidence of public user *(g)*. In order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery, it is necessary to prove a number of instances adequate in character, number and extent. Long user, as evidence of a dedication, must be long and absolute and there should be no break. If there is evidence of discontinuance of the use of the land as a burial ground, that may cause the land to lose its consecrated character. A stray burial or two in a plot does not furnish ground for treating the land as a burial ground and there is no wakf by user *(h)*. Where a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a wakf *(i)*. If a site is described in the revenue register as a grove and is owned by a Hindu zemindar the existence of a few graves will not justify the presumption of a dedication *(j)*; for the burials must be adequate in number, character and extent to justify the inference *(k)*. But although one burial in a plot will not make the land wakf *(l)* it has been held in Allahabad that the presumption is that the part of the site where the dead body is buried is dedicated with the consent of the owner so that the grave is wakf and the Muslim community have access to it *(m)*. But in the absence of evidence of user such a claim for a private grave would seem to be of doubtful validity: a Pir's tomb or a Dargah is accessible to the public and proof of user would establish the nature of the institution. Where in a public graveyard, one portion was used as burial ground from time immemorial and another portion was quite separate and distinct and in the possession of the mutawalli but was not shown in the settlement papers as the personal property of the mutawalli, and there were no burials in the built portion, it was held that the whole piece of land in the graveyard could not be considered wakf property; the built portion was the private property of the Mutawalli *(n)*. A public graveyard is wakf property and therefore inalienable even after it has been closed by the Municipality *(o)*. The Muslim community has a right to require the demolition of a house built on a disused graveyard in contravention of the original purposes of the wakf *(p)*. But the building of a temporary hut by the custodian of the graveyard does not amount to an assertion of title hostile to the wakf *(q)*. When the land has become wakf for a graveyard, the rights of the former owner are extinguished and he has no right to graze his cattle on it *(r)*. Private ownership of a plot is incompatible with the plot having been dedicated as a wakf for graveyards *(s)*. Where a mortgage decree was obtained in respect of the alleged wakf property, there would be an inference against wakf by user *(t)*.

Under the Mahomedan Law, graveyard may be of two kinds; a family or private graveyard and a public graveyard. A graveyard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury the dead. On the other hand, if any member of the public is permitted to be buried in a graveyard and this practice grows, so that it is proved by instances, adequate in character, number and extent, then the presumption will be that the dedication is complete and the graveyard has become a public graveyard where the Mahomedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard.

('38) A.O. 77; *Mohammed Kasam* v. *Abdul Gafoor* ('64) A.M.P. 227; *Punjab Waqf Board, Ambala* v. *The Panchayat Deh* ('71) A. Punjab 482.

(i) Arur Singh v. *Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119; *Mohammad Kasam* v. *Abdul Gafoor supra.*

(j) Baqar Khan v. *Badu Raghindra Pratap Sahi* (1934) 9 Luck. 568 148 I.C. 433, ('34) A.O. 263.

(k) Mahabir Prasad v. *Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.PC. 174.

(l) Ballabh Das v. *Nur Mahomed supra; Siraj Ahmad Khan* v. *Gaya Prasad* (1939) A.L.J. 115, 180 I.C. 942, ('39) A.A. 219.

(m) Nazira v. *Subhdarshan Lal* (1936) All L.J. 651.

(n) Mohammad Kasam v. *Abdul Gafoor* ('64) A.M.P. 227. See also: *Abdul Gafoor* v. *Hakim Ali* ('59) A. All. 78.

(o) Abdul Ghafoor v. *Rahmat Ali* (1930) 122 I.C. 326, ('30) A.O. 245.

(p) Ehsan Beg v. *Rahmat Ali* (1934) 10 Luck. 547, 152 I.C. 798, ('35) A.O. 47.

(q) Ramzan v. *Mohammad Ahmad Khan* (1936) 165 I.C. 104, ('36) A.O. 207.

(r) Jhao Lal v. *Ahmudallah* (1934) All. L.J. 248, 149 I.C. 966, ('34) A.A. 335.

(s) Dost Mahomed v. *Chainrai* (1940) Kar. 174, 187 I.C. 227, ('40) A.S. 43.

(t) Jawaharbeg v. *Abdul Aziz* ('56) A.N. 257.

(u) Arur Singh v. *Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119 (Decision of a single Judge); *Motishah* v. *Abdul Khan* (1955) Nag. 1000.

(v) Muhammad Ahsan v. *Umardaraz* (1906) 28 All. 633.

Once a Kabaristan has been held to be a public graveyard, it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not.

The following rules apply in order to determine whether a graveyard is a public or a private one:

(1) even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user, i.e., where the corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all; (2) if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard; (3) in order to prove that a graveyard is public dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and (4) where a burial ground is mentioned as a public graveyard in either a revenue or historical papers, that would be conclusive proof of the public character of the graveyard. A.I.R. 1936 P.C. 83; A.I.R. 1938 Lahore 246; A.I.R. 1934 All. 868; A.I.R. 1938 Oudh. 77 and A.I.R. 1964 Madh. Pra. 227 Ref. It was held on facts, that the entire burial ground of village Vijayapuram, Tiruvarur District, Madras State, was a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants Labbais, descendants of the founder. That the Labbais used to realize pit fees or other incidental charges would not detract from the public nature of the dedication. [P.K. Goswami and S. Murtaza Fazl Ali. JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

It has been held that a Hindu may dedicate a plot of land for the purpose of a Muslim graveyard *(u)*.

In the absence of a plea that a presumption of dedication arises from long user, there can be no such presumption. Land was recorded in *Jamabandis* in 1909-1910 and in 1954-56 as *'gher mumkin kabrastan'* the entry was held to be not correct because the village was predominantly Hindu before partition of India and no Muslim remained after it. No graves were found on the spot. The entries of 1957-58 and 1960-61 were held to repeat merely the earlier entries. *Panchayat Deh* v. *Punjab Wakf Board* ('69) A. Punj. 344.

Land used as a graveyard ceases to be private property. *Pirbux* v. *Sher Mohd.* 1969 All. L.J. 169. Apart from immemorial user of land as a graveyard, evidence of instances must be given. From the number of instances a reasonable inference of dedication can be drawn, if the nature of the property admits it. *Skh.-Bashir Alunad* v. *Skh. Abdul Jabbar* ('68) A. Pat. 29.

189. Revocation of wakf.— (1) A testamentary wakf, that is a wakf made by will, may be revoked by the wakif (dedicator) at any time before his death *(v)* [sec. 184].

A testamentary wakf, being no more than a *bequest* for a religious or charitable purpose, may be revoked as any other bequest may be, see sec. 128 above. A wakf created during *marz-ul-maut* stands on the same footing *(w)*, see sec. 135 above.

(2) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid *(x)*.

(w) Sayad Abdulla v. *Sayad Zain* (1889) 13 Bom. 555, 560.

(x) Fatmabibi v. *The Advocate-General of Bombay* (1882) 6 Bom. 42, 51; *Assoobai* v. *Noorbai* (1906) 8 Bom. L.R. 245, 250-251; *Pathukutti* v. *Avathalakutti* (1890) 13 Mad. 66, 73-74; *Ashna Bibi* v. *Awaljadi* (1917) 44 Cal. 689, 702, 37 I.C. 887; *Abdul Satar* v. *Advocate-General of Bombay* (1933) 35 Bom. L.R. 18, 143 I.C. 799, ('33) A.B. 87; *Janabali Sardar* v. *Sabha Khatun* (1938) 177 I.C. 307, ('38) A.C. 257.

(y) Ma E Khin v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71; *Abdul Wahab* v. *Mussammat Sughra* (1932) 54 All. 455, 136 I.C. 619, ('32) A.A. 248.

Baillie, 565; Hedaya, 234.

190. Power to alter beneficiaries and to increase or reduce their shares.— The wakif (dedicator) may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares *(y)*.

In the absence of such a reservation the wakif cannot alter the terms of the wakf *(z)* nor can he make a change in the personnel of the mutawallis *(a)*. He cannot, of course, so reduce the shares as to withdraw any part of the *property* from the wakf. Nor can he substitute an invalid for a valid purpose, for the effect would be to withdraw so much of the property as would be appropriated for the invalid purpose. Nor can he alter the objects of the wakf *(b)*.

"Syed Mahmood Hasan the Mutawalli of the first lot is vested with the power to fix stipends for his children and their descendants and for his wives during his lifetime whatsoever he pleases or to lay down conditions by means of a registered document or may get any writing kept reserved in the custody of the District Judge, so that after him it be binding upon every Mutawalli; such in case he might not get any writing registered or kept in the custody of the District Judge of the district, then under such circumstances the twenty (20) per cent of the income of the wakf property having been set apart for the expenditure of collection and realisation and right of the Mutawalliship and the amount of Rs.6000 (Rupees six thousand) for meeting the expenditure of 'Azadari' as detailed at para No. 7 above; the entire remaining balance will be distributed among the heirs of Mahmood Hasan according to their respective legal share provided under Mohammadan Law."

Held that the meaning of the clause was that Saiyed Mohammad Hasan, the Raja was given a special power and right to fix stipends for his children, wives and descendants either by a registered document and/or by a document in writing kept in the custody of the District Judge so that after him it might be binding on every subsequent Mutawalli. If he failed to do so, then after setting apart 20 per cent of the gross income to meet the expenditure of collection and realisation of Rs.6000 the charitable expenditure, mentioned in Cl. 7 the balance was to be distributed amongst the heirs of Saiyed Mohammad Hasan according to their respective legal shares provided under the Mahomedan Law. On a reasonable view of the matter, either by way of construction of Cl. 18 or as necessary implication of it the Raja was vested with the power to fix stipends for his children and their descendants and for his wives during the lifetime also. Apart from the fact that in Cl. 27 of the wakf deed it was specifically mentioned that any condition or phrase laid down in any of the paras of the wakf deed was not meant to go against the Mahomedan Law and was not to be of any effect if it did so, it was difficult to conclude that the Raja was conferred an absolute power or discretion to fix any stipend for any beneficiary and no stipend for some beneficiary. Equally amongst all is a golden thread which runs throughout the Mahomedan Law. The power given to the Raja under Cl. 18 had to be reasonably exercised within a reasonable limit of variation according to the exigencies and special needs of a particular beneficiary. He had no power to spend money quite disproportionately for the benefit of one beneficiary. He had no power to spend money for acquisition of any immovable property for a beneficiary. It would be a startling proposition of Mahomedan law to cull out from Cl. 18 of the wakf deed that a property acquired obviously and clearly out of the funds of the wakf estate in the name of one of the beneficiaries should be treated as having been acquired for him or her in exercise of the power under Cl. 18. The law relating to benami transactions, strictly speaking could not be applied in all its aspects to a transaction of the kind in question. Even if applied, the real owner of the property was the Raja in his capacity as Mutawalli and the beneficiary was a mere benamidar. The property in reality, therefore, belonged to the wakf estate. [R.S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.] *Bibi Siddique Fatima* v. *Saiyed Mohammad Mahmood Hasan*, 1978 All. L.J. 634. (S.C.)

(z) Niamatunnissa v. *Hafizul Rahman* (1933) 8 Luck, 482, 144 I.C. 473, ('33) A.O. 261; *Sibte Rasul* v. *Sibte Nabi* (1942) A.L.J. 722, ('43) A.A. 74.

(a) Rahiman v. *Baqridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

(b) Khalil Ahamed v. *Malka Mehar* ('54) A.A. 362 (F.B.)

(c) Syeda Bibi v. *Mughal Jan* (1902) 24 All. 231. The actual decision in this case cannot be supported since the Privy Council ruling in *Baqar Ali Khan* v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

(d) Mahabir Prasad v. *Mustapha* (1937) 41 Cal.

191. Contingent wakf not valid.— It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children, on their attaining majority, and *in the event of her death* without leaving children, to devote the income to certain religious uses. This is not a valid wakf, for it is contingent on the death of the settlor without leaving issue: *Pathukutti* v. *Avathalakutti* (1888) 13 Mad. 66; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 258, 12 I.C. 225; *Habib Ashraff* v. *Syed Wajibuddin* (1933) 144 I.C. 654, ('33) A.O. 222; *Mahomed Safi v. Khadim Ali*, ('44), A.O. 291: Baillie, 564.

A Mahomedan executes a deed of wakf which contains a direction that until payment of specified debts due by him, no proceedings under the wakfnama should be enforceable. The provision for the payment of debts does not import a contingency and the wakf is valid: *Khalil-ud-din* v. *Shri Ram* (1934) 56 All. 293, 148 I.C. 294, ('34) A.A. 176.

A direction in the deed of wakf to create a reserve fund intended for preserving, improving and extending the wakf properties does not invalidate the wakf: *Hashim Ali* v. *Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

Where the deed of wakf provides that the ultimate gift to charity is to take effect only if a certain person dies without leaving any issue, the rule of contingency under the Mahomedan law would affect such disposition, and the position in that respect is not altered by anything in the Mussalman Wakf Validating Act, 1913. That Act undoubtedly authorizes a postponement of the ultimate gift to charity, which would not have been valid under the original law, but it does not abrogate the rule of contingency under the Mahomedan law: *Commissioner of Wakfs, Bengal* v. *Haji Rashid Ali Dina* ('58) A.C. 413 (See also the notes on sec. 197, below).

Shia law.— The same is the rule of Shia law *(c)*; Baillie, II, 218. If a widow and her sons make a dedication of their inheritance and some of the sons are minors the dedication cannot take effect at once for it depends upon the minors attaining majority and doing likewise. The wakf is therefore wholly invalid *(d)*.

Shaffei law.— Under Shaffei law also a wakf dependent on a contingency is invalid, a wakf to come into operation on the death of the wakif is valid, but it is to be treated on the same footing as a testamentary wakf: *Hussain* v. *Salah* ('53) A Hyd. 195.

192. Reservation of life interest for benefit of wakif (dedicator).— (1) Under the Hanifi law, the wakif (dedicator) may provide for his maintenance out of the income of the wakf property. He may, if he wishes, reserve even the whole income for himself for his life *(e)*.

On the amount of maintenance becoming not sufficient to make both ends meet, the amount of maintenance can be increased on a suit by a beneficiary against Mutawalli, 1937 Oudh W.N. 429. Reld. on A.I.R. 1932 All. 248, Dist. [S.K. Kaul, J.] *Smt. Nawab Sarukh Jahan Begam* v. *Saiyed Enayat Husain Khan.* A.I.R. 1975 All. 452.

(2) *Payment of wakif's debts.*— Under the Hanifi law, the wakif may provide for the payment of his debts out of the income of the wakf property *(f)*.

This was well established before the Wakf Validating Act, 1913, and it is now reproduced in sec. 3, cl. (b) of the Act. See sec. 198 below.

(a) A Hanafi Mahomedan female conveys her house to her husband upon trust to pay the

W.N. 933, 168 I.C. 418, ('37) A.PC. 174.

(e) Doe dem Juan Beebee v. *Abdollah* (1838) Fulton's Rep. 345; *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42, 51-52; *Cassamally* v. *Currimbhoy* (1912) 36 Bom. 214. 12 I.C. 25; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682. 74 I.C. 142 ('24) A.A. 113; *Ma E Khin* v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

(f) Luchmiput v. *Amir Alum* (1882) 9 Cal. 176; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429 [a case under the Wakf Validating Act]; *Khalil-uddin* v. *Shri Ram* (1934) 56 All. 293. 148 I.C. 294, ('34) AA. 176.

(g) See cases cited in f.n. *(j)* above.

(h) Phul Bee Bee v. *R.M.P. Chetiyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038; *Abdul Karim* v. *Rahimbai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

(i) V. Mohamed Mohini v. *Wakf Board Madras*

income of the house to her for her life, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid wakf, though the charitable trust is not to come into effect until after the founder's death *(g)*. *Hedaya*, 237. Such a wakf is not valid under the Shia law: see below "Shia law".

(b) A Hanafi Mahomedan executes a deed of wakf by which he directs his debts to be paid out of the rents and profits of the wakf property. This is a valid wakf. Such a wakf is not valid under the Shia law: see below "Shia law."

(c) A Hanafi Mahomedan executes a deed of wakf by which he reserves the whole legal and beneficial interest to himself during his lifetime. The wakf is invalid *(h)*.

It is submitted that this case is wrongly decided. Later cases in Allahabad and Madras have dissented from the view expressed here.

(d) Where in a wakf benefit was reserved in the wakf for some individual and it was claimed that this was not a wakf, the analogy of the Bombay Public Trusts Act was not applied. It was held that the Act being a piece of legislation cannot determine the issue and a Muslim wakf is not bad because it reserves some benefit in favour of persons. *G. Venkataswamy* v. *Mir Zahid Hussain Saheb* ('73) Mys. A. 145.

'Family' in Mussalman Wakf Validating Act, 1913 means persons descended from one common progenitor and having a common lineage. Brother's son, brother's daughter and their descendants are included. Intermediate beneficial interests do not matter as the ultimate benefit is to charity: 1944 Bom. 91 and 1933 Cal. 581 dissented from: 1943 Mad. 234 held overruled by 1947 Mad. 176. *(i)*.

Wakf to defraud creditors.— A wakf made with intent to defeat or defraud creditors is voidable at the option of creditors *(j)* but cannot be revoked by the wakif or his heirs *(k)*.

Provision for settlor's residence.— It would seem that a provision for the residence of the settlor for his life in the endowed property is not invalid *(l)*.

Shia law.— According to the Hanafi law, the settlor may reserve the usufruct of the endowed property of himself for his life. According to the Shia law a wakf is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created *(m)*. Hence a settlor cannot, according to that law, reserve for himself a life-interest in the income or any portion thereof: Baillie, II, 218-219. It has been held by the High Court of Allahabad that if the settlor reserves the whole income for himself, the wakf is wholly void; but if he reserves a portion of the income *i.e.*, one-third, the wakf is void as to one-third only of the corpus, but valid as to the remaining two-thirds *(n)*. But in *Abadi Begum* v. *Kaniz Zainab (o)* the Privy Council expressed the opinion that in such a case the wakf would be entirely void. Their Lordships approved the four conditions governing the validity of a wakf under Shia law as set out in Baillie's Digest, II, 218-219. These are "(1) it must be perpetual; (2) absolute and unconditional; (3) possession must be given to the *mowkoof* (beneficiary) of the thing appropriated; and (4) it must be taken entirely out of the wakif or appropriator." The last condition has been expressed in direct and homely language by saying that the wakif must not eat out of the wakf. The case was one in which the settlor under colour of fixing her salary as mutawalli really reserved for herself a portion of the income very much in excess of the salary fixed for future mutawallis. The case was not decided on this ground but the wakf was held to be invalid as the settlor had not parted with

('68) A. Mad. 243.

(j) Bismillah Begam v. *Tahsin Ali* (1930) 52 All. 710, 124 I.C. 722, ('30) A.A. 562; *Hanuman Prasad* v. *Mahomed Ismail* (1936) 162 I.C. 495, ('36) A.L. 72; *Mohammad Ismail* v. *Hanuman Parshad* (1938) 178 I.C. 476, ('38) A.PC. 290; *Har Prasad* v. *Mohammad Usman* (1942) A.L.J. 645, ('43) A.A. 2.

(k) Zafrul Hasan v. *Farid-ud-din* (1945) All. 161, 47 Bom. L.R. 239, ('46) A.PC. 177.

(l) See *Muhammad Shafi* v. *Muhammad Abdul* (1927) 49 All. 391, at p. 395, 99 I.C. 1052, ('27) A.A. 255.

(m) Ali Raza v. *Sanwal Das* (1919) 41 All. 34, 48 I.C. 212; *Hemraj Radhanji* v. *Shahbhan* (1939) 179 I.C. 692, ('39) A.S. 22, affirmed in *Shabhan Mohib* v. *Hemraj* (1941) Kar. 474, ('42) A.S. 14.

(n) Hajee Kalub v. *Mehrum Bee Bee* (1872) 4 N.W.P. 155; *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257.

(o) (1927) 54 I.A. 33, 6 Pat. 259, 99 I.C. 669, ('27) A.PC. 2.

(p) 54 I.A. 33 *supra*; *Mt. Ali Begum* v. *Badrul-Islam Ali Khan* (1938) 65 I.A. 198, ('38) A.PC. 184; *Sibte Rasul* v. *Sibte Nabi* (1942) A.L.J. 722, ('43) A.A. 74.

(q) Mohammad Qasim v. *Mohammad Mehdi* (1938) 13 Luck. 458, ('37) A.O. 465.

possession so as to comply with the third condition set out above.

But though a Shia cannot provide for his own maintenance out of the wakf property he may provide for the maintenance of his family, children and dependants *(p)*. This is recognized in sec. 3(a) of the Wakf Act. But a Shia may provide for the expenses of Roza, Namaz, Haj, Ziarat, etc., to be performed after his death for his spiritual benefit *(q)*. He may also reserve a life interest for a beneficiary in the usufruct of the property if the intention that the property should become wakf on the settlor's death is clear *(r)*. If the settlor is the first mutawalli he may lawfully take the remuneration of the mutawalli *(s)*. The High Court of Allahabad has held that a provision that the endowment shall not take effect till the death of the settlor's wife is valid *(t)*, but this view of the law has been overruled by the Privy Council in *Mt. Ali Begum* v. *Badr-ul-Islam Ali Khan (u)* in which it was held that a direction that certain property should become wakf after the death of a person surviving the testator was invalid.

Again according to the Shia law, a wakf is not valid, if it provides for the payment of *personal* debts of the settlor. But a provision for payment of debts *charged* on the estate is valid; in other words, a Shia may like a Sunni, make a valid wakf of property which is subject to a mortgage *(v)*. Baillie, II, 218-219.

In *Syed Ali Zamin* v. *Syed Akbar Ali Khan (w)* the Judicial Committee held that the settlor has divested himself of all interest in the property dedicated though he had appointed himself Mutawalli with uncontrolled powers of management. Whether he has so divested himself, is a question of construction of the wakfnama, and is not to be confounded with the question whether there has been a transfer of possession or change in the character of his own possession.

193. Wakf property cannot be alienated.— Wakf property cannot be alienated except in the cases mentioned in secs. 207 and 208 *(x)*.

Hedaya, 231, 232; Baillie, 558-560.

194. Attachment of wakf property.— Wakf property is not liable to attachment and sale in execution of a personal decree against the mutawalli *(y)*, nor can the rents and profits thereof be seized in execution. See sec. 125.

195. Suit for a declaration that property is wakf.— A suit for a declaration that property belongs to a wakf can be brought by Mahomedans interested in the wakf without the sanction of the Advocate-General. The provisions of sec. 92 of the Code of Civil Procedure, 1908, do not apply to such a suit. That section applies only to suits claiming any of the reliefs specified in it *(z)*.

Even acquisition of immovable property directly with the wakf fund is an accretion to the wakf property. [R.S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.] *Bibi Siddique Fatima* v. *Saiyed Mohammad Mahmood Hasan*, 1978 All. L.J. 634 (S.C.) Suit for declaration that property belongs to wakf can be filed by any Mahomedan interested in wakf.

It is settled law that in a case where a long period has elapsed since the origin of the alleged

(r) Mt. Ali Begum v. *Badr-ul-Islam Ali Khan* (1938) 65 I.A. 198, ('38) A.PC. 184.

(s) Mahabir Prasad v. *Syed Mustafa Husain* (1933) 8 Luck. 246, 141 I.C. 501 ('33) A.O. 107 approved by the Privy Council on this point in (1937) 41 Cal. W.N. 933. 168. I.C. 418, ('37) A.PC. 174.

(t) Muhammad Ahsan v. *Umardaraz* (1906) 28 All. 633.

(u) (1938) 65 I.A. 198, ('38) A.PC. 184. See also *Chief Administrator of Auqaf* v. *Mohd. Sher Nawab Khan* P.L.D. 1967 Lah. 672.

(v) Musharaf Begum v. *Sikandar* (1929) 51 All. 40, 49-50, 111 I.C. 583, ('28) A.A. 516 explaining *Hamid Ali* v. *Mujawar* (1902) 24 All. 257, 263.

(w) (1937) 64 I.A. 158, 16 Pat. 344, 41 Cal. W.N. 709, 167, I.C. 884, ('37) A.PC. 127.

(x) Abdur Rahim v. *Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44.

(y) Bishen Chand v. *Nadir Hossein* (1887) 15 Cal. 329, 15 I.A. 1; *Mutu Ramanadan* v. *Vava Levvai* (1917) 44 I.A. 20, 40 Mad. 116, 39 I.C. 235; *Shah Mohammad* v. *Mohammad* (1927) 2 Luck. 109, 100 I.C. 241, ('27) A.O. 113; *Muhammad Ismail* v. *Muhammad* (1921) 43 All. 508. 62 I.C. 904, ('21) A.A. 224.

(z) Abdur Rahim v. *Mahomed Barkat Ali* (1928) 55 I.A. 96, 55 Cal. 519, 108 I.C. 361, ('28) A.PC. 16; *Muslim Orphanage* v. *Khatoon Bi* ('58) A. Mys. 28.

(a) Abdul Ganne v. *Hussen Miya* (1873) 10 Bom. H.C. 7; *Mahomed Hamidulla* v. *Lotful Huq* (1881) 6 Cal. 744.

(b) Luchmiput v. *Amir Alum* (1882) 9 Cal. 176; *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17

wakf, user can be the only available evidence to show whether the property is wakf or not. *Anjuman Islamia* v. *Najim Ali*, A.I.R. 1982 M.P. 17.

Whether the Wakf falls within s. 92 C.P.C. is to be seen with reference to the objects of the Wakf. They must be substantially for public purposes. The suit under s. 92 must be in a representative capacity and not to vindicate private rights. The wakf may create intermediate private rights but if there is substantial benefit for charity, the suit, if it is to vindicate public rights will fall in s. 92 and the consent of the Advocate-General is a condition precedent. *Sughra Bibi* v. *Haji Kummu Miamn* ('69) A.S.C. 884.

Even a worshipper will be entitled to maintain a suit for possession of a trust property where the trustee has alienated the trust property and would not proceed to recover possession of the same or has disabled himself otherwise from maintaining suit in respect thereof, or declines to institute a suit. The Court may after setting aside the alienation hand over the property to the trustee or to the worshippers, if there is no trustee. *Amir Jan* v. *Shaik Sulaiman Sahib*, (1968) II M.L.J. 559.

Family Settlements by way of Wakf

History of the Wakf Validating Act.— In order to understand the following wakfs may be divided into two classes, *viz.*, (1) public and (2) private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants, and is called *wakf-alal-aulad*. It was considered at one time that "to constitute a valid wakf there must be a dedication of property *solely* to the worship of God or to religious or to charitable purposes *(a)*, in other words, that a private wakf was in no case valid. But this extreme view is no longer tenable *(b)*, and a private wakf may now be made subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act of 1913. They have been considerably relaxed by the Wakf Act. Wakfs are divided into private and public. A wakf means the divesting of the property of the donor and vesting it in the Almighty. *Ahmed G. Ariff* v. *Commr. of Wealth-tax*: ('71) A.S.C. 1691. The case deals with the positions before and after the Wakf Act.

Wakf *exclusively* for the benefit of the settlor's family, children, and descendants in perpetuity.— Such a wakf was invalid before the Wakf Act. It is also invalid under that Act: see Wakf Act, proviso to sec. 3 reproduced in sec. 198 below.

Wakf *both* for the benefit of the settlor's family, children, and descendants, *and* for charity.— According to the Privy Council decisions before the Wakf Act, such a wakf was valid if there was "a *substantial* dedication of the property to charitable uses at some period of time or other" *(c)*. But if the primary object of the wakf was the aggrandizement of the family, and the gift to charity was illusory whether for its small amount or from its uncertainty and remoteness, the wakf for the benefit of the family was invalid and no effect could be given to it. The leading case on the subject was *Abul Fata Mahomed* v. *Russomoy (d)*, decided in 1894 [see ill. (d) to sec. 196 below]. Under the Wakf Act, a wakf for the benefit of the family is valid, even if the gift to charity is illusory. All that is necessary under the Act is that there should be an ultimate gift to charity. See Wakf Act, sec. 4, reproduced in sec. 198 below.

In *Abul Fata Mahomed's* case referred to above, the income of the wakf property was to be applied in the first instance for the benefit of the settlor's descendants from generation to generation, and the trust in favour of charity was not to come into operation *until after the extinction of the whole line of the settlor's descendants*. Their Lordships of the Privy Council, held that the gift of charity was illusory, and that the sole object of the settlor was to create a family settlement *in perpetuity*, and that the provision for the settlor's family was therefore invalid. In the course of the judgment their Lordships said (p. 631):—

"As regards precepts, which are held up as the fundamental principles of Mahomedan law [see S. 33], their Lordships are not forgetting how far law and religion are mixed up together in the

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Cal. 498, 509, 17 I.A. 28.

(c) Mahomed Ahsanulla v. *Amarchand Kundu* (1899) 17 Cal. 498, 509, 17 I.A. 28, 37.

(d) (1894) 22 Cal. 619, 22 I.A. 76.

(e) Mutu Ramanadan v. *Vava Levvai* (1916) 44 I.A. 21, 26-27, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86.

(f) Hamid Ali v. *Mujawar Husain* (1902) 24 All. 257.

(g) Khajeh Solehman v. *Nawab Sir Salimullah*

Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts [*hiba*] by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf* in the name of God, of for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any."

The decision of the Privy Council in *Abdul Fata Mahomed's* case caused considerable dissatisfaction in the Mahomedan community in India. It can hardly be doubted that under the pure Mahomedan law a wakf exclusively for the benefit of the settlor's family and descendants was valid. Such a settlement may be one in favour of *unborn persons;* for it may create successive *life-interests* in favour of such persons; it may be "a *perpetuity,* of the worst and most pernicious kind," but it was recognised by Mahomedan law. The Privy Council, however, held that such a wakf was invalid. A representation was thereupon made to the Government of India with the result that an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object being to remove the disability created by that decision. But it was held as to this Act that it was not retrospective, that is to say, it did not apply to wakfs created before the Act. This led to the enactment of another Act in 1930, by which a retrospective effect was given to the Wakf Act of 1913. The result is that the Wakf Act of 1913 now applies also to wakfs created before that Act: see sec. 199 below. We now proceed to state in the form of propositions the law before the Wakf Act and the law as laid down by that Act. (See also the Judgment of the Supreme Court in *Fazlul Rabbi Pradhan* v. *State of West Bengal* (1965) 3 S.C.R. 307, 315-16).

196. Law relating to private wakfs before the Mussalman Wakf Validating Act, VI of 1913.— Under the law before the Wakf Act of 1913, a wakf was valid if the effect of the deed of wakf was to give the property in substance to charitable uses. It was not valid if the effect was to give the property in substance to the testator's family *(e)*.

Shia law.— The same was held as to Shia wakfs *(f)*.

Illustrations

(a) A Mahomedan conveys property to a mutawalli, *A.B.*, with a direction to defray out of the profits of the endowed land the expenses of a mosque, to give alms to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials, and circumcision of the members of *A.B*'s family. Here there is a substantial dedication to charity; the wakf, therefore is valid: *Muzhurool Huq* v. *Phuraj* (1870) 13 W.R. 235; *Deoki Prasad* v. *Inait Ullah* (1892) 14 All. 375.

(b) *A* executes a document purporting to settle property as "wakf" for the benefit of his wife, daughter, and descendants of the daughter. The deed does not contain any provision for the application of the income in the event of the family becoming extinct. This was not a valid wakf under the law before the Wakf Act, as there was no gift to charity: *Nizamuddin* v. *Abdul Gafur* (1888) 13 Bom. 264 affirmed on appeal by the Privy Council, sub-nominee *Abdul Gafur* v. *Nizamuddin* (1892) 17 Bom. 1, 19 I.A. 170; *Abdul Ganne* v. *Hussen Miya* (1873) 10 Bom. H.C. 7. Nor is it a valid wakf under the Wakf Act, for there is no ultimate gift to charity. See sec. 197, note (3).

(c) A Mahomedan executes a document purporting to be a *wakfnama* which begins with a dedication of his entire property for the purpose of supporting a mosque and two schools, and for *sadir warid.* The dedication is qualified by the words "in the manner provided by the following paragraphs," and these paragraphs contain provisions for the appointment of the settlor's sons and descendants as mutawalli and for their salary, and for the maintenance and support of his family and descendants *from generation to generation.* The only provision in the deed as to religious and charitable purposes is that the mutawallis should continue to perform them *according to custom,* and this requires a *very small expenditure* compared to the income. The effect of the deed, as a whole, is that while it professes to dedicate as wakf property bringing in an annual income of about

(1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.P.C. 107.

(h) Mohiuddin Ahmed v. *Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 947, 192 I.C. 693, ('40) A.C. 501;

Rs.12,000, it leaves it to the members of the family who as mutawallis are to retain the control and management, to spend a small amount for religious purposes, and to take as much as they like for themselves and the members of the family, for all time on account of salary as maintenance. This was not a valid wakf under the law before the Wakf Act, for the main purpose of the settlement was the *aggrandizement of the settlor's family,* and the gift of charity was illusory: *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 17 I.A. 28; *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233, 28 I.A. 15 [where the income to be devoted to charity was left entirely to the discretion of the mutawalli for the time being]; *Muhammad Munawar* v. *Razia Bibi* (1905) 27 All. 320, 32 I.A. 86; *Fazlur Rahim* v. *Mahommad Obedul* (1903) 30 Cal. 666; *Balla Mal* v. *Ata Ullah Khan* (1927) 54 I.A. 372, 9 Lah. 203, 193 I.C. 518, ('27) A.PC. 191 [annual income Rs.1,558—Rs.146 per annum to be applied to charity and the rest to go to the settlor's descendants—wakf held to be invalid]; *Rukeya Banu* v., *Najira Banu* (1928) 55 Cal. 448, 105 I.C. 647, ('28) A.C. 130, [annual income Rs.10,000—Rs.456 per year to be applied to charity and the rest to go to settlor's descendants—wakf held to be invalid]. [All these would constitute a valid wakf under the Wakf Act].

Note.— In *Mahomed Ahsanulla*'s case (17 I.A. 28, 38-39)their Lordships of the Privy Council observed: "If indeed it were shown that the *customary* uses were of such magnitude as to *exhaust* the income or to absorb the *bulk* of it, such a circumstance would have its weight in ascertaining the intention of the grantor." Accordingly, where a Mahomedan dedicated property, of which the average annual income was Rs. 850, for the purpose of performing *fateha* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was Rs. 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was *substantial,* and that the wakf was therefore valid; *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211. See also *Gobinda Chandra* v. *Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163; *Subhan Ali Makhadomunnissa* (1947) A.L.J. 214, ('48) A.A. 11.

(d) Two Mahomedan brothers executed a deed purporting to make a wakf of all their immovable property for the benefit of their children and their descendants from generation to generation, and on *total failure of all their descendants,* for the benefit of widows, orphans, beggars and the poor. The provision for the settlor's children and their descendants was void according to the law before the Wakf Act, for the gift to the poor was too *remote.* and it was not to take effect until the total extinction of all the descendants of the settlor: *Abdul Fata Mahomed* v. *Russomoy* (1894) 22 Cal. 619, 22 I.A. 76. [Such a wakf is valid under Wakf Act: see sec. 4 of the Act reproduced in sec. 198 below.]

In the above case their Lordships of the Privy Council said: (p. 89) "If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in the high position. Their Lordships agree that the poor have been put into this settlement merely to give it *colour of piety,* and so to legalize arrangements meant to serve for the *aggrandizement of a family.*"

(e) Two Mahomedan brothers execute a deed whereby they settle lands of the value of Rs.20,000 in trust to apply an indeterminate portion of the income for the due performance of customary *fateha* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the settlor's sons and their descendants without power of alienation. The amount required for *fateha* and almsgiving is estimated by the Court at Rs.600 per annum. The total income of the trust estate is estimated at Rs.1,500, leaving a balance of Rs.900 for the benefit of the settlor's descendants. It was held by their Lordships of the Privy Council that though *two-fifths* of the income was to be devoted to the charity, and three-fifths was to go to the family, the effect of the deed was to give the property *in* substance to charitable uses, and that the deed was therefore valid. Their Lordships said: "But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and needs of the charity may expand even ... The *paramount* purpose of the grantors was evidently to provide for all the needs

of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. *It is the residue, which may be a dwindling sum, that is given to the family.* The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound": *Mutu Ramanadan* v. *Vava Levvai* (1917) 44 I.A. 21, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86.

Family settlement based on invalid wakf.— *A* executes a deed of wakf. After *A*'s death some of his heirs bring a suit against the mutawalli and the other heirs to set aside the wakf on the ground that the gift to charity is illusory. The suit is compromised and an agreement is made whereby the members of the family agree that the wakf is binding and that allowances fixed thereunder should be paid *out of the income of the endowed property* to named members of the family, and upon the death of any of the named persons, to his heirs. The agreement, being for consideration, is enforceable as constituting a valid charge upon the property, although the wakf is invalid *(g)*.

Effect of Shariat Act.— Sec. 2 of the Shariat Act expressly makes the Muslim personal law applicable *inter alia* to wakfs. The result is that Mussalman law is expressly made applicable to wakfs whereas previously the law relating to wakfs had to be decided on principles of equity and good conscience under the terms of the Acts and Regulations which have been in part repeated by the Shariat Act. There is nothing in the Shariat Act to affect the Privy Council decisions previous to the Mussalman Wakf Validating Act as they expressly interpret what was held to be the Mussalman law on the subject of wakf *(h)*.

197. Law relating to private wakfs under the Mussalman Wakf Validating Act, VI of 1913.— (1) It is now declared by section 3 of the Mussalman Wakf Validating Act that it is lawful for a person professing the Mussalman faith to create a wakf which is all other respects is in accordance with the provisions of the Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated [see s. 192 above].

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

(2) No such wakf is to be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants, of the person creating the wakf.

Note (1).— A wakf may be created for the support of the "family" [Wakf Act, s. 3(a). "The Act authorises the maintenance and support not only of children and descendants but also of the family of the wakif, and it is by no means clear what that word includes"]. The term "family" includes a daughter-in-law *(i)* and has also been held to include an adopted son who has resided with the settlor as a dependent relation *(j)*. It is not confined to persons who are dependent for their maintenance on the wakif. It has accordingly been held that the son of a half-brother, the son and grandson of a paternal uncle, and the son of a half-sister, though not dependent of the wakif for

Beli Ram v. *Mohammed Afzal* (1949) Lah. 1, 50 Bom. L.R. 674, ('48) A.PC. 168.

(i) Musharraf Begum v. *Sikandar* (1929) 51 All. 40, 111 I.C. 583, ('28) A.A. 516.

(j) Mubarak Ali v. *Ahmed Ali* (1935) 158 I.C. 149, ('35) A.L. 414.

(k) Imdad Ali v. *Ashiq Ali* (1929) 4 Luck. 101, 113 I.C. 494, ('29) A.O. 25.

(l) Ismail Haji Arat v. *Umar Abdulla* (1942) 44 Bom. L.R. 256, ('42) A.B. 155.

(m) Ghazanfar v. *Ahmadi Bebi* (1930) 52 All. 368,

their maintenance and residing separately from him, are included in the term "family" *(k)*. A sister's son who resides with the wakif and is maintained by him is also a member of the family *(l)*. A provision for the maintenance of the settlor's nephews and of their descendants generation after generation has also been held to be valid *(m)*. The Allahabad High Court has held that the word "family" in sec. 3(a) has to be given a wide and not a restricted meaning and a person may belong to a "family" either if he is from a common progenitor or if he is living under the same roof and is being supported and maintained by the settlor. Thus the step-daughter, of the wakif's sister, bred, brought up and married by the settlor was held to be a member of the wakif's family, but not her descendants *(n)*. A valid wakf can be created in favour only of some members of the family or of some of the children or descendants whether males or females and to the exclusion of others *(o)*. It is not illegal to make a wakf deliberately to deprive an heir of the share of his inheritance *(p)*. But if there is no provision of the maintenance of the family a wakf for a solely religious purpose, though valid as a wakf, is outside the Act even though the founder's daughter-in-law and after her, her daughter are appointed mutawallis with a remuneration *(q)*. It has been held by the Calcutta High Court that if the ultimate gift to charity be postponed till after the extinction of the family, children or descendants of the wakif, the wakf would be valid, but if it is to take effect on the extinction of the heirs how-low-soever, the wakf would be invalid *(r)*. The Lahore High Court *(s)* has, however, held that if a life-interest is given *inter alia* to a stranger such provision is void, but that does not invalidate the wakf. It merely accelerates the succession in favour of the settlor's family and ultimately of charity. The view, however, did not find favour when the case went to the Privy Council. The Hyderabad High Court has held that the dedication to the poor must be *bona fide (t)*.

Note (2).— The *ultimate* gift must be one for a religious, pious or charitable purpose *(u)* [Wakf Validating Act, s. 3, proviso]. It is not necessary, as it was under the law before the Act, that there should also be a *concurrent* gift to charity. Under the Act a Mahomedan need not provide for any gift of charity until after the extinction of the whole line of his descendants. This is in accordance with the view of Mahomedan law taken by West, J., in *Fatma Bibi* v. *The Advocate-General (v)*, by Farran, J., in *Amrulal* v. *Shaik Hussein (w)*, and by Ameer Ali J., in *Bikani Mia* v. *Shuk Lal (x)*. In the first of these cases, West, J., said: "If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated." It will be remembered that the view taken by West, J., Farran, J., and Ammer Ali, J., was disapproved by the Privy Council in *Abul Fata Mahomed* v. *Russomoy (y)*. See ill. (d) to sec. 196. See, however, *Mohd. Ismail* v. *Sabir Ali* ('62) A.S.C. 1722, where it was held by the Supreme Court that a deed of *wakf-alal-aulad*, for the benefit of the wakif and his descendants, which was in respect of Talukdari property governed by Oudh Estates Act, 1899 was invalid as infringing s. 12 of that Act which embodied the rule against perpetuity. This was so because the Act was a complete code

123 I.C. 369, ('30) A.A. 169; *Badrul Islam Ali Khan* v. *Mt. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251; *Muhammad Azam Khan* v. *Hamid Shah* (1946) All. 575, ('47) A.A. 137.

(n) Abdul Qavi v. *Asaf Ali* ('62) A. All. 364. See also: *K.M.U. Ahmad* v. *Board of Wakfs*, 1959. All. L.J. 486.

(o) Mt. Mubarak Jan v. *Mt. Tej Begum* (1938) 19 Lah. 435, 177 I.C. 439, ('38) A.L. 453.

(p) Beli Ram v. *Mohammad Afzal* (1949) Lah. 1. 50 Bom. L.R. 674, ('48) A.PC. 168.

(q) Rahiman Begum v. *Baqridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

(r) Mohiuddin Ahmed v. *Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 974, 192 I.C. 693, ('40) A.C. 501; *Mahammad Nassair* v. *Mahammad Yusuf* ('54) A.C. 524.

(s) Mohammad Afzal v. *Din Mohammad* ('47) A.L. 117. 50 Bom. L.R. 674, ('48) A.PC. 168. See also *Abdul Qavi* v. *Asaj Ali supra*.

(t) Salah v. *Husain* (1954) Hyd. 608. ('55) A. Hyd. 229.

(u) Ghulam Mohammad v. *Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81; *Abdul Hasan* v. *Rajbir* ('31) A.O. 124, 131, I.C. 433; *Phul Bee Bee* v. *R.M.P. Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038.

(v) (1881) 6 Bom. 42, 53.

(w) (1887) 11 Bom. 492.

(x) (1893) 20 Cal. 116, 132-177.

(y) (1894) 22 Cal. 619, 22 I.A. 76.

(z) Baqa Ullah Khan v. *Ghulam Siddique Khan* (1935) All. L.J. 647, 155 I.C. 416, ('35) A.A. 616.

(a) Thanga Mayil Ammal v. *Pappa* (1960) 1 M.L.J. 150, ('60) A.M. 318.

governing Talukdari estates and the holder's right of transfer must be determined and circumscribed by the Act. It was also held that though the wakf property may vest in God on the creation of the wakf, the absolute vesting (i.e. of both the legal and beneficial estate) which s. 12 contemplated would be postponed beyond the period prescribed by it

After the Validating Act of 1913, on the basis of the law as it prevailed even before, creation of the wakf for the purpose of the maintenance of the members of the Wakif's family and their descendants is also a charitable purpose. According to Shia Law the wakf is irrevocable after possession is given to the beneficiaries or the Mutawalli. The settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created. In purely metaphorical sense the expression "ownership of God" is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the jural sense, although the ownership of the property becomes reverted in God as he is originally the owner of all things. The Shia authorities considered the property as transferred to the beneficiaries or to the object of the Wakf. Strictly speaking, the ownership of the wakf property has no jural conception with any exactitude. The corpus is tied down and is made inalienable. Only the usufructs and the income from the corpus of the wakf property is available for carrying out the objects of Mutawalli is like a Manager rather than a trustee. The Mutawalli, so far as the wakf property is concerned, has to see that beneficiaries got the advantage of the usufruct. A.I.R. 1933 All. 407, disapproved. [R.S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.] *Bibi Siddique Fatima* v. *Saiyed Mohammad Mahmood Hasan*. 1978 All. L.J. 634 (S.C.)

Note (3).— The ultimate gift to charity may be an "implied" gift; it need not be express [Wakf Validating Act, s. 3 proviso]. What does "implied" mean? In a case where there was no express disposition of the ultimate benefit, the Allahabad High Court implied an ultimate benefit for charity, from intention of the founder as disclosed by the terms of the deed, from the fact that there was a provision for charity and from the fact that the wakf was to be perpetual, although the founder contemplated the possible extinction of his descendants *(z)*. It has been held by the Madras High Court that where a wakf provides for the maintenance of the founder's descendants and concurrently for charity, a reservation for charity in case of failure of descendants may be implied *(a)*. According to Abu Hanifa and Muhammad, it is necessary for a wakf to be complete that the ultimate benefit for the poor should be *expressly* reserved. According, however, to Abu Yusuf, such benefit may be reserved *impliedly*, and this can be done by the mere use of the word "wakf." Thus according to Abu Yusuf, if a person simply says "I give this land by way of *wakf* to Zeyd," the wakf is complete, and Zeyd has the usufruct of his life, and after his death, the income will go to the poor, though the poor are not expressly mentioned *(b)*. The *Fatawa Alamgiri* declares a preference for the opinion of Abu Yusuf *(c)*. In the first case cited in ill. (b) to sec. 196, the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that in the absence of an ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal *(d)*. Is it intended by the word "impliedly," which appears in sec. 3 of the Wakf Validating Act, to give effect to the opinion of Abu Yusuf, so that an ultimate gift to charity may be implied even where none is named from the mere use of the word "wakf"? It has been held in Allahabad *(e)*, Calcutta *(f)*, and Oudh *(g)*, that it is not to be so implied. A similar view has been taken by the Privy Council *(h)*.

The Mahomedan law recognises the existence of a private trust which is also of a charitable nature and which is generally called Wakf-allal-aulad, where the ultimate benefit is reserved to

(b) Hedaya, p. 234.

(c) Baillie's Digest, p. 558.

(d) Abdul Gaful v. *Nazamuddin* (1892) 17 Bom. 1, 19 I.A. 170.

(e) Iran Ali v. *Official Receiver* (1930) 52 All. 748, 130 I.C. 631, ('30) A.A. 837; *Mt. Ruqia Begum* v. *Surajmal* (1936) All. L.J. 231, 163 I.C. 344, ('36) A.A. 404.

(f) Masuda Khatun v. *Mahommad* (1932) 59 Cal. 402, 412-414, 133 I.C. 657, ('32) A.C. 93; *Tahiruddin Ahmed* v. *Masihuddin Ahmed* (1933) 60 Cal. 901, 37 Cal. W.N. 741, 147 I.C. 196, ('33) A.C. 716; *Mahomed Ali* v. *Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W.N. 718, ('40) A.C. 417.

(g) Sheikh Ramazan v. *Musammat Rahmani* (1932) 7 Luck. 300, 135 I.C. 372, ('32) A.O. 71.

(h) Ghulam Mohammad v. *Ghulam Husain* (1932) 59 I.A. 74, 86 [see the argument of counsel], 54 All. 93, 136 I.C. 454, ('32) A.PC. 81.

(i) Punjab Sind Bank v. *Anjuman Himayat Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(j) Mohammad Afzal v. *Din Mohammad* ('47) A.L. 117, affirmed in *Beli Ram* v. *Mohammad Afzal* (1949)

God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. In case the family becomes extinct then the Wakf becomes a public wakf, the property vested in God. A public wakf under the Mahomedan law is called wakf-fisabilil-lah. [S. Murtaza Fazl Ali, A. Varadarajan and A. N. Sen. J.J.] *Radhakanta Deb* v. *The Commissioner of Hindu Religious Endowment*, Orissa, A.I.R. 1981 S.C. 798.

Religious, pious or charitable purpose.— It is not sufficient to use these general words but the particular purpose must be specified *(i)*. But this view has been dissented from in a subsequent case where it was held that a wakf for "religious and charitable purposes" was valid *(j)*.

Under the Mussalman Wakf Validating Act, 1913 (ss 3, 4) the ultimate test is that a wakf alal-aulad must reserve the ultimate benefit for the poor or any other religious, pious or charitable object of a permanent nature and not that its benefit should be substantially for any such object. If an immediate beneficiary is outside the class for whom provision can be made, the deed is not void but they can be cut out and the rest of the provisions can be given into effect to. The charitable disposition in that behalf is accelerated. *Abdul Rauf* v. *Shamshulhaq* ('69) A. All. 35.

This is nothing in the Mussalman Wakf Validating Act, 1913 that in a wakf alal-aulad the wakf property vests in the wakif and not in God.

Observations in 1933 All. 407 over-ruled, to the effect 'that the estate vests in the beneficiaries'.

The mutawalli is only a manager or superintendent; unless so provided he can have no beneficial interest even in the income. *Moattar Raza* v. *Joint Director of Consolidation.* ('70) A. All. 509 F.B.

In a private wakf if the amount of maintenance becomes insufficient to make the ends meet, the amount of the maintenance can be increased on a suit by a beneficiary against the Mutawalli. *Smt. Nawab Sarukh Jahan Begum* v. *Saiyid Enayat Husain* ('75) A. All. 452.

A private gift to one's own self or kith and kin may be meritorious and pious, but it cannot be regarded as being for religious or charitable purposes: *Fazlul Rabbi Pradhan* v. *State of West Bengal* (1965) 3 S.C.R. 307.

Family settlement.— As in the case of wakfs under the law before the Act a wakf which is invalid as a wakf may yet be binding on the parties as a family settlement *(k)*

Wakf-bil-wasiyat.— Though the wakf fails as a wakf, the directions contained in the *wakfnama* for maintenance allowance, etc. in favour of persons who are alive at the date of the death and for expenses to be incurred for charity are binding on the heirs as the will of the deceased *(l)*.

Shia wakfs.— The Wakfs Act applies to Shias also, except sec. 3 (b).

198. Text of the Mussalman Wakf Validating Act, 1913.— The following is the text of the Wakf Act VI of 1913, which came into force on 7th March, 1913:—

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts: it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of India except part B States.

(i) Punjab Sind Bank v. *Anjuman Himayat Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

(j) Mohammad Afzal v. *Din Mohammad* ('47) A.L. 117, affirmed in *Beli Ram* v. *Mohammad Afzal* (1949) Lah. 1, 50 Bom. L.R. 674. ('48) A.PC. 168.

(k) Latifunissa v. *Najimuddin* (1935) 156 I.C. 609, ('35) A.A. 856; *Sekander Ali* v. *Sadruddin Bhuniya* (1935) 40 Cal. W.N. 174, 159 I.C. 1008, ('35) A.C. 792; *Mohammad Irfan Ali Khan* v. *Mohammad Tabiz Ali Khan* (1933) All. L.J. 97, 147 I.C. 173, ('33) A.A. 277 following *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 I.A. 28, 17 Cal. 498.

(l) Mohammad Sabir Ali v. *Tahir Ali* (1954) 2 All. 556.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context,
   (1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable *(m)*
   (2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

Power of Mussalmans to create certain wakf.

3. If shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law *(n)*, for the following among other purposes:—
   (a) for the maintenance and support wholly or partially of his family *(o)*, children or descendants, and
   (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated *(p)*:

Provided that the ultimate benefit *(q)* is in such cases expressly or impliedly *(r)* reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

199. Wakf Validating Act of 1913 has now retrospective effect.— The Wakf Act of 1913 came into force on the 7th March, 1913. It was held not to be retrospective, that is to say, that it did not apply to wakfs created before that date *(s)*. To give it retrospective effect, an Act was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (XXXII of 1930). It came into force on the 25th July, 1930. The effect of it is that the Wakf Act of 1913 applies also, from and after the 25th July, 1930, to wakfs created before the 7th March, 1913.

200. Succession among descendants.— Where a wakf is made for the benefit of the settlor's descendants, but no rules of succession are laid down in the deed of wakf, the descendants take *per stirpes,* and not *per capita, (t)*, and males and females take equal shares *(u)*.

The Allahabad High Court has held that as each line branches off, the shares should be divided between the various branches, but in the same branch the nearer should exclude the more remote *(v)*. The High Court of Andhra Pradesh, however, differs from this view and maintains that the rule of exclusion of remoter by nearer heirs does not apply to endowed property. Thus if

(m) See. s. 177.

(n) See ss. 173-191.

(o) As to meaning of "family" see note (1) to s. 197 above.

(p) This is not new. It is in accordance with the law as settled before the Act. See s. 192 and notes thereto.

(q) See note (2) to s. 197 above.

(r) See note (3) to s. 197.

(s) Khajeh Solehman v. *Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.P.C. 107; *Balla Mal* v. *Ata Ullah Khan* (1927) 54 I.A. 372, 9 Lah. 203, 103 I.C. 518, ('27) A.P.C. 191.

(t) Macnaghten, 341; *Sayad Mahomed* v. *Sayad Gobar* (1881) 6 Bom. 88, 90-91.

(u) Macnaghten, 342; Baillie, 553 *et seq.* See *Abdul Ganne* v. *Hussen Miya* (1873) 10 Bom. H.C. 7 at p. 14; *Sheikh Karimodin* v. *Nawab Mir Sayad* (1885) 10 Bom. 119.

(v) Maqsood Ali v. *Zabid Ali* ('54) A.A. 385.

wakf is in favour of the descendants "generation after generation", the implication is that the nearer line or class takes first, and after them the line next after. But the principle that the children of a predeceased son are excluded by their uncles and aunts does not apply to endowed property. Hence, where there are no such words as "generation after generation" the profits are to be divided equally among all the descendants *(w)*.

201. Forfeiture of interest under Wakfnama on remarriage of widows.— A condition in a deed of wakf that the interest given by the deed to a widow or to the wife of a beneficiary shall be forfeited on her remarriage is not invalid *(x)*. The Wakfnama, being a gift, may expressly provide for the order of succession and the Wakf will not be invalid because such provisions are contrary to the rules of inheritance *(y)*.

Of Mutawallis or Managers of Wakf property

202. Mutawalli.— Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakif and vest in the Almighty. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and is not a trustee in the technical sense. He is merely a superintendent or manager *(z)*. The admissions of a mutawalli about the nature of the trust are not binding on his successors *(a)*.

Suit for a declaration.— A mutawalli may sue in his personal capacity for a declaration that he is mutawalli without suing for possession *(b)*.

Where a suit, the plaintiffs admit that the defendant is in possession of the suit properties but they assert that he is there as mutawalli and that his possession is on behalf of the Sunni Muhammadan community and for that reason the plaintiffs say that a declaratory suit will lie and that they need not sue for possession, then the burden lies on the plaintiffs to prove their claim. As the defendant is admittedly in possession and except for the fact that the plaintiffs claim that he is in possession of their behalf (a fact which the defendant denies) the plaintiffs are out of possession, they must prove that the defendant is in possession on their behalf. The only way in which the plaintiffs can do that is by showing that the properties in suit are wakf property. *Mohammad Shah* v. *Fasihuddin Ansari* A.I.R. 1956 S.C. 713.

Suit for possession.— A mutawalli is entitled to sue for possession, though the property is not vested in him *(c)*. Limitation is under Art. 142 from the date of dispossession of Art. 134 does not apply *(d)*. If the mutawalli's name has been recorded as a co-sharer, he is entitled under sec. 226 of the Agra Tenancy Act, 1926, to sue the lambardar for his share of the profits *(e)*.

Appointment of mutawalli by arbitration.— The office of mutawalli of a public wakf, being in the nature of a public office, the question as to which of two persons is entitled to be mutawalli cannot be referred to arbitration *(f)*. But where *A* claims that certain property is wakf property and that he is the mutawalli thereof and *B* denies that the property is wakf property, an award made by an arbitrator that each shall be entitled to an equal share in the management and profits of the property until the matter is decided by the Court, is perfectly valid *(g)*.

(w) Mazhar Ali v. *Murtuja* ('58) A. Andh. Pra. 8.

(x) Latafatunnisa v. *Shaharbanu* (1932) 139 I.C. 292, ('32) A.O. 108.

(y) Birijis Mahal v. *Humayun Reza* (1944) 23 Pat. 203, ('44) A.P. 234.

(z) Vidya Varuthi v. *Balusami* (1921) 48 I.A. 302, 312, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123; *Abdur Rahim* v. *Narayan Das* (1923) 50 I.A. 84, 90; 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44; *Saadat Kamel Hanum* v. *Attorney General Palestine* (1939) 183 I.C. 101, ('39) A.PC. 185; *Daw Ein* v. *Daw Chan Tha* (1940) Rang. 136, 186 I.C. 210 ('39) A.R. 365.

(a) Sibte Rasul v. *Sibte Nabi* (1942) A.L.J. 722, ('43) A.A. 74.

(b) Muhammad Jafar v. *Muhammad Taqi Khan* (1934) 9 Luck. 170, 145 I.C. 1003, ('33) A.O. 517.

(c) See *(k)*.

(d) Wahid Ali v. *Mahboob Ali Khan* (1936) 11 Luck. 297, 156 I.C. 92, ('35) A.O. 425.

(e) Muhammad Qamar v. *Salamat Ali* (1933) 55All. 512, 147 I.C. 926, ('33) A.A. 407.

(f) Muhammad Ibrahim v. *Ahmad* (1910) 32 All. 503, 6 I.C. 219.

(g) Moazaam v. *Raza* (1924) 46 All. 856, 81 I.C. 851, ('24) A.A. 818.

Superintendent or manager.— The functions of a mutawalli are the same as those of a trustee but he is not a trustee either generally or under the Indian Trusts Act.

Hashim Husain v. *Ahmad Raza* ('74) A. All.305 D.B.

Although the wakf property is not vested in the mutawalli he has the same rights of management as an individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque *(h)*. Again although a mutawalli is not a trustee in the sense in which the expression is used in English law he has duties akin to those of a trustee and if he wrongfully deprives a beneficiary of the profits he is liable for interest in cases in which, under sec. 23 of the Trusts Act, a trustee would be liable *(i)*. It has even been said that in the case of a private wakf (*i.e.*, a wakf for the family of the founder where only the ultimate benefit is reserved to charity) the mutawalli is not a mere superintendent or manager but is "practically speaking the owner" *(j)—sed quare*.

A *de facto* mutawalli is not unknown in Mahomedan law. A *de facto* mutawalli can sue for rents without establishing his *de jure* character. In this case the owner of a house created a wakf and appointed himself as a mutawalli. He then appointed certain persons as his agents and gave them a power of attorney which included powers of management and bringing suits to evict tenants and to recover rent. The agent brought the suit as agent. It was held that the suit was validly constituted. *Abdul Raheem Khan* v. *Mamdu* (1970) M.P.L.J. 968.

Mutawalli not duly appointed.— The liabilities of a mutawalli not duly appointed are the same as those of a duly appointed mutawalli *(k)*.

While it is true that S. 92 applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose there is no doubt that it also applies where the direction of the Court is necessary for the administration of any such public trust. Where the defendants have been looking after the suit properties in one capacity or the other and been enjoying the usufruct thereof, they are trustees *de son tort* and the mere fact that they put forward their own title to the properties would not make them trespassers. A.I.R. 1946 Nag. 401; A.I.R. 1942 Cal. 343 and A.I.R. 1940 Pat. 425, approved.

Where there is evidence to show that the defendants (Trustees *de son tort*) were guilty of grave mismanagement, it is clear case for formulating a scheme under S. 92 by a suit. [P.K. Goswami and S. Murtaza Fazl Ali, JJ.] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*. A.I.R. 1976 S.C. 1569.

The definition of a Mutawalli includes a person who for the time being manages wakf property. *Syed Mustafa Peeram Sahib* v. *State Wakf Board* ('69) A. Mad. 66.

203. Who may be appointed mutawalli.— (1) Subject to the provisions of sub-sec. (2), the founder of a wakf may appoint himself *(l)*, or his children and descendants *(m)* or any other person, even a female *(n)*, or a non-Mahomedan *(o)*, to be mutawalli of wakf property.

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.*, the duties of a *sajjadanashin* (spiritual superior) *(p)* [s. 220]. or *khatib* (one who reads

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(h) Syed Ahmed v. *Hafiz Zahid* (1934) 153 I.C. 1095, ('34) A.A. 732.

(i) Kishwar v. *Zafar* (1933) 55 All. 164, 146 I.C. 733, ('33) A.A. 186.

(j) Mohammad Qamar v. *Salamat Ali* (1933) 55 All. 512, 147 I.C. 926. ('33) A.A. 407.

(k) Jawaharbeg v. *Abdul Aziz* ('56) A.N. 257.

(l) Baillie, 601; *Hedaya*, 238; Baillie, II, 214; *Advocate-General* v. *Fatima* (1872) 9 B.H.C. 19; *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom. L.R. 295, 14 I.C. 988; *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I.A. 224, 42, All. 609, 57 I.C. 329.

(m) Baillie, 601.

(n) Baillie, 601; *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732; *Shahar Banoo* v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1033, 51 I.C. 489; *Syed Abdul Hameed* v. *Syed Unnissa Bibi* (1934) 67 Mad. L.J. 907, 152 I.C. 630, ('34) A.M. 692; *Mohammad Bhai* v. *Waziribi* (1946) Nag. 646, 224 I.C. 338, ('47) A.N. 31.

(o) Ameer Ali, 4th Ed., Vol. 1, p. 446.

(p) Kaniz v. *Saiyid* (1923) 2 Pat. 819. 77 I.C. 209, ('23) A.P. 576.

sermons) or *mujavar* of a dargah *(q)*, or an *imam* in a mosque (whose function it is to lead the congregation) *(r)*, a female is not competent to hold the office of mutawalli, and cannot be appointed as such *(s)*. Similar remarks apply to non-Mahomedans. The duties of a manager of a graveyard are secular and can be performed by a female *(t)*.

(2) Neither a minor nor a person of unsound mind can be appointed mutawalli *(u)*. But where the office of mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to the office is defined in the deed of wakf and the person entitled to succeed to the office on the death of the first or other mutawalli to act in his place during his minority *(v)*.

Female as mutawalli.— The Privy Council have said that there is no legal prohibition against a woman holding a mutawalliship when the trust by its nature involves no spiritual duties such as a woman could not discharge in person or by deputy *(w)*. In a case where a woman was the founder of a wakf for a mosque and other religious and charitable purposes, and appointed herself first mutawalli, and directed that two male relations should be mutawallis after her and then directed that their legal heirs should succeed as mutawallis—the Calcutta High Court held that the expression legal heirs did not exclude female heirs *(x)*. The Madras High Court has held that a woman can be appointed head *mujawar* of an *astan* or platform where mohurram ceremonies are performed *(y)*. The Court observed that the rule of exclusion did not apply if the religious duties were such as could be performed by deputy. The Bombay High Court has also taken the view that in the absence of any usage a woman can be appointed a *mujawar (z)*. The Madras High Court has held that a woman in the Nellore District is not disqualified from holding the office of *khatiba (a)*. In a Bombay case it was considered that religious duties cannot be performed by proxy and it was accordingly held that a female is excluded from succession to land assigned as remuneration of a Mulla or village preacher *(b)*. The decision may well be supported on narrower grounds as the performance of the duties of a preacher like those of the Imam of a mosque depends upon the personality of the incumbent and cannot be assigned to a deputy. But in the case of an appointment, where the duties are secular or religious, the Court may prefer to appoint a male mutawalli owing to the habits of seclusion of Mahomedan females *(c)*.

Difference of sect.— In one case the Court appointed a Shia to be mutawalli of a Sunni wakf,

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(q) Hussain Beebee v. *Hussain Sherif* (1868) 4 M.H.C. 23; *Ibrahimbibi* v. *Hussain Sheriff* (1880) 3 Mad. 95. As to dargah, see *Piran* v. *Abdool Karim* (1891) 19 Cal. 203; *Mahomed Oosman* v. *Essak Salemahomed* (1937) 39 Bom. L.R. 502.

(r) See *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1033, 1038, 51 I.C. 489.

(s) Kaniz v. *Saiyid* (1923) 2 Pat. 819, 77 I.C. 209, ('23) A.P. 576. See also *Munavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1033, 51 I.C. 489, and *Ismailmiya* v. *Wahadani* (1911) 36 Bom. 308, 14 I.C. 469.

(t) Abbasali v. *Mohammad Shah* ('51) A. Madh. Bharat 92.

(u) Baillie, 601; *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219- 220; *Syed Hasan* v. *Mir Hasan* (1917) 40 Mad. 941, 38 I.C. 528; *Kaniz* v. *Saiyid* (1923) 2 Pat. 819, 77 I.C. 209, ('23) A.P. 576; *Abdus Salam* v. *Abdul Aziz* (1944) 48 C.W.N. 465, ('44) A.C. 299.

(v) (1891) 19 Cal. 203, 220, *supra; Ejaz Ahmad* v. *Khatan Begam* (1917) 39 All. 288, 37 I.C. 885; *Bibi Zohra* v. *Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9.

(w) Shahar Banoo v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Muhammad M. Hussain* v. *Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485; *Mohamad Bhai* v. *Waziribi* (1946) Nag. 646, 224 I.C. 338, ('47) A.N. 31.

(x) Wares Ali v. *Sheikh Shamsuddin* (1936) 63 Cal. L.J. 573; *Abdul Mannan* v. *Mutwali of Sm. Janebali* ('56) A.C. 584.

(y) Munnavaru Begum v. *Mir. Mahapalli* (1918) 41 Mad. 1033. 51 I.C. 489: followed in *Kasim* v. *Hazara Begum* (1920) 32 Cal. L.J. 151, 60 I.C. 165, ('20) A.C. 800.

(z) Abdul Aziz v. *Mahomed Ibrahim* (1941) Bom. 341, 43 Bom. L.R. 126, 196 I.C. 181, ('41) A.B. 238, affirming *Husainbi* v. *Sayad Khairuddin* (1939) 41 Bom. L.R. 875, 185 I.C. 675, ('39) A.B. 487.

(a) Mahomed Husain Farok v. *Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

(b) Biyamma v. *Ahmed Sahib* (1935) 37 Bom. L.R. 257, 156 I.C. 656, ('35) A.B. 245.

(c) Syed Mahomed Ghouse v. *Sayabiran Sahib*, (1935) 68 Mad. L.J. 684, 156 I.C. 757, ('35) A.M. 638.

but he was a person of considerable local influence both among Sunnis and Shias *(d)*. In another case the Court refused to appoint a woman of the Babi sect to be mutawalli of a Shia wakf, though she was a lineal descendant of the founder of the wakf who was himself a Shia *(e)*.

204. Appointment of mutawalli.— (1) The founder of the wakf has power to appoint the first mutawalli, and to lay down a scheme for the administration of the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office *(f)*.

(2) If any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or if the office if mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed *(g)*—

(a) by the founder of the wakf *(h)*;

(b) by the executor (if any);

(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of sec. 205 below, appoint a successor on his death-bed;

(d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules:—

(i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment *(i)*;

(ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office *(j)*;

(iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in the exercise of that discretion appoint the other claimant to be mutawalli *(k)*.

Baillie, 603-604; Macnaghten, p. 70, sec. 6, p. 244, Case X.

Shia law.— Under Shia law a wakf does not become effective until transfer of possession to the mutawalli or beneficiary. See note 'Shia law' under s. 136. The founder of the wakf is *functus officio* after he has transferred possession. He may appoint a mutawalli after dedication and before transfer of possession but not after transfer of possession *(l)*. If he has not appointed a mutawalli he cannot make an appointment or settle a scheme after he has transferred possession for after that the beneficiaries have the right to administer the wakf *(m)*.

(d) Dyal Chund v. *Syud Keramut Ali* (1871) 16 W.R. 116.

(e) Shahar Banoo v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 148.

(f) Ghazanfar v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Shah Ghulam* v. *Mahomed* (1875) 8 Mad. H.C. 63.

(g) Advocate-General v. *Fatima* (1872) 9 B.H.C. 19; *Khajeh Salimullah* v. *Abdul Khair* (1909) 37 Cal. 263, 3 I.C. 419; *Phatmabi* v. *Haji Musa* (1913) 38 Mad. 491, 21 I.C. 964.

(h) Rugghan v. *Dhanno* (1927) 49 All. 435, 99 I.C. 1045, ('27) A.A. 257.

(i) Khajeh Salimullah v. *Abdul Khair* (1909) 37 Cal. 263, 268, 3 I.C. 419.

(j) Advocate-General v. *Fatima* (1872) 9 B.H.C. 191; *In re Mahomed Haji Haroon Kadwani* (1935) 59 Bom. 424, 156 I.C. 655, ('35) A.B. 254; *Asha Bibi* v. *Nabissa Sahib* ('57) A.M. 583.

(k) Shahar Banoo v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118.

(l) Syed Ali v. *Syed Muhammad* (1928) 7 Pat. 468, 110 I.C. 12, ('28) A.P. 532.

(m) Ghulam Ali v. *Mohammad Ali* (1933) 144 I.C. 467, ('33) A.L. 342.

Lineal descendant.— In *Shahar Banoo* v. *Aga Mahomed (n)*, the founder was a Shia and his lineal descendant, who claimed to be appointed mutawalli was a female of the Babi sect. The trial Judge appointed her a mutawalli, but the High Court set aside the appointment and appointed another person. This was not on the ground that she was not qualified, but because as a female she would have to perform many of her duties by deputy, and as a Babi she might not take zealous interest in carrying out the religious observances of the Shia school for which the trust was founded. This decision was upheld by the Privy Council on appeal. In considering the authorities their Lordships said: "The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution." If the line of devolution is prescribed from generation to generation it does not follow that a female, or persons claiming through females, are excluded though it may not be desirable to appoint a female owing to their habits and seclusion *(o)*. In a case where the founder of the wakf was a Mahomedan lady who had appointed herself first mutawalli and directed that the succession should be to the legal heirs of the second mutawalli it was held that female heirs were not excluded *(p)*. Where the wakif appointed his son as mutawalli and provided that the descendants (*ba farzandan-farzandan*) should succeed as mutawallis, it was held that the words *ba farzandan* did not exclude the daughters of male descendants, but excluded the children of daughters *(q)*.

Resignation of Wakif as mutawalli.— In *Ali Asghar* v. *Farid Uddin (r)* the wakif appointed himself as the first mutawalli, and after his death *A*. The wakif resigned from the mutawalliship and appointed *B* as mutawalli. It was held that *A* was entitled to become a mutawalli only on the death of the wakif, and as there was nothing in the wakfnama providing for the appointment of a mutawalli on the resignation of the first mutawalli, there was a vacancy, and the wakif was entitled to appoint *B* as mutawalli, but such appointment was valid only for the lifetime of the wakif. "There is nothing in Mahomedan law", said Braund J., "which prevents the appropriator or wakif, who is himself the first mutawalli from resigning his office, and, out of is own residuary or general powers as wakif or appropriator, appointing his own successor provided that thereby he does not oust any express power already conferred by the deed of wakf." Where the wakif has reserved the power of appointing a mutawalli, he is entitled to appoint a mutawalli, but he is not entitled to dismiss him, unless he has reserved to himself the power to do so *(s)*.

Powers of Courts.— As regards the management of public, religious or charitable trusts, the Privy Council in *Mahomed Ismail* v. *Ahmed Moola (t)* said:—

"It has further been contended that under the Mahomedan law the Court has no discretion in the matter [*i.e.*, appointment of trustees of the mosque in question] and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawallis. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants in based on the misconception. The Mussalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the *objects* of the benefaction; but as regards *management*, which must be governed by circumstances, he has complete discretion. He may differ to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his

(n) (1907) 34 I.A. 46, 54, 34 Cal. 118.

(o) Syed Mahomed Ghouse v. *Sayabiran Sahib* (1935) 68 Mad. L.J. 684, 156 I.C. (757), ('35) A.M. 638.

(p) Wares Ali v. *Sheikh Shamsuddin* (1936) 63 Cal. L.J. 573.

(q) Mahammad Eshaque v. *Mahammad Amin* ('48) A.C. 312.

(r) 1946 All. 661, ('47) A.A. 261.

(s) Sheikh Masthan Sahib v. *Balarami* ('53) A.M. 958.

(t) (1916) 43 I.A. 127, 134, 43 Cal. 1085. 1100, 35 I.C. 30; *Mahomedally Adamji Peerbhoy* v. *Akbarally Abdul Hussain Peerbhoy* (1934) 36 Bom. L.R. 386, 59 Cal. L.J. 133, 38 Cal. W.N. 952, 66 Mad. L.J. 733, 147 I.C. 882, ('34) A.PC. 53. See also *Ibrahim Esmael* v. *Abdool Carim* (1908) 35 I.A. 151, 164 [a case from Mauritius].

primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution." Even if a wakf deed has provided that a certain person should be appointed mutawalli during the minority of a mutawalli, the Court ought not to appoint that person as mutawalli if he has repudiated the wakf *(u)*. The District Court has no power to remove a *de facto* mutawalli and to appoint a receiver in a summary proceeding. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under sec. 92 of the Code of Civil Procedure *(v)*.

In the case cited above the dispute was as regards the management of a Sunni mosque in Rangoon. The Sunnis of Rangoon consist partly of Randherias and partly of Soorties. The mosque was founded by a Randheria, it was subsequently rebuilt and improved with money the bulk of which was supplied by Randherias, and the management had been for about 50 years in the hands of Randherias. It was not alleged that they had mismanaged the mosque. In these circumstances their Lordships held that all other conditions being equal, the Randheria section was entitled to manage and act as trustees of the mosque.

It has been held by the Orissa High Court that the participation by the public in the management of the mosque by subscriptions and donations is not inconsistent with the mutawalliship of the person in office. A member of the public by completing the construction of the mosque and by making improvements in it, whether with his own funds or funds raised by public subscriptions, cannot disentitle the person who has the right to its mutawalliship and himself become the mutawalli. Mahomedan law permits anybody to do such acts of piety which the mutawalli cannot refuse: *Ali Mohammed* v. *Mohd. Yusuf* ('62) A. Orr. 111.

The mutawalli has to carry out the provisions of the wakf strictly. In considering whether there should be a deviation from the original user of a mosque, the civil court, which has taken the place of the Kazi, has to decide on the evidence available whether the interest of the public to whom the mosque is dedicated require a change in the object of the foundation, whether the conditions necessary for making the change exist and whether the object of the founder was comprehensive enough to include the change: *Kunhalavi Musaliar* v. *Abdulla* ('65) A. Ker.

The question whether a mosque is a private or public endowment is a question of fact *(w)*.

Vacancy may be filled up on application to Court.— Where there is a *vacancy* in the office of mutawalli, and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the Court. It is not necessary to bring a suit under sec. 92 of the Civil Procedure Code *(x)*; but before making the appointment the Court should issue notices to all persons interested *(y)*.

Appointment by congregation.— In the case of an institution confined to a particular locality, such as a mosque or a graveyard, the appointment of a mutawalli may be made by the congregation of the locality *(z)*.

Appointment of imam.— An imam is ordinarily appointed by the mutawalli, but in the absence of a mutawalli, an imam is to be appointed by the wakif's descendants and members of his family. If, however, the imam is found to be incompetent, the congregation is entitled to select a fit person after applying to the Kazi for the removal of the incompetent imam and for the appointment of the person selected by the congregation *(a)*. The High Court of Calcutta has held that a *de facto*

(u) Bibi Zohra v. *Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9.

(v) Saliluddin Ahmad v. *Mohiuddin Ahmad* (1948) 26 Pat. 531, ('48) A.P. 374.

(w) Imdad Ali Khan v. *Sardar Khan* ('54) A. Orissa 15. *Shri Ghasi* v. *Waqfalalaulad* (1969) All. L.J. 923.

(x) Abdul Alim v. *Abir Jan* (1928) 55 Cal. 1284, 110 I.C. 416, ('28) A.C. 368; *Bibi Zohra* v. *Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28. ('40) A.P. 9; *Abdul Hasan Khan* v. *Jafar Husain* (1938) 13 Luck. 523, ('37) A.O. 381; *Allah Rakhoo* v. *Nasiruddin* (1943) O.W.N. 154 ('43) A.O. 278; *Mohammad Bhai* v. *Waziribi* (1946) Nag. 646, 224 I.C. 338 ('47) A.N. 31. The above passage was applied in *Mian Jan* v. *Fakir Mohammad* P.L.D. 1960 (W.P.) Karachi 420.

(y) Elahi Baksh v. *Mahomed Ghaus* (1933) 141 I.C. 169, ('33) A.L. 27.

(z) Piran v. *Abdool Karim* (1891) 19 Cal. 203; *Dilawar Husain* v. *Subhan Kha*; ('31) A.O. 375, 136 I.C. 241 *Ghulam Mohammad* v. *Abdul Rashid* (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905; *Khagum Khan* v. *Mohd. Ali Sahib* ('55) A. Andh. Pra. 209 (1955) Andh. W.R. 1.

(a) Shakul Hameed v. *Mahomed Hussain* (1940) 2 M.L.J. 446, 193 I.C. 131, ('41) A.M. 42.

(b) Wajid Ali v. *Dadannessa Bibi* (1947) 51 C.W.N.

mutawalli has the power to appoint an Imam and also to dismiss him on proper grounds *(b)*.

Religious Endowments Act, 20 of 1863.— The section does not apply to a mutawalli appointed by a Committee under this Act. Such a mutawalli is merely a servant of the Committee *(c)*.

205. Mutawalli may appoint successor on his death-bed.— If the founder and his executor are both dead, and there is no provision in the wakfnama for succession to the office, the mutawalli for the time being may appoint a successor *on his death-bed*. He cannot, however, do so while he is in health, as distinguished from death-illness *(d)*. Nor if the office goes by hereditary right *(e)*.

A mutawalli may on his death-bed appoint even a stranger as his successor; he is not bound to appoint a member of the founder's family *(f)*. The Lahore High Court has decided that the above rule applies only when the mutawalli transfers the mutawalliship to another, but he may appoint his successor by will *(g)*; but in appeal to the Privy Council *(h)*, their Lordships refrained from expressing an opinion on this point.

The office of a mutawalli is not transferable. *Khalil Ahmad Khan* v. *Siddiq Ahmad Khan* A.I.R. 1974 All. 382.

A mutawalli cannot delegate his functions in his life-time while he is in good health. He can, however, nominate his successor in his life-time and even while in good health, but it must be effective after his death. Its only the delegation or parting with his duties when he is in good health, that is prohibited. The Privy Council explained this in the following passage:

"Death may come without warning or expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective." *Ahsanullah Shah* v. *Ziauddin* 1937 All. L.J. 585.

205A. Succession where two or more mutawallis are jointly appointed.— Where two or more mutawallis are appointed as joint mutawallis i.e., as joint holders of a single office, and there is no direction, express or implied, given by the wakif and there is no evidence of custom supporting a usage to the contrary, the office of mutawalliship held jointly will pass on the death of one holder to the survivor or survivors *(i)*.

Where two mutawallis are appointed jointly and one dies, the mutawalliship passes to the survivor in the absence of any provision in the wakf deed, or if there is no usage or custom to the contrary. The surviving mutawalli can nominate his successor after the death of the other mutawalli. *Commr. of Wakfs* v. *Asraful Alam Shami* ('75) A. Cal. 162.

A, B and *C* are appointed joint mutawallis of a wakf. There is no direction in the wakfnama with regard to what is to happen if one of them were to die and there is no evidence of custom. *A* dies, but before he dies he appoints *X* as mutawalli to succeed him. *X* cannot act as mutawalli because on the death of *A*, the mutawalliship passes to *B* and *C*, and *A* has no power to appoint *X* as a mutawalli.

206. Office of mutawalli not hereditary.— The Mahomedan law does not recognise any right of inheritance to the office of mutawalli. But the office may

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111, ('47) A.C. 282; *Khagum Khan* v. *Mohd. Ali Sahib (supra)*.

(c) Gholam Hussain Shah v. *Syed Altaf Hossain* (1934) 61 Cal. 80, 149 I.C. 1215, ('34) A.C. 328.

(d) Baillie, 604; *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219; *Zooleka Bibi* v. *Syed Zymul Abedin* (1904) 6 Bom. L.R. 1058; *Mt. Kammon* v. *Allah Baksha* (1941) 193 I.C. 323, ('41) A.L. 36; *Ali Mohammad* v. *Mohd. Yusuf* ('62) A. Orr. 111.

(e) Hakim Khan v. *Sahebjan Sahib* (1935) 69 Mad. L.J. 722, 159 I.C. 694, ('35) A.M. 1040; *Muhammad M. Hussain* v. *Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

(f) Sheikh Amir Ali v. *Syed Wazir* (1905) 9 C.W.N. 876.

(g) Abdul Razak v. *Ali Baksh* (1945) Lah. 554, 228 I.C. 100, ('46) A.L. 200.

(h) Haji Abdul Razaq v. *Sheikh Ali Bakhsh* (1948) 75 I.A. 172.

(i) Haji Abdul Razaq v. *Sheikh Ali Bakhsh* (1948) 75 I.A. 172. ('48) A.PC. 163.

(j) Macnaghten, p. 344, case X; *Sayad Abdula* v.

become hereditary by custom, in which case the custom should be followed *(j)*.

Where there is a vacancy in the office of mutawalli, and the Court is called upon to appoint a mutawalli, the Court will ordinarily appoint a member of the founder's family in preference to a stranger, and a senior member in preference to a junior member. But where no such appointment is to be made, and the suit is merely one to oust from the office of mutawalli, a defendant who is *already in possession and enjoyment of the office,* the Court will not oust the defendant from the office merely because the plaintiff is the elder brother and the defendant a younger brother, or because the plaintiff is a member of the founder's family and the defendant a stranger. The reason is that according to Mahomedan law no right of inheritance attaches to the office of mutawalli. The office, however, may be hereditary by *custom.* Such a custom, however, is opposed to the general law, and must be supported by strict proof *(k)*.

A suit was filed for a declaration that the plaintiff was mutawalli and for a permanent injunction restraining the defendant from interfering. The defences raised were limitation and prescription and that the suit was bad as no consequential relief was asked. It was held that the mutawalliship being heritable or hereditary the suit was maintainable as the property vests in the Almighty and a suit for the possession of the office of a mutawalli was sufficient. The claim for permanent injunction made this a suit for declaration and a claim for recovery of the office of a mutawalli. It was held that one trespasser cannot tack on the possession of another trespasser when there is no connection between the two. *Hazera Khatoon* v. *Abdul Latif* 75 C.W.N. 114.

207. Power of mutawalli to sell or mortgage.— A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.

A mutawalli of a wakf although not a trustee in the true sense of the term is still bound by the various obligations of a trustee. He like a trustee or a person standing in a fiduciary capacity, cannot advance his own interests or the interests of his close relations by virtue of the position held by him. The use of the funds of the wakf for acquisition of a property by a muttawalli in the name of his wife would amount to a breach of trust and the property so acquired would be treated as wakf property. [R. S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.] *Bibi Siddique Fatima* v. *Saiyed Mohammad Mahmood Hasan,* 1978 All. L.J. 634 (S.C.).

A mutawalli is not allowed to sell, mortgage or lease the wakf property unless he obtains permission of Court which has the general powers controlling the actions of mutawalli. Save and except as recognised by any custom, the law does not favour the right to act as mutawalli becoming heritable. When the mutawalli does, the wakif is still alive, possesses the right to appoint another and in his absence his curator and in the absence of both, the Court appoints the successor mutawalli. Mutawalli has no ownership rights or estate in the wakf property, he holds the property as a manager for fulfilling the purpose of wakf. Even a Sajja Danishina, who has larger interest in the usufruct has no right in the property endowed. These features distinguish a mutawalli from a shebait. The elements which render shebaitship a property are absent in mutawalliship and mutawalliship is an office, 47 Indian Appeals 224 (P.C).. 48 Indian Appeals 303 (P.C.). Ref. to: (1932) I.L.R. 60 Cal. 452 (F.B.) L.R.I.A. Supp. Vol. 47, 70 I.A. 57, 68 I.A. 448 and A.I.R. 1954 S.C. 282, A.I.R. 1963 S.C. 985 and A.I.R. 1970 All. 509. Rel. on [A.K. Sen and B.C. Roy. JJ.] *Zohra Khatoon* v. *Md. Jane Alan,* 82 C.W.N. 51.

Baillie, 605.

Power of sale.— An instance of such power is a deed of wakf which authorized the mutawalli to sell the property and utilize the proceeds for the construction and maintenance of a resthouse at Mecca *(l)*. But a sale after the death of the Wakif by the mutawalli according to the directions

Sayad Zain (1889) 13 Bom. 555, 561; *Phatnabi* v. *Haji Musa* (1913) 38 Mad. 491, 21 I.C. 964; *Atimannessa* v. *Abdul Sobhan* (1916) 43 Cal. 467, 32 I.C. 21; *Mahomed Haji Haroon Kadwani, In re* (1935) 59 Bom. 424, 156 I.C. 655, ('35) A.B. 254; *Mohammad Soleman* v. *Tasadduq Hassan* (1935) 158 I.C. 544, ('35) A.C. 623.

(k) Sayad Abdula v. *Sayad Zain* (1889) 13 Bom. 555; *Phatnabi* v. *Haji Musa* (1913) 38 Mad. 491, 21, I.C. 964.

(l) Muhammad Usuf v. *Muhammad Sadiq* (1933) 14 Lah. 431, 144, I.C. 271, ('33) A.L. 501.

(m) Anwar Reza v. *Hachinur Reza* (1944) 1 Cal. 680,

in a void wakf is void against the heirs *(m)*.

Unauthorized mortgage cannot be partly valid.— The Court removed a mutawalli for mortgaging the wakf property, and appointed a new mutawalli. When the new mutawalli sued to recover possession from the mortgagee, the latter claimed that the mortgage was valid as to the portion of the property which was settled for the benefit of the settlor's family. The Judicial Committee held that such a contention was inconsistent with the character of a wakf under which all rights of property pass out of the wakif and vest in Almighty God *(n)*.

Retrospective confirmation.— It has been held in Calcutta that a mortgage of wakf property, though made without the previous sanction of the Court, may be *retrospectively* confirmed by the Court. A mortgage without the previous leave of the Court is not void *ab initio (o)*. The Allahabad High Court acting on this principle validated a usufructuary mortgage by a mutawalli *(p)*. Both these cases proceeded on the grounds (1) that the mortgage was necessary for the purposes of the wakf, and (2) that the pledge was not of the corpus but of the income. The Madras High Court *(q)* has also decided that an alienation which was for the benefit of the wakf can be retrospectively confirmed. The same view has been taken by the Orissa High Court *(r)*.

The court exercises the same powers as a *Kazi* and the orders of the court are revisable under S. 115 of the Code of Civil Procedure. The court can grant permission for transfer of property. *Jan Mohamad* v. *Mahomood Ali* ('74) A. All. 124

Procedure for obtaining permission of Court.— It was held by the Calcutta High Court in a case decided in 1909 that a mutawalli, desirous of obtaining the sanction of the Court for a sale, mortgage, or lease of wakf property, must proceed by way of suit, and not by an application under the Trustees Act XXVII of 1866, the reason given being that, that Act applies only to trusts in the English form constituted by persons of purely English domicile or by persons governed by the Indian Succession Act, and that does not apply to Mahomedans *(s)*. But this decision has been disapproved in recent cases where it was held that the sanction may be obtained on an application and that it is not necessary to bring a suit *(t)*. It would seem that in Bombay leave may be obtained on an application under the Trustees Act *(u)*. The Chief Court of Sind has held that the procedure is by way of suit and not by application *(v)*.

Unauthorized alienation—who can sue the mutawalli?— Where a mutawalli makes an unauthorized alienation of wakf property, any beneficiary has the right to bring a suit for possession. It is not necessary to file a representative suit *(w)*.

Unauthorized alienation and limitation.— The law as regards the period of limitation for a suit to follow wakf property in the hands of a mutawalli and to set aside unauthorized transfers of such property, and to recover possession thereof from the transferee, was amended and altered by Act I of 1929. The amendments consist of an addition of para. 2 to sec. 10 of the original Act [Limitaion Act, 1908], and of the insertion of new articles, being arts. 48B, 134A, 134B and 134C. As to the law before the amendment, see the undermentioned case *(x)*. See also the Limitation

221 I.C. 262, ('45) A.C. 189.

(n) Abdur Rahim v. *Narayan Das* (1923) 50 I.A. 84, 91, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44, on appeal from Cal.

(o) Nimai Chand v. *Golam Hossein* (1909) 37 Cal. 179, 3 I.C. 353; *Shailendranath* v. *Hade Kaza* (1932) 59 Cal. 586, 137 I.C. 500, ('32) A.C. 356 [where confirmation was refused].

(p) Afzal Hussain v. *Chhedi Lal* (1935) 57 All. 727, 155 I.C. 791, ('35) A.A. 792.

(q) Abdul Kadir v. *Kadiria Sabha* ('53) A.M. 143.

(r) Saleb Khan v. *Madar Saheb* ('54) A. Orissa 239.

(s) Halima Khatun, In re (1909) 37 Cal. 870, 7 I.C. 33.

(t) Fakrunnessa v. *District Judge* (1920) 47 Cal. 592, 56 I.C. 475; *Habibar* v. *Saidannessa* (1924) 51 Cal. 331, 77 I.C. 949, ('24) A.C. 473; *Wazir Ali* v. *Ladley Begum* (1938) 177 I.C. 417, ('38) A.C. 437; *Jan Mohamad* v. *Mahmood Ali* ('74) A. All. 124.

(u) See *In re Kahandas Narrandas* (1881) 5 Bom. 154, and *Lang* v. *Moolji* (1919) 21 Bom. L.R. 1111, 54 I.C. 455, where it was held on a petition for appointment of new trustees that the Act applied to Hindus in Bombay.

(v) In re Muhammad Ismail (1944) Kar. 69, ('44) A.S. 183.

(w) Thangachi v. *Ahmad Husain* ('57) A.M. 194.

(x) Vidya Varuti v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123; *Abdur Rahim* v. *Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44 [mortgage]; *Subbaiya* v. *Muhammad* (1923) 50 I.A. 295, 46 Mad. 751, 74 I.C. 492, ('23) A.PC. 175 [sale in execution of decree]; *Alla Rakhi* v. *Shah Mohammad Abdul Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 887, ('34) A.PC. 77; *Arumugam Pillai* v. *Khazi Mohideen Sheriff Sahib* (1933) 64 Mad. L.J. 706, 144 I.C. 541, ('33) A.M. 533.

(y) Woozanunnessa, in the matter of (1908) 36 Cal.

Act 1963 and A.I.R. Manual Vol. 13 (3rd Edn.) pp. 381-382 for corresponding provisions.

208. Power of mutawalli to grant leases.— A mutawalli has no power to grant a lease of wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year—

(a) unless he has been expressly authorized by the deed of wakf to do so;

(b) or, where he has no such authority, unless he has obtained the leave of the Court to do so *(y)*; such leave may be granted even if the founder has expressly prohibited a lease for a longer term.

A mutawalli cannot lease agricultural land for more than three years and other land for more than one year without the permission of the Wakf Board. A longer lease than the one permitted is not void, but voidable at the instance of the mutawalli or the beneficiaries. It can be validated by the Board even retrospectively. *Ramdhani* v. *Janki Rai* ('71) A. All. 553.

A mutawalli executed a lease of property subject to a wakf for a period exceeding one year without the sanction of the Court. It was held that the test to apply would be: (a) whether the transaction was for a legal necessity, or (b) whether it was for the benefit of the wakf or (c) whether it was of the benefit of the beneficiaries. If so found the sanction can be given retrospectively and the transaction need not be struck down. The transaction is voidable and not void *ab initio*. *K. M. Shaida* v. *Delhi Iron & Steel Co.* 1971 All. L.J. 510.

Baillie, 606-607.

Permanent lease.— It follows that a permanent lease cannot be granted by a mutawalli without leave of the Court *(z)*. Such leave must be obtained on an application to the District Judge. A Munsiff cannot validate such a lease by an order made in a pending suit *(a)*. A single judge of the Bombay High Court, however, has held that where a mutawalli has leased wakf property for a long term without the sanction of the Court, the Court has the power to sanction the lease retrospectively if it is satisfied that the transaction is for the benefit of the wakf *(b)*. The lease however binds the mutawalli personally during his lifetime and he cannot repudiate it and evict the lessee *(c)*. Where a mutawalli under a lease of Wakf property for agricultural purposes granted a right of a permanent nature, it was held by the Patna High Court that the lease was valid for the first three years and since no steps were taken to avoid the voidable lease, the lessee's possession continued to be lawful and was not that of a trespasser *(d)*.

Presumption of a legal origin.— A mutawalli sought to evict a tenant who claimed that he and his ancestors had been for a long and indefinite time in occupation as permanent tenants. The mutawalli relied on a Moghul sanad of 1772 which contained an absolute restriction on the mutawalli's power of granting a permanent lease. But as the wakf was of considerable antiquity and already established and subject to the rules of Mahomedan law before the grant of the sanad, the Court made the presumption of a lost and unrecorded permission of the Kazi *(e)*. No such presumption, however, can be drawn where the lease has been granted by the mutawalli in 1891 and proof of leave granted by the District Judge is not forthcoming *(f)*.

Limitation.— See note to sec. 207 above.

209. Creditor's rights.— As a mutawalli (unless authorized by the deed of wakf) has no power of alienation without the leave of the Court, a creditor advancing money to a mutawalli for carrying out the purpose of the trust has no

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21. See also: *Mayadhar* v. *Orissa Board of Wakfs*, ('66) A. Orr. 208.

(z) Alimunnisa Bibi v. *Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485.

(a) Abdul Rahman Molla v. *Abdul Hossain Molla* (1936) 40 Cal. W.N. 585.

(b) Zafarbhai v. *Chagantal* (1941) 43 Bom. L.R. 854, ('42) A.B. 21, See also *Sundaramurthi* v. *Chotti Bibi* (1942) 2 M.L.J. 164, ('42) A.M. 641.

(c) Sayed Arsad Hossain v. *Naresh Nandini Dasi* (1936) 40 Cal. W.N. 584; *Sundaramurthi* v. *Chotti Bibi* (1942) 2 M.L.J. 164 ('42) A.M. 641.

(d) Shah Mohd. v. *Manzoor Ali* ('66) A.P. 45.

(e) Mahamad Mazaffar-al-Musavi v. *Jabeda Khatun* (1930) 57 I.A. 125, 57 Cal. 1293, 123 I.C. 722, ('30) A.P.C. 103.

(f) Sundaramurthi v. *Chotti Bibi* (1942) 2 M.L.J. 164, ('42) A.M. 641.

right to be indemnified out of the trust property. In this respect a creditor of a mutawalli is in a worse position than a creditor of the shebait of a Hindu endowment *(g)*. A decree against *A.B.* "as mutawalli" is not sufficient to create a charge on the wakf property of which *A.B.* is mutawalli. A decree will not bind the wakf property unless it expressly says so; and in that case the proper procedure in execution is to appoint a receiver of the income of the endowment *(h)*.

210. Allowance of officers and servants.— The mutawalli has no power to increase the allowance of officer and servants attached to the endowment where the allowance is fixed by the wakif (dedicator), but the Court may in a proper case increase such allowance.

Ameer Ali, 4th ed. I, 469.

211. Remuneration of mutawalli.— The founder may provide for the remuneration of the mutawalli. Such remuneration may be a fixed sum or it may be a residue of the income of the wakf property after defraying the expenses necessary for the maintenance of the wakf *(i)*. If no provision is made by the founder for the remuneration of the mutawalli, the Court may fix a sum not exceeding one-tenth of the income of the wakf property *(j)*. If the amount fixed by the founder is too small, the Court may increase the allowance, but it must not exceed the limit of one-tenth *(k)*.

The wakf concerned being a wakf-al-al-aulad, the mutawallis were also beneficiaries and the right, title and interest which other mutawallis or their predecessor in interest had in the estate vested by transfer, surrender or abandonment in her husband and on his death in herself. The prayer for declaration or right to wakf properties is as substantial as the claim in respect of the order of the commissioner of wakf. Such relief in respect of immovable properties situated outside the jurisdiction of the Court cannot be entertained by the Court. [A. K. Sen and B. C. Roy, JJ.] *Zohra Khatoon* v. *Md. Jane Alan.* 82 C.W.N. 51 A.I.R. 1978 Cal. 133.

212. Statutory control of wakfs in India.— In addition to the enactments which apply to all trusts, including wakfs (listed in sec. 225, below), the supervision and control of wakfs is provided for by the following statutes:—

The Wakfs Act, 1954.— The Wakfs Act 1954 (29 of 1954, as amended by Act 34 of 1964) which has been enforced in all the States except Bihar, Gujarat, Maharashtra, Uttar Pradesh and West Bengal, has been enacted by Parliament to provide for the better administration and supervision of wakfs. It provides for the incorporation of a Board of Wakfs in every State (ss. 9-24) consisting of members of Parliament, members of the State Legislature, persons having special knowledge of Muslim Law and representing the State Jamiat-ul-Ulema for Sunni wakfs and the State Shia Conference for Shia wakfs, persons having special knowledge of administration, finance and law and mutawallis of wakfs. If the Shia wakfs in any State are more than fifteen per cent in number or their income is in excess of fifteen per cent of the income of all the wakfs in the State, then the State Government may establish separate Boards for Sunni and Shia wakfs [s. 9(1A)]. By the amendment Act of 1964, provision has been made (ss. 8A to 8D) for the establishment of a Central Wakf Council, with the Union

(g) Sailendra Nath Palit v. *Hade Kaza Mane* (1932) 59 Cal. 586, 137 I.C. 500, ('32) A.C. 456; *Mahabir Prasad Marwari* v. *Syed Shah Muhammad Yehia* (1936) 15 Pat. 88, 163 I.C. 869, ('36) A.P. 390.

(h) Zubaida Sultan Begum v. *Dawood Ismail Makra* (1937) Cal. 99, ('37) A.C. 402.

(i) Sayid Ismail v. *Hamidi Begum* (1921) 6 Pat. L.J. 218, 233-234, 62 I.C. 455, ('21) A.P. 125.

(j) Mohiuddin v. *Sayiduddin* (1893) 20 Cal. 810, 821; *Muntaz Qadar* v. *Advocate-General* (1946) 21 Luck. 516, 225 I.C. 21, ('46) A.O. 244.

(k) Ameer Ali, 4th ed., Vol. I, 469 *et seq.*

Minister incharge of wakfs as its Chairman, for advising the Central Government on matters concerning the working of Boards and the administration of wakfs. The Act also provides for investigation, survey (ss. 4-8) and registration (ss. 25-29) of wakfs; and submission and audit of accounts of wakfs (s. 33) A new Section 36A now requires that previous sanction must be obtained for any transfer of the immovable property of a wakf. The Board of Wakfs in each State is empowered to make rules (s. 67) and regulations (s. 68) and to institute suits to obtain any of the reliefs mentioned in section 92, of the Code of Civil Procedure, 1908 (V of 1908). The Act makes the Board of Wakfs a necessary party to every suit relating to title to wakf property or the right of a mutawalli (s. 57), and directs the Collector to give notice to the Board of Wakfs where any property sought to be acquired under the Land Acquisition Act, 1894 (I of 1894) is wakf property (S. 58). See also: Public Wakfs (Extension of Limitation); Amendment Act, 1967 (22 of 1967); Wakf Amendment Act, 1969 (38 of 1969); (this Act validates certain contributions and amends other sections). The Act repeals the following enactments in so far as they apply to wakfs to which the Act applies:—

(a) Bengal Regulation No. XIX of 1810;
(b) The Religious Endowments Act, 1863 (XX of 1863)
(c) The Charitable Endowments Act, 1890 (VI of 1890); and
(d) The Mussulman Wakf Act, 1923 (XLII of 1923).

WAKFS ACT (XXIX OF 1954).— Where there is no separate dedication for pious, religious and Charitable purposes and for purposes of the maintenance of the members of the family. The entire document has to be taken as creating wakf and the properties would come within the purview of the Act. In such a case it would be necessary for the Wakf Board to frame a scheme providing allocation among the different objects in the manner contemplated by the wakf.

An alienation of the wakf property is invalid and the Wakf Board can recover the property from the alienee. (1961) 1 M.L.J. 65. Rel. on A.I.R. 1977 All. 18, ref. to (1981) 94 L.W. 511; (1981) 2 M.L.J. 176.

Bihar.— Bihar Wakfs Act, 1947 (Bihar Act VIII of 1948).

Gujarat and Maharashtra.— The Mussulman Wakf Act, 1923 (XLII of 1923) still applies, as modified by the Mussulman Wakf (Bombay Amendment) Act, 1935 (Bom. Act XVIII of 1935).

Uttar Pradesh.— The Uttar Pradesh Muslim Wakfs Act, 1960 (U.P. Act XVI of 1960) applies. Sections 5-10 of the Central Act XLII of 1923 do not apply.

Under the U.P. Muslim Wakf Act 1960 (16 of 1960) as amended in 1971 (28 of 1971) permission of the wakf Board is required to file a suit but as the amending Act is not retrospective previously filed suits can go on. *Khalil Ahmad Khan* v. *Siddiq Ahmad Khan* ('74) A. All. 382.

U.P. Muslim Wakf Act.—. Dissolution of managing committee of Wakf— Controller is competent to pass such order.

Order of dissolution of managing committee of wakf without stating therein reasons— Error of law apparent on face of record— Order quashed and case remanded. Decision of Allahabad High Court, Reversed. *Mohammad Mustakhan* v. *U.P. Sunni Central Board of Wakf,* A.I.R. 1981 Supreme Court 1739.

West Bengal.— The Bengal Wakf Act, 1934 (Beng. Act XIII of 1934) applies. Sections 5-10 of the Central Act XLII of 1923 do not apply.

In this case the powers of the Commissioner and the wakf Board under Bengal Wakf Act (13 of 1934) were considered. This was in connection with the cancellation of elections and ordering of fresh elections. Under s. 78 illegal acts of the Commissioner even if ratified by the Board cannot

be sustained. *Syed Hamid* v. *Janab Mohamad.* ('70) A. All. 509 F.B. This was a special case under ss. 69 and 70 of the Bengal Wakf Act (13 of 1934).

A commissioner under the Act having notice of a suit and being joined as a party cannot claim a second notice of a compromise, when the compromise took place in Court and he had asked earlier for a discharge from the array of parties. A.I.R. 1966 Cal. 68 reversed. *Mst. Ayesha Bibi* v. *Commr. of Wakf W.B.* ('70) A.S.C. 287.

Madras.— The State Wakf Board has no jurisdiction either to claim, demand or collect contribution from the income of the properties of a private wakf. The Board can only collect contribution in respect of the religious, charitable and pious purposes. The contribution is of the net income. *G.M.A. Bhaimia* v. *The Madras State Wakf Board* (1968) I.M.L.J. 410.

(History of Mussalman Wakf Validating Act, 1913 given and Case law discussed.) Note:— The observations of the Supreme Court in *Mohd. Ismail* v. *Sabir Ali* ('62) A.S.C. 1722 were made in the context of the Oudh Estates Act, 1899 but have been generalised here. This is open to question. See S. 197 (Note 2 above).

Special Acts.— The Dargah of Khwaja Muin-ud-din Chishti at Ajmer, which is expressly excluded from the operation of the Wakfs Act, 1954, is governed by the Dargah Khawaja Saheb Act, 1955 (XXXVI of 1955) as amended by Act 20 of 1964.

Wakf Act, 1954: Recent cases on some of the provisions of this Act are summarised below:

Note:— Under S.3 (1) wakf is defined to include:

(i) a wakf by suer;

(ii) mashrut-ul-khidmat;

and (iii) a wakf-alal-aulad.

Ss. 3(1), 5(2)

Where properties were dedicated for charity but there was a small charge in favour of two of the testator's relations for the duration of their lives, it was held that notwithstanding the dispositions in favour of the relations, as the testator had substantially endowed the properties for charity permanently, the Wakf Board had jurisdiction to treat the wakf as one coming under the Act. Furthermore, though the wakf deed mentioned charitable and secular objects, an allocation of income from the wakf properties between the two objects was not necessary before the Board made a notification under s. 5(2): *Azemuddin* v. *M. S. Wakf Board* ('65) A.M. 121.

Ss. 3(1), 28

Under the Wakf Act, the purpose for which a wakf can be created must be one which is recognised by Muslim Law as pious, religious, or charitable and the objects of public utility which may constitute beneficiaries under the wakf must be objects for the benefit of the Muslim community. There can be no doubt that the wakfs with which the Act deals are trusts which are treated as wakfs under the definitions of s.3(1) and as such, a trust which does not satisfy the tests prescribed by the said definition would be outside the Act: *Zain Yar Jung* v. *Director of Endowments* ('63) A.S.C. 985.

Ss. 3(g), 46

In calculating "net income" for the purpose of s. 46(1) read with s. 3(g), the expenses of cultivation must be deducted: *Mahomed Ibrahim* v. *Kerala Wakf Board* ('64) A. Ker. 310.

S. 18(1)(b)

Under s. 18(1)(b) three main requisites need to be satisfied before an order removing a member of the Board can validly be passed. First, the member must have done some allegedly prejudicial act; second, his explanation in respect of it must be heard and third, the Government before passing the order of removal must be satisfied, as an honest and reasonable person, that the act or conduct in respect of which the explanation was heard was prejudicial to the interests of the Wakf: *Akhtar Ahmed* v. *State of A.P.* ('64) A. An. Pr. 244.

Ss. 42, 43

Where there is a dispute as to the propriety or validity of the removal of a mutawalli and the appointment of another, s. 42 is attracted and the Board will have prima facie jurisdiction to go

into the question; a petition under Art. 226 of the Constitution at this stage is therefore premature. It is for the Board, in the first instance, to consider whether there are grounds made out for the removal of a mutawalli under s. 43: *Mohd. Mohideen* v. *State Wakf Board Madras* ('63) A.M. 132.

s. 55

Consent of the Board under s. 55(2) required for instituting a suit involves neither an adjudication of rights of parties, nor need it be given after an enquiry or on the basis of any judicial adjudication. The question is more or less one of expediency of permitting a suit to be filed. Such a duty on the part of the Board cannot be regarded as a quasi-judicial act to entitle the High Court to interfere under Art. 226 of the Constitution: *Abdul Kasim* v. *Mohamed Dawood* (1963) Mad. 824.

Ss. 55, 69

An application by any person or authority other than the Board made to the District Collector for sanction to institute a suit under s. 92, C.P.C. against the trustees of a muslim wakf governed by the Wakf Act, 1954, is maintainable and the Collector has jurisdiction to proceed with the enquiry in view of s. 55 (2), Wakf Act.

The necessity to obtain the leave referred to in the Religious Endowments Act, 1863, and the consent referred to in s. 92, C.P.C., are dispensed with by s. 55(1) Wakf Act only in the case of suits 'instituted by the Board' and not in the case of suits 'instituted by any person or authority other than the Board's': *Mohd. Jacco* v. *Dist. Collector* ('62) A. Ker. 343.

(As a result of the amendment of ss. 55 and 69 by the Amending Act of 1964, anyone other than the Board now only requires the consent of the Board to institute a suit and the Religious Endowments Act, 1863, has been repealed in so far as it applied to wakfs to which the Wakf Act, 1954 applies).

S. 59

In proceedings under sec. 145 Cr. P.C. regarding wakf properties, the Wakf Board as a party vitally interested in the up-keep, management and functioning of the wakf, has a right under sec. 59 to appear and apply to be made a party: *Mysore Board of Wakfs* v. *Mahbood Ali* ('62) A. Mys. 128.

Wakf Act, 1954, *as amended by Wakf (Amendment) Act* 1964.— Under Order 41, r. 27 C.P.C., the appellate Court was entitled to take into consideration the Amendment Act of 1964 which came into force pending a second appeal.

Under the Act of 1954, Wakf includes a Wakf by user.

From the fact that some preference is shown to the descendants of the founder in the administration of a scheme, it cannot be said that the endowment ceases to be a wakf. *Edulla Saheb Mohd. Ghouse* v. *Madras State Wakf Board,* ('66) A.M. 439.

S. 15

Where a Wakf is being properly administered in accordance with a scheme settled in a suit, the Board has no jurisdiction to decide a dispute over rights among descendants of the founder of the Wakf. Furthermore, the measure of relief in pursuance of such rights under the scheme cannot be decided in writ proceedings under Art. 226 of the Constitution. *Fatheuddin Ahmed* v. *State Wakf Board,* (66) A.M. 307.

S. 15(2) bars the jurisdiction of the Civil Courts to take cognizance of an application for sanction of a lease for a term over three years and the Board alone is competent to accord such sanction. *Mayadhar Subudhi Tana* v. *Orissa Board of Wakfs,* ('66) A. Ori. 208.

Ss. 3-6, 27, 36-A, 36-B and 59.

A commissioner of Wakfs has no jurisdiction to adjudicate whether a particular property is Wakf property or not.

The expression "any person interested there in" in s. 6(1): explained. *Radhakrishan* v. *State of Rajasthan* ('67) A. Raj. 1. *Sk. Sharfuddin* v. *Board of Wakfs* (1969) 3 Cut. L.J. 1198 details the duties of the Wakf Board.

The following cases may be seen: s. 3(e) *Mysore Board of Wakfs* v. *V.K.S.L. Setty* ('74) A. Karnatak 28 (long user as a wakf); s. 5.15. s.15 *Andhra Pradesh Wakf Board* v. *M. Hidayatullah* ('74) A.A.P. 287 s. 66(c) *Madras Wakf Board* v. *Kazi Mehuddin* ('74) A. Mad. 225.

Later cases under the Wakf Act 1954 are noted below:— (XXIX of 1954).

S.3(1)(i) — Wakf — Creation of — Presumption as to can be drawn even in absence of dedication and delivery of possession. 1981 All. L.J. 669.

S. 3 (11) — "Wakf" One "E" executed a deed styled wakf-cum-settlement. He constituted himself the Manager of the properties covered by the document and stated he would enjoy the properties only in his capacity as the Manager. After his death his son would be the Manager. Thereafter a suitable person from among the members of his family was to be constituted as the Manager. Properties were to be purchased in the name of 'E' estate. There was a ban on alienation either by the manager or by anybody in management of the properties. A lease deed for a period of not less than three years could however be executed. There was also a provision for making exchanges of the trust properties with other properties. The person in management was to draw a sum of Rs.600 as allowance per annum. Every person who was to be in management of the properties after the lifetime of 'E' was to pay the taxes and incur the necessary expenses for the maintenance of the properties. The balance of income was to be reserved for unforeseen expenditure. It should be constituted into a fund and according to the circumstances, property could be purchased out of it. During the period of Ramzan gruel was to be supplied to the poor people and clothes were also to be distributed out of one share of income. Out of eight shares, the income from seven shares excluding the share for charity was to be individually allotted to the respective branches. Thus one share alone was to be utilised for the pious and religious purposes mentioned above.

In the present case there was no separate dedication for pious, religious and charitable purposes and for purposes of maintenance of the members of the family. Therefore the entire document has to be taken as creating a wakf and the properties would come within the purview of the Wakf Act, 1954. The Wakf Board can recover possession of the property from the alienee. [V. Sethuraman, J.] *The Tamil Nadu Wakf Board by its Secretary* v. *Sannasi Munayathiriyan* (1981) 2 M.L.J. 176.

House given by Muslim for the use of all travellers irrespective of their religion and financial position. Held: The dedication cannot be held valid. See Wakf Act (1954) S. 3 (f) and (a). (1982) 2 Karn. L.J. 176: A.I.R. 1982 Kant. 309.

S. 3(h) — "Person interested in a wakf" — Meaning

The appellants applied under S. 14 of the Wakf Act before the State Wakf Board for conducting an enquiry into the administration and management of a wakf. The respondents raised the plea that the appellants were not "persons interested in the wakf" as defined in the Act and cannot invoke the Board's jurisdiction under S. 44 of the Act. The board rejected the objection. A single Judge of the High Court, in writ proceedings upheld the objection and restrained the Wakf Board from conducting an enquiry into the affairs of the wakf. On appeal against the order.

Held: The former part of the definition of the word "person interested in a wakf" appearing in S. 3 (h) of the Wakf Act, 1954, apart from stating that a person interested in the wakf means any person who is certified to receive any pecuniary benefits, also states that it means any person who is entitled to other benefits from the wakf. The expression "person who is entitled to receive other benefits from the wakf" is of the widest connotation, and there is neither reason nor principle to restrict the scope of that expression only to certain types of benefits analogous to pecuniary benefits. Whenever a benefit is reserved for the public in general without restricting the persons who will be entitled to participate therein either with reference to the age, or with reference to the social status any person who will fall within the particular category of the persons for whom the benefit is reserved will be a person entitled to receive that benefit as of right and such a person will certainly be entitled to invoke the jurisdiction of a body like the Wakf Board under S. 44. It may be that a person may not be entitled to call upon the trustees to perform the particular charity in which under the trust deed he has a right to participate. If a narrow interpretation is to be given to the expression "any person interested in a wakf occurring in S. 3(h). S.44 will become inapplicable to a large number of public wakfs. From the very nature of the case, a public wakf will not indicate or enumerate the beneficiaries but will merely refer to the beneficiaries in general terms.

Ss. 3 and 11:—

The salient features of a document executed by a Muslim are: (a) The document is styled as

a wakf deed, (b) the charities mentioned therein are for reading of Koran five times a day, for imparting instructions in the school, for lighting, for drawing water from the tank, distribution of narasa (Prasadam) of certain value at the end of every month and certain amount to be spent on dhramam by way of feeding annually, (c) the properties worth of Rs.3000 shall be subject to above charities (d) during lifetime of executant he alone shall be mutawalli and perform charities, paying kist, land cess etc., and (e) after death of the executant his son and thereafter his heirs according to law of primogeniture, shall take possession of and enjoy the properties and from and out of its income they are to perform above-mentioned charities as mutawallis without any power of alienation or creating encumbrances.

Held, that the document was executed by a pious Muslim in the year 1944 who, under normal circumstances could not have thought of anything but a wakf to create a method by which there should be a perpetual performance of certain charities. The various clauses show (1) that on and from the date of creation of the document, the executant ceases to own the properties in his personal capacity and he assumes the role of mutawalli. Therefore there is a clear divestiture. (2) The executant has no power of alienation, but has a mere power to enjoy: (3) The line of succession in relation to mutawalli is something which runs counter to Muslim Law because it is stated very emphatically that the succession shall be according to the law of primogeniture. (4) Those mutawallis who would succeed will have also no power of alienation, nor the power of creating an encumbrance. By a reading of all these clauses and the document as a whole, one gains the only impression that this is a deed of wakf. Relying on certain words in a clause it cannot be contended that those words are clear enough to indicate the creation of a charge and the restraint on alienation is bad. If that clause only is taken into consideration all the other clauses will be rendered as otiose or nugatory. The document has not the effect of creating a charge for the performance of charities. [Natarajan and Mohan, JJ.] *Kani Ammal* v. *Tamil Nadu Wakf Board* (1982) 1 M.L.J. 196: A.I.R. 1983 Mad. 188.

Ss. 2, 4, 5 and 26— Mosque although not registered is wakf covered by Act — Authority is bound to register and enlist it as wakf. *Mohd. Ghouse* v. *Secy., Karnataka Board of Wakfs*, A.I.R. 1986 Karnataka 12.

Public Wakfs (Extension of Limitation) Act (29 of 1959), S. 3 (as amended from time to time) — Suit for possession of wakf properties filed on 2-1-1969 — Held, even assuming that the commencement is from date of death of mutawalli in 1950, the suit is in time. *Mohammed Sab* v. *Abdul Gani* A.I.R. 1985 Karnataka 177.

Wakf Act (29 of 1954), Ss. 3(f) and 55 — Mutawalli — Plaintiffs filing suit for possession of Wakf properties — Concurrent finding of Courts below that plaintiffs are trustees and first plaintiff is in de facto management of mosque — Suit maintainable without sanction.

— Denial of execution of Wakf deed — Denial must be specific and in express terms — It should be definite and unambiguous — Held, that the denial in written statement in the case has not satisfied requirements of law. A.I.R. 1973 Bom. 242 Disting. Wakf Act (29 of 1954), Ss. 3 (e), 12 and 67 — Punjab Wakf Rules (1964), R. 6 — Tenure of office of Chairman of Wakf Board — Not fixed for five years — Word 'member' in s. 12 does not include Chairman. *Haji Anwar Ahmed Khan* v. *Punjab Wakf Board*, A.I.R. 1980 Punj. & H.P. 306.

Wakf Act (29 of 1954) Ss. 3(1) and 27(2) — Wakf — Proof — Mukambs — Presumption as to wakf by immemorial user, when cannot be drawn. *The Kerala Wakf Board, Ernakulam* v. *Valia Maliyekkal Koyanji Koya Thangal*, A.I.R. 1985 Kerala 228.

Wakf Act (1954) (as amended by Act 34 of 1964) Ss. 3(1) and 66C — Essentials of Wakf within S. 3(1) indicated — Inam granted to individuals for service at Dargah — Grant resumable on failure to render service — Inam constitutes Wakf property — Whether grantor was Muslim or professed other religion is immaterial — Grant of patta to grantees under Inams Abolition Act would not change character of property as wakf.

Wakf Act, (1954), (as amended by Act. 34 of 1964) Ss. 2, 15, 25 and 3(e) — Act applies to all wakfs created before or after it — Whether wakf is registered under Act or not is not material. *A.P. Wakf Board, Hyderabad* v. *S. Syed Ali Mulia*, A.I.R. 1985 A.P. 127.

S. 6— Person disputing wakf itself was not a person interested — Suit or application to declare that certain property was not wakf property was not maintainable under S. 6.

The expression 'any person interested' occurring in S. 6 which enables the Board or Mutawalli of the Wakf or any person interested therein to file a suit in a Civil Court for decision in case any question about certain property being wakf property or not arising does not include one who disputes the existence of the wakf itself.

In the circumstances of the case the application for declaring that the property was not wakf property was not maintainable under S. 6 of the Act. A.I.R. 1979 SC 289, Followed. *Anjuman-E-Islamia* v. *Sakeenabi*, A.I.R. 1986 Kant. 75.

Ss. 12, 20, 11 of Wakf Act (1954)— The object of the main Section 12 is to define the duration of the members of the Board and the object of the proviso is to see that there should not be any hiatus in the continuation of the membership. The proviso cannot be said to be invalid for the reason that it seeks to whittle down the effect of the main section. Object of the Act and Section 12 and effect of Section 20 pointed. *V.J. Mahamood* v. *State of Andhra Pradesh,* A.I.R. 1976 Andhra Pradesh 169.

In view of Section 12 and notwithstanding the fact that the term of the office of the members stood expired, still on account of the impact of the proviso, the members shall have to hold office until the appointment of the successor is notified in the official gazette. It is the State Government that is competent to appoint the members of the Board under Section 11, and it is only the State Government that can issue the proceedings securing the continuation of the Board. In view of section 20 the proceedings of the Board resulting in the reconstitution of the District Wakf Committee cannot be invalidated and, therefore, the impugned proceedings are valid in law.

V. J. Mahamood v. *State of Andhra Pradesh*, A.I.R. 1976 Andhra Pradesh 169.

S. 15 (2) (h), (i) and (o) of the Wakf Act empowers the Wakf Board to take measures for the recovery of lost property of any wakf, institute and defend suits and proceedings in a Court of law relating to the wakf, and generally do all such acts as may be necessary for the due control, maintenance and administration of wakfs. This section applies to all wakfs and therefore the suit is maintainable whether the suit property belonged to 'F' Durga wakf or 'J' Durga wakf.

The period of one month prescribed in sub-s. (3) of S. 57 of the Act is applicable only to an application under S. 57 (3). This is a summary remedy available to the Wakf Board. This summary remedy does not bar the plaintiff from instituting a suit for declaration of title and recovery of possession at any time before the title of the wakf to the property is extinguished by adverse possession and enjoyment by party in possession. [S. Suryamurthy, J.] *The Tamil Nadu Wakf Board by its Secretary having its office at No. 4, Santhome High Road, Madras - 4* v. *Dawood Bi* (1981) 1 M.L.J. 220.

S. 15— Board competent to appoint committee of Management for a mosque— It has general superintendence over all wakfs and duty to see to their proper management under S. 15— Power not lost by citing a wrong provision. *Mohd. Ghouse* v. *Secy., Karnataka Board of Wakfs*, A.I.R. 1986 Karnataka 12.

S. 15— Wakf Act (29 of 1954)— Board cannot appoint Executive Officer or/and Committee to manage wakf without removing Mutawalli or taking any proceedings against him. *Khadar Shariff* v. *Tamil Nadu State Wakf Board,* A.I.R. 1987 Madras 40.

—Suit against Wakf Board for declaration of plaintiff's title and injunction restraining Board from taking possession of property in execution of decree obtained by Board against third person — Act of Board falls under S. 15 — Section 56 notice is a must failure to give notice — Not formal defect — Plaint is liable to be rejected. See Wakf Act (1954) S. 56 1981 T.L.N.J. 377.

S. 15 (2)(h)(i)(o)— Wakf property — Wrongful alienation — Suit for declaration and recovery of possession — Name of Wakf mentioned in plaint different from the name mentioned in sale certificate — Held, suit is maintainable irrespective whether property belongs to one wakf or other in view of S. 15(2)(h)(i)(o). [Suryamurthy, J.] *Tamil Nadu Board* v. *Dawood Bi* (1981) 94 L.W. 81: (1981) 1 M.L.J. 220.

See also:—

(1982) 1 M.L.J. 245:

Wakf Act (1954), Section 15(2)(h).

The provision of S. 15(2)(h) is merely an enabling provision or in fact a provision which casts a duty on the Wakf Board to take measures for the recovery of lost property of any wakf, in

accordance with law. This provision is not a substantive provision providing any procedure for recovery of the possession of any Wakf property.

P.S. Rudra Murthy v. *Kant. Board of Wakfs,* A.I.R. 1977, Karnataka 147.

Wakfs Act (29 of 1954), Ss. 18, 67 — Punjab Wakf Rules (1964). R. 6 — Chairman of Wakf Board — Removal — Members of Board can remove him by passing vote of no-confidence. I.L.R. (1975) Andhra Pradesh 242. Dissented from — [Constitution of India, Art. 372 (1); General Clauses Act (1897), S. 21].

In view of the principles of common law applicable to India by virtue of provisions of Art. 372 (1), there being no provision in the state barring the removal of the Chairman of the Board by a vote of no confidence, the members who have the power to elect the Chairman also have the power to remove the Chairman by a majority of votes. This principle is also enshrined in the provisions of S. 21 of the General Clause Act. It is accepted principle of common law relating to the removal of the holder of an office that the body which has authority to elect its Chairman, has the inherent, and implied power to remove the Chairman. I.L.R. (1975) Andhra Pradesh 242 Dissented from. *Haji Anwar Ahmed Khan* v. *Punjab Wakf Board,* A.I.R. 1980 Punj. & H.P. 306.

Wakf Act (1954), S.25(8)

From the examination of the provisions of the Act, their scope, object and the consequences that would ensure, the only conclusion that can be drawn is that sub-sec. (8) of S. 25 is an imperative or mandatory enactment and is not a directory enactment. *Shah Mansur Peer Dargah* v. *State of Karnataka,* A.I.R. 1980 Kant. 118.

If any of the properties are not included in a wakf that is already registered, the proper course for the Board is to collect such information under Section 27 and after making such enquiry as it may deem fit, decide that question in accordance with sections, the Rules and the principles of natural justice. In deciding that question, it is open to the Board to rely on any information (furnished by any person or any authority). The power conferred on the Board by S. 27 is a *suo motu* power to be exercised by the Board and cannot be exercised on an application made under Section 25 (8).

Shah Mansur Peer Dargah v. *State of Karnataka,* A.I.R. 1980 Kant. 118.

Ss. 36-A and 36-B— Transfer of Wakf Property in contravention of S.36-A — S.36-B provides for procedure for its recovery — Wakf property transferred long before Wakf Board came into existence — Section 36-B cannot be invoked for its recovery. *P.S. Rudra Murthy* v. *Kant. Board of Wakfs,* A.I.R. 1977 Karnataka 147.

Ss. 36(A) and 36(B)(1) and (2)— Where the property of a wakf was sold after obtaining the Board's sanction it was not open to the Board to prefer a requisition under S. 36 (B) (1) to the Collector and the Collector in his turn to order under S. 36B (2) delivery of the property to the Board. The requisition as also the order of the Collector were illegal. It was also pertinent to note that R. 3(1) of the Bihar Wakf Rules prohibiting the Board from according such sanction unless the transfer was for the benefit of the Wakf and also that it was unavoidable did not apply to transfers by sale. *Bihar State Shia Wakf Board* v. *Sheonandan Prasad,* A.I.R. 1986 Patna 10.

Ss. 42, 3(f), 15 and 43 — Wakf created under will — Line of succession to office of Mutawalli given by the testator — On arising of vacancy, Board of Trustees appointing Mutawalli — Mutawalli functioning as Managing Trustee in pursuance of order — Wakf Board enquiring into matter, considering conflicting claims and holding that appointment made by Board of trustees was not legal and proper — Order of Wakf Board is illegal and has to be set aside. *Kerala Wakf Board* v. *Alam Aboobacker Sait,* A.I.R. 1987 Kerala 176.

Muslim Wakfs Act (XXIX OF 1954), S. 43— Control of shrine by descendants of Shah Qumais — Wakf property — Issuance of show cause notice to petitioner why he should not be removed from office Shah Qumais — Collector or Sub-Divisional Officer in the control — Collector of a District cannot act arbitrarily — He has to show his authority under law to issue such show cause notice. [Ajit Singh Bains, J.] *Syed Abdul Basith* v. *State of Haryana.* 1983 Rev. L.R. 12.

Wakf Act (29 of 1954) Ss. 42, 43-A and 15 Scheme for management of wakf framed by Wakf Board-Direct management of wakf can be assumed by Board under s. 43-A— Board can continue such management for 5 years — Thereafter it must implement scheme when there is no obstacle for it and appoint Committee of Mutawallis as provided therein to manage wakf — Appointment

of ad hoc committee to manage wakf on ground that Board was contemplating to amend scheme is invalid. *Gulam Ali* v. *Secy., Karnataka Board of Wakfs,* A.I.R. 1985 Karnataka 242.

The action under S. 44 is meant for the better administration and management of the wakf as such, and the expression "a person interested in a wakf" will have to be understood in that context. If so understood any person who will be entitled to derive a benefit from the wakf will be a "person interested in the wakf" being clothed with a right to invoke the jurisdiction of the Board under S. 44. Having regard to the objects and the terms of the present wakf, the appellants were "persons interested in the wakf" and therefore they were entitled to invoke the jurisdiction of the Wakf Board under S. 44 of the Act. [M.M. Ismail and V. Ratnam, JJ.] *K. Jainulaludden* v. *K. P. Jainulaludden* (1981) 1 M.L.J. 332.

Wakf Act (1954), Section 55

If a suit under Section 55(2) of the Wakf Act has been filed, then it should be for the vindication of a public right. Even then, the action should not be camouflaged with such a request or relief. It must be genuine desire on the part of the litigant to expose public rights. *Mohamed Ghouse* v. *Mohamed Yusuf,* A.I.R. 1976 Madras 371.

Ss. 56, 57— Suit by Mutawalli for declaration that Municipality had no right to make use of plaintiff's Kabrastan and for permanent injunction— Wakf Board joined as second defendant— No relief claimed against Board S. 56 notice to Board is not necessary— Notice under S. 57 was sufficient.

Syed Khersha Sajanshah Mutvalli v. *The Bhuj Municipality,* A.I.R. 1986 Guj. 1.

Preamble, S. 3(f), Ss. 6, 36, 37, 38, 55, 60— Suit by Mutawalli respecting wakf property— Not barred by either S. 36 or S. 55— Hence suit by mutawalli for declaration that Municipality had no right to make use of suit Kabrastan and for permanent injunction — Not incompetent — Prior sanction of Board u/s. 92, C.P.S. is not necessary. *Syed Khersha Sajanshah Mutvalli* v. *The Bhuj Municipality,* A.I.R. 1986. Guj. 1.

Wakf Act (XXIX OF 1954), Ss. 63 and 15— The petitioner institution which was a society and a wakf was managed by a governing body elected at a general body meeting of the members and their term was due to expire on 30th July, 1980. By the order dated 14th March, 1980 the Board appointed *K* as virtually the administrator of the institution displacing the legally constituted governing body of the institution. In the other letter dated 1st April, 1980, the board requested the Secretary of the petitioner to hold elections. Both these orders were made in pursuance of a minute or note of the Minister for Wakfs communicated to it. The orders were challenged.

Held, that the power of the Government to issue general or special directions to a Board in its working cannot be construed as empowering the Minister for Wakfs or the Government to interfere with the day to day functioning of every wakf in the State. On a perusal of Ss. 15 and 63 of the Wakf Act it is clear that the order or directions issued by the Minister for wakfs and the consequent orders made thereto by the Board were wholly without jurisdiction and manifestly illegal. Assuming that any elections had been held in pursuance of the impugned orders, the elections are also invalid. Unfortunately, a piquant situation has arisen in the affairs of the institution where there is no legally constituted governing body or a mutawalli to administer the affairs of the institution. That situation has to be remedied either by the Board exercising the powers under S. 42 of the Wakf Act and appointing a mutawalli or by the State Government exercising the powers conferred by S. 27-A(1)(b) of the Karnataka Societies Registration Act, 1960 and appointing an administrator with necessary powers to administer the institution and hold elections and make over the management of the institution to the new governing body to be elected in accordance with law. [K. S. Puttaswamy, J] *Masjid-E-Islammabad* v. *Karnataka Board of Wakf,* A.I.R. 1981 Kant. 154.

Wakf Act (1954), S. 67. Wakf Rules (1964), R. 6— It is no doubt true that in view of the provisions of S. 3 (e), wherever the word "member" of the Board exists, it includes the Chairman. This is so unless the context otherwise requires. As is clear from the scheme of the Act and R. 6 that after the members are appointed under S. 11 of the Act, the first meeting of the Board has to be convened by the Government as soon as possible by giving the members not less than 10 days' clear notice and in that meeting the Chairman has to be elected. It would thus be seen that there will be some time gap between the date of nomination of the members and the election of the

Chairman. The Chairman continues in office on the strength of his being a member of the Board. It is, therefore, obvious that the period of five years shall start from the date when the members are nominated by the Government under S. 11 whereas the Chairman is elected on some subsequent date. In this view, the Chairman, in no case, can be there for complete period of five years. It will, therefore, be obvious that in view of the scheme of the Act, the word "member" used in S. 12 cannot be held to include "Chairman". Therefore, the tenure of the office of the Chairman is not fixed for five years and the same is at the pleasure of the members of the Board. [Bhopinder Singh Dhillon and G. C. Mital, JJ.] *Haji Anwar Ahmed Khan* v. *The Punjab Wakf Board.* A.I.R. 1980 P. and H. 306.

The following cases are under the Wakf Act read with Section 92 of the Code of Civil Procedure.

The Advocate-General has merely to see whether there is or there is not a prima facie case that should be allowed to go to a Court of law. He does not decide the rights of the person against whom the suit is intended to be filed as such a person will have full opportunity to present his case before the Court in which the suit is filed. The Court cannot enquire whether the sanctioning authority has heard the parties though it can enquire into the competency of the authority to act under Ss. 92 and 93. Case-law discussed. A.I.R. 1956 Pepsu 65, dissented. [Avadh Behari Rohatgi, J.] *S.S. Bhagat* v. *N.S. Ahluwalia.* A.I.R. 1978 Del. 14.

S. 92— Applicability — Wakf governed by Wakf Act — Compromise decree — *A* and *B* appointed joint mutawallis — *B* put in charge of management of property — Suit by *A* against *B* for his share of income and rendition of accounts — Maintainability — Ss. 15, 44 and 45 of Wakf Act — Scope of. *See* Wakf Act (1954), S. 15. A.I.R. 1978 Mad. 121.

The following case under U.P. Muslim Wakfs Act (16 of 1960) may be seen:—

U.P. Muslim Wakfs Act (16 of 1960), Ss. 49-B(4), 29, 30 — Appeal — Jurisdiction of appellate Court. *Afzal Hussain* v. *1st Addl. Dist. Judge,* A.I.R. 1985 All. 79.

S. 57A — U.P. Muslim Wakfs Act (16 of 1960)

Before taking an action under S. 57A, for recovery of possession of Wakf property from unauthorized occupants the first enquiry which the Board has to make is whether the immovable property in respect of which action is to be taken is entered as property of wakf in the register of wakfs maintained under S. 30. The next enquiry that he is required to make is whether the said property is in unauthorised occupation of anyone. Action under S. 57A can be taken only when the first condition is satisfied, namely that the property is entered as wakf property in the register of wakfs maintained under S. 30. This is a jurisdictional fact and action under S. 57A would be permissible only when the property is so entered. Under this provision it is not enough that the property is wakf property. The said property has also to be entered as wakf property in the register of wakfs maintained under S. 30. It is on the satisfaction of this jurisdictional fact that action can be taken by the Board under S. 57A. *Afzal Hussain* v. *1st Addl. Dist. Judge,* A.I.R. 1985 All. 79.

Bengal wakf Act (13 of 1934), Ss. 27(1)(f) and 59(1) (as amended in 1973) — Provision requiring Wakfs to pay contribution to Wakf Fund and Education Fund are not ultra vires of Arts. 25, 26, 27 Constitution— Constitution of India, Arts. 25, 26, 27. *Mustt. Nasima Khatun* v. *State of West Bengal,* A.I.R. 1981 Cal. 302.

Wakf Act (29 of 1954), S. 15(2)(g) and S. 63 — Mutawalli — Appointment of — Wakf Board and not the State Government is competent— Even approval of State Government is not necessary. *Jamia Masjid Magadi Town* v. *Karnataka Board of Wakfs,* A.I.R. 1981 Karnataka 37.

Wakf Act (29 of 1954), Ss. 63 and 15 — Power of State Government to issue directions — Does not include power to interfere with day to day functioning of wakf. *Masjid-E-Islammabad* v. *Karnataka Board of Wakf,* A.I.R. 1981 Kar. 154.

Wakf Act (29 of 1954), Ss. 15, 55— Scheme framed under S. 92, C.P.C. prior to coming into force of Act— Scheme does not cease to be operative after coming into force of the Act. A.I.R. 1969 Mad. 350, Dissented from. *Amjadulla Siddiqui* v. *Mirza Nizamuddin Baig,* A.I.R. 1982 A.P. 342.

Wakf Act (29 of 1954), S. 57(1)— Andhra Pradesh Agricultural Indebtedness (Relief) Act (7 of 1977), S. 4 (1) — Notice to Wakf Board — Whether essential — Wakf Board in possession of property under invalid Wakf — Notice held not essential. *Md. Abdul Aziz* v. *G. Bhumavva,*

A.I.R. 1982 Andhra Pradesh 349.

Wakf Act (29 of 1954), S. 3(1) and (a) — House given by Muslim for the use of all travellers irrespective of their religion and financial position — Dedication was not wakf. *The Karnataka State Board of Wakf* v. *Mohd. Nazeer Ahmed,* A.I.R. 1982 Karnataka 309.

Wakf Act (29 of 1954), s.15 — Wakf Board — Power of, as to wakf in respect of which scheme has been framed prior to passing of Act — Board has power to appoint mutawallis as per the scheme — (Muslim Law-Wakf). *T.S. Yusuf* v. *Tamil Nadu Wakf Board,* A.I.R. 1982 Madras 115.

Wakf Act (29 of 1954), Ss. 15, 42, 43, 44 and 45 — Extent of Board's power to remove and appoint mutawalli indicated — Appointment to office of Managing Trustee of mutawalli — Board cannot adjudicate upon validity of appointment in terms of wakf deed — That is for Civil Court to decide. *Adam Aboobacker Sait* v. *Kerala Wakf Board,* A.I.R. 1982 Kerala 322.

Wakf Act (29 of 1954), sections 3(1), 15, 66C, 36A — Sanction under Section 36A — Necessity of — Grant of land by a non-Muslim Ruler in favour of Fakkirs visiting the Mosque and not to the Mosque — It is neither wakf within Section 3(1), nor a deemed wakf under Section 66C — Scheme decree also framed for property — Sanction for lease of land under Section 36A is not necessary. *Tamil Nadu Wakf Board* v. *S. Syed Inam Saheb,* A.I.R. 1983 Madras 297.

Wakf Act (29 of 1954), S. 3(b) — Nature of document — Whether it is Wakf deed or whether it creates a charge for performance of charities — Document must be read as a whole — A clause should not be so read as to render other clauses nugatory. *Kani Ammal* v. *Tamil Nadu Wakf Board,* A.I.R. 1983 Madras 188.

Wakf Act (29 of 1954), S. 64 — Order of supersession — Statement of reasons for the order — Whether necessary when show cause notice has not been replied.

An order superseding a statutory Board has such serious civil consequences that ordinarily it should be a reasoned order.

Wakf Act (29 of 1954), S. 44 — Application under — Not necessary where mismanagement is by Board itself.

Section 44 pertains to an enquiry relating to the administration of Wakf. A person interested in a wakf can make an application for such an enquiry where the affairs are being mismanaged. The section has nothing to do with the corruption and mismanagement of funds by the Board itself. *Chairman, Wakf Board for the State of Punjab* v. *Union of India,* A.I.R. 1983 Delhi 439.

S. 6 — Disputes regarding wakfs — Execution proceedings of decree passed in suit for possession of wakf property after Wakf Act came into force in State of Bihar — Cannot be instituted by Mutawalli of Wakf property. *Maulvi Reza Ansari* v. *Shyamlal Sah,* A.I.R. 1983 Patna 299.

Wakf Act (1954), Ss. 2, 15 — Wakf created before Act — Scheme framed by Civil Court in force — Wakf Board has power to direct Mutawalli to get properties registered under Act and to submit accounts etc. to it — Mutawalli need not file any return to Civil Court under the Scheme. *C.S. Peeran* v. *State Wakf Board,* A.I.R. 1969 Madras 350.

Wakf Act (29 of 1954), s. 11(d) Proviso — Appointment of members of Wakf board-Prohibition under Proviso that only one Mutawalli can be appointed as member under Cl. (d) — Prohibition does not apply if Mutawallis can be appointed under other clauses of S. 11. *Mohammad Yahyah Ali Khan* v. *State of Madhya Pradesh,* A.I.R. 1983 Madhya Pradesh 53.

Per S.S. Sandhawalia, C.J., and K.S. Tiwana J. (Goyal J. Contra) Per Majority: S. 15 — Administration of Evacuee Property Act (31 of 1950) S. 11 — Section 11 is not impliedly repealed by S. 15 of the Wakf Act — Evacuee trust — Suit in respect of — Not maintainable by board.

Per Goyal J.: The public wakf property being not evacuee property within the meaning of S. 2(f) of the Evacuee Act never vested in the Custodian; and after the enactment of the Wakf Act, public wakfs are exclusively governed by its provisions and the Board constituted under this Act is the sole authority entitled to manage them; the authority of the Custodian to manage the wakfs, if any, comes to an end within the deletion of Explanation of S. 11 and in case S. 11 is taken to be still applicable to wakfs. *Decided by Full Bench on order of reference made by S.S. Sandhawalia C.J. and S.P. Goyal J., D/- 25-3-1982.

**(Note: In this case the Judges of the Full Bench differ in their views. The majority view is

taken by Sandhawalia C.J. & K.S. Tiwana J. and the majority view is taken by S.P. Goyal J.

The judgments are pointed in the order in which they are given in the Certified Copy ... Ed.)

even after deletion of the said explanation. Its provisions stand expressly repealed by the provisions of S. 69(2) of the Wakf Act and in the alternative by implication, the Wakf Act being special and later statute.

Per Majority: (Goyal J. Dissenting) Section 69(2) of the Wakf Act is no warrant for the proposition that S. 11 of the Administration of Evacuee Property Act, 1950, stands expressly repealed thereby. *Baenan Singh* v. *Punjab Wakf Board,* A.I.R. 1984 P. & H. 68.

Wakf Act Section 64.

One or two isolated cases of failure to act will not amount to persistent default within the meaning of Section 64. Persistent failure to carry out the directions issued by the Central or State Government under Section 62 or Section 63 will attract the section. Even a single act of disobedience of the direction may, added to certain continuing circumstances, depending upon the gravity of the matter, indicate persistence on the part of the defaulter. *Kerala Wakf Board* v. *State of Kerala,* A.I.R. 1984 Kerala 57.

Wakf Act (29 of 1954), S. 55(2) proviso — Suit against Mutawalli — Board also impleaded — Benefit of proviso cannot be claimed Board's action or direction not having been complained of — Suit filed without consent of Board — Not maintainable. *Shahabuddin* v. *S. Nohaman,* A.I.R. 1984 Madras 116.

Wakf Act (29 of 1954), S. 55 — Civil P.C. (1908), Section 92 — Suit claiming relief against Wakf — Consent of Board contemplated by Section 55 of Wakf Act not obtained — Suit was held not maintainable for want of consent. A.I.R. 1962 Ker. 343 (F.B.), Rel. on *Shamsuddin* v. *Tuticorin Jamia Masjid,* A.I.R. 1984 Madras 276.

Bengal Wakf Act (13 of 1934) S. 40. Appointment of Mutawallis of Wakf-Commissioner appointing strannity given to heirs of last Mutawallis of being substituted as Mutawallis — Appointment invalid. *Mt. Aziza Khatun* v. *State of West Bengal,* A.I.R. 1984 Calcutta 326.

Wakf Act (29 of 1954) Ss. 55, 57, 59 — Suit under S. 92, Civil P.C., filed prior to enforcement of Wakf Act — Does not abate on coming into force of Wakf Act — Decree framing scheme for wakf passed after enforcement of Wakf Act is not void and unenforceable. *Mohammad Ghouse Sahib* v. *Muhammad Kuthubuddin Sahib,* A.I.R. 1985 Supreme Court 375.

Wakf Act (1954), Ss. 3(1), 28 — Nature of wakfs with which Act deals — Distinction between Wakfs recognised by Muslim law and religious endowments recognised by Hindu law on the one hand and public charitable trusts as contemplated by English law on the other. *Nawab Zain Yar Jung* v. *Director of Endowments,* A.I.R. 1963 Supreme Court 985.

TAX LAWS AND MAHOMEDAN LAWS

These three cases have discussed Mahomedan Law in relation to Income Tax and Wealth Tax Act. They may be seen, if necessary:

1. *Haji Abdul Hamid* v. *C.I.T.* (1983) 144 I.T.R. 948.
2. *C.M.S. Abdus Salam* v. *Commissioner of Wealth Tax,* Madras (1983) Tax L.R. 1584.
3. *Commissioner of Wealth Tax* v. *Hasnate Burhaniya F. Wakf,* (1984) 147 I.T.R. 509.

Gujarat and Maharashtra.— The Mussulman Wakfs Act, 1923, makes no express provision for the investigation or determination of the nature and extent of wakf property. The question whether such a power given to the Court by necessary implication has created a conflict of decisions in many High Courts. Before the Bombay Amendment Act of 1935, it was held by the Bombay High Court that in proceedings under section 10 (the penal section) a Magistrate can go into the question whether the property in reference is wakf or not *(l)*. In a later decision, the same Court held that an inquiry under s. 6-C(i) of the Mussulman Wakf (Bombay Amendment) Act, 1935, is confined to cases where the existence of a wakf is admitted, and that where the existence of the wakf itself is disputed, the District Court has no power to inquire into its existence *(m)*.

(l) In re Sayedna Taher Saifuddin (1934) 58 Bom. 302, 36 Bom. L.R. 311, 154 I.C. 940, ('34) A.B. 169.

(m) Mahomedhussein v. *The Collector of Broach* (1945) Bom. 257, 46 Bom. L.R. 925, 219 I.C. 449, ('45) A.B. 157.

Section 10-B(2) provides that proceedings under section 10 of the Act of 1923 shall not be dealt with by any court lower than that of a Magistrate of the First Class or a Presidency Magistrate. Before the Bombay Amendment Act of 1935, however, it was held that in a Miscellaneous Application the District Judge has jurisdiction to try an offence under section 10 of the Act *(n)*.

Under section 6-C of the Act, as applied in Bombay State, the Court has power to inquire whether property is wakf. District wakf committees have the right to institute suits with the Court's permission for the protection or recovery of the property of a wakf or for the application of the income of such property to any charitable or religious purpose, notwithstanding anything contained in section 92, of the Code of Civil Procedure.

Uttar Pradesh.— The Central Boards of Wakf have wide powers of investigation, supervision and control. All the power formerly exercised by the District Judge in respect of wakfs, except the power to apply the doctrine of cy-pres, have now been given to the U.P. Central Board of Wakfs *(o)*. Section 47 of the U.P. Act of 1936 provided that the Board of Wakfs may file a suit in the District Court for an order applying the income of a wakf to similar objects. By section 50 of the U.P. Act of 1936 the orders of the Board of Wakfs cannot be questioned in a Court of law, except an order settling the scheme of management of a wakf.—

[See also the recent case of *Hafiz Mohd.* v. *U.P.S.C. Board of Wakf* ('65) A.A. 333, where some of the provisions of the U.P. Muslim Wakfs Act, 1960, are considered, and particularly the constitutional validity of s. 55 empowering removal of mutawallis].

West Bengal.— The Commissioner of Wakfs has power to intervene in the interests of a wakf in any suit in respect of wakf property (s. 70 , Bengal Wakf Act, 1934). But under s. 83, rights already accrued before the Act are saved. The Commissioner is therefore not entitled to intervene in an appeal *(p)* or after the Court has passed a decree for a scheme under section 92 of the Code of Civil Procedure *(q)*. The Commissioner may himself file a suit for the reliefs referred to in section 92 without the consent of the Advocate-General, or for the reliefs referred to in sec. 14 of the Religious Endowments Act, 1963, without the leave of the Court (s. 73). The consent of the Commissioner is required to any suit filed by any other person under the abovementioned provisions.

Wakf for public purpose.— Where the wakf which is substantially for a public purpose provides that the surplus, if any, shall be enjoyed by the founder of the wakf or his family, the wakf is not a private wakf such as is described in the Mussulman Wakf (Validating) Act, 1913 (VI of 1913), s. 3: *Kadir Murthuza Hussain* v. *Mohammad Murthuza Hussain* (1942) 2 Mad. L.J. 672, ('43) A.M. 234.

Under S. 48 of the U.P. Muslim Wakf Act 1960, the powers of the board to appoint a Mutawalli can only be exercised when there is a vacancy *Hashim Husain* v. *Ahmad Raza* ('74) All. 305 D.B.

Under the Mahomedan Law, by nomination a mutawalli only proposes or selects his successor to exercise his duties as a mutawalli on his death. He does not part with or delegate his functions of a mutawalli during his lifetime. It is only the delegation or parting with duties by a Mutawalli, while in good health, that is prohibited. A.I.R. 1946 Lah. 200: I.L.R. (1945) Lah. 554, follow. [K. B. Asthana and K. C. Agarwal, JJ.] *Hashim Husain* v. *Ahmad Raza* A.I.R. 1974 All. 305.

For removal of a mutawalli the procedure of Section 92 of the Civil Procedure Code is not necessary. *Khalil Ahmad* v. *Siddiq Ahmad* ('74) A. All. 382.

A mutawalli can be removed only by a suit *Jan Mohamad* v. *Mahmood Ali* ('74) A. All. 124.

213. Removal of mutawalli.— A mutawalli may be removed by the Court on proof of misfeasance or breach of trust, or if it is found that he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case. The *founder* has no power, after delivery of

(n) Kale Khan v. *Karim Rahman* (1935) 37 Bom. L.R. 207, 156 I.C. 203, ('35) A.B. 207.

(o) Sunni Central Board of Wakfs v. *Sardar Khan* (1946) All. 352, 222 I.C. 457. ('46) A.A. 256.

(p) Mahmuda Bibi v. *Iffat Arah Begum* (1937) Cal. 77.

(q) Commissioner of Wakfs, Bengal v. *Umma Salima* (1937) Cal. 673, 41 Cal. W.N. 382, 65 Cal. L.J. 340, ('37) A.C. 150.

possession, to remove a mutawalli in any case, unless he has expressly reserved such a power in the deed of wakf *(r)*.

A suit was filed by some beneficiaries under a wakf deed for removal of the trustee and for framing a scheme. The suit was decreed as prayed for. The plaintiffs had alleged mis-management of the trust funds, since they had not received anything from the trust. Though the defendant produced the account books, they were not examined by the plaintiffs and no fault had been made out. The defendant preferred an appeal: From an overall appreciation of a given situation, it should be made clear that if a suit under S. 55(2) of the Wakf Act had been filed, then it should be for the vindication of a public right.

The mere fact that some mis-management had resulted through the misconduct of the trustees, was not a ground to modify a scheme which contained provisions, which, if properly worked out, were sufficient to protect the interests of the trust. The plaintiff's counsel harped upon the mis-management of the defendant in the light of the non-distribution of the share of the net income to the dependent of the donor. Apart from the fact that such an assertion was indicative of the private interest of the plaintiffs, for which purpose no suit either under S. 92 of the C. P. Code or under S. 55 of the Wakf Act, was maintainable, the plaintiffs had not even established reasonably that their apprehension about the accounts was justified.

In the absence of objective evidence about malversation or misfeasance on the part of the trustee, the subjective satisfaction of the Court without even a full probe into the evidence on the conduct of the trustee could not go a long way to prompt the Court to remove him, as the primordial consideration in such circumstances was the interests of the institution. In this case, no case had been made out by the plaintiffs for the removal of the defendant on the ground that the interests of the trust and its administration so required. [T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.] *Mahomed Ghouse* v. *Mohamed Yusuf.* (1976) 2 M.L.J. 184: 89 L.W. 399.

Baillie, 608, Macnaghten, p. 79, sec. 5. A founder, who is himself a mutawalli, may be removed by the Court on the ground of misconduct.

In the case of a public, religious or charitable trust the primary duty of the Court is to consider the interests of the public. The Court will therefore remove a mutawalli who is insolvent *(s)*, or who does not perform the religious services as directed in the Wakfnama *(t)*, or who claims the wakf property as his private estate *(u)*, and will frame a scheme of management. It is conceivable that if there has been no mismanagement a claim to the property under a mistaken impression of right would not be good reason for removing a mutawalli; but the assertion of a claim adverse to the trust coupled with neglect of duty would render a mutawalli liable to be removed *(v)*.

A mutawalli appointed by a committee under the Religious Endowments Act XX of 1863 is not a mutawalli under Mahomedan law but a servant liable to be dismissed by the committee *(w)*.

Procedure.— Although the District Judge, exercising his powers as a *Kazi*, has the jurisdiction on mere application to appoint a mutawalli when there is a vacancy, the removal of a mutawalli can only be effected by a suit properly instituted *(x)*.

214. Office of mutawalli not transferable.— A mutawalli has no power to transfer the office to another, unless such a power is expressly conferred upon him by the founder. But he may appoint a deputy to assist him in management of the endowed property *(y)*. He cannot, however, appoint co- mutawallis unless

(r) Gulam Hussain v. *Aji Ajam* (1868) 4 Mad. H.C. 44; *Advocate- General* v. *Fatima* (1870) 9 Bom. H.C. 19, 23-24 [a Shia case]; *Hiddaitoonnissa* v. *Syud Afzul* (1870) 2 N.W.P. 422 [a Shia case]. *Siddique Ahmed* v. *Syed Ahmed* (1945) 49 C.W.N. 311, ('45) A.C. 418; *Khalil Ahmad* v. *Malka Mehar* ('54) A.A. 362.

(s) Mahomedally Adamji Peerbhoy v. *Akberally Abdull Hussain* (1934) 36 Bom. L.R. 386, 59 Cal. L.J. 133, 38 Cal. W.N. 452, 66 Mad. L.J. 733, 147 I.C. 882, ('34) A.PC. 53.

(t) Mohammad Abdul Gani v. *Mt. Kulsan* (1945) 49 C.W.N. 273, ('45) A.C. 328.

(u) Ahmad Shah Mubarak Shah v. *Altakhan* (1934) 152 I.C. 323, ('34) A.Pesh. 57.

(v) Nawaz Ahmed Khan v. *Hasamuddin Ahmed* (1936) 162 I.C. 762, ('36) A.C. 262.

(w) Gholam Hussain Shah v. *Syed Altaf Hossain* (1934) 61 Cal. 80, 149 I.C. 1215, ('34) A.C. 328.

(x) Mohammad Ali v. *Ahmad Ali* (1945) All. 818, 221 I.C. 515, ('45) A.A. 261.

(y) Khajeh Salimullah v. *Abdul Khair* (1909) 37 Cal. 263, 277-279, 31 I.C. 419; *Haji Ali* v. *Anjuman-i-Islamia* (1931) 12 Lah. 590, 596, 135 I.C. 56 ('31) A.L. 379; *Mohammad Soleman* v. *Tasaddaq Hossain* (1935)

he is expressly empowered to do so *(z)*.

A hereditary ministrant cannot make a valid settlement of his right to receive offerings at a Darga or Shrine *(a)*.

215. Attachment of office of mutawalli.— The office of mutawalli cannot be attached in execution of a personal decree against the mutawalli *(b)*. See sec. 194.

216. Limitation for suit against mutawalli.— No suit against a mutawalli or manager or wakf property, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, is now barred by any length of time.

Section 10 of the Limitation Act, 1908, as amended by sec. 2 of Act I of 1929. As to limitation for suits where the property is transferred for a consideration, see arts. 48B, 134A, 134B and 134C, inserted by sec. 3 of Act I of 1929. Sec. 10 of the Limitation Act referred to a person in whom the property has become "vested in trust" and the amendment was made in consequence of the decision in *Vidya Varuthi* v. *Balusami (c)* that a mutawalli is not such a person. The amendment is not retrospective. In a suit instituted before the 1st January 1929 the mujawars or servants of a shrine who has been put in possession of a wakf land by the Sajjadanashin on account of their services could not claim the benefit of the section as assigns of the Sajjadanashin or manager of the shrine *(d)*.

217. Adverse possession against wakf.— Wakf property may be lost by adverse possession *(e)*. But a *mutawalli's* possession cannot be adverse to the wakf *(f)*.

A stranger to the trust can encroach on the trust estate and will in course of time acquire a title by adverse possession. But a Mutawalli cannot take up such a position. If the Mutawallis of a mosque choose to build on part of the mosque property in such a way as to integrate the whole into one unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends. *Mohammad Shah* v. *Fasihuddin Ansari,* A.I.R. 1956 Supreme Court 713.

Miscellaneous

218. Public Mosques.— Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque *appropriated exclusively by the founder to any particular sect or school* can be used by the followers of another sect or school *(g)*.

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158 I.C. 544, ('35) A.C. 623; *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732; *Abdul Mannan* v. *Mutwali of Sm. Janebali* ('56) A.C. 584.

(z) Abdul Sobhan v. *Wasin Bhuvia* (1950) 54 C.W.N.

(a) Hakim Khan v. *Sahibjan Sahib* (1935) 69 Mad. L.J. 722, 159 I.C. 694, ('35) A.M. 1040.

(b) Sarkum v. *Rahaman Buksh* (1896) 24 Cal. 83, 91.

(c) (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123.

(d) Allah Rakhi v. *Shah Mahammad Abdul Rahim* (1934) 61 I.A. 50, 56 All. 111, 36 Bom. L.R. 408, 38 Cal. W.N. 400, 59 Cal. L.J. 157, 66 Mad. 431, 147 I.C. 887, ('34) A.PC. 77.

(e) Shahidganj v. *Gurdwara Parbhanda Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116; *Abdur Rahim* v. *Narayandas* (1923) 50 I.A. 84, 50, Cal. 329, 71 I.C. 646, ('23) A.PC. 44; *Hafiz Mohammad* v. *Swarup Chand* (1941) 2 Cal. 434, 73 C.L.J. 475, 200 I.C. 822, ('42) A.C. 1.

(f) Mohd. Shah v. *Fasihuddin* ('56) A.S.C. 713. *Kunhalavi Muschiar* v. *Kunhali* 1969 Ker. L.R. 685.

(g) Ata-Ullah v. *Azim Ullah* (1889) 12 All. 494; *Jangu* v. *Ahmad-Ullah* (1889) 13 All. 419 F.B.; *Fazl Karim* v. *Maula Baksh* (1891) 18 Cal. 448, 18 I.A. 59; *Abdus Subhan* v. *Korban Ali* (1908) 35 Cal. 294; *Maula Baksh* v. *Amir-ud-Din* (1920) 1 Lah. 317, 57

The right to offer prayers in a mosque is a legal right, for the disturbance of which a muslim is entitled to seek relief in a court of law *(h)*.

In *Ata-Ullah's* case *(i)*, it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim's* case, but they did not express any opinion on it stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan's* case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans was in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah's* case was followed by the High Court of Lahore *(j)* and that Court has said that there is no such thing as a Shia mosque or a Sunni mosque *(k)*. The question therefore cannot be said to be definitely settled. But when a mosque is not appropriated to a particular sect, there is no doubt that it may be used by any Mahomedan for the purpose of worship or customary religious ceremonies *(l)* without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because the Shafei practice is to pronounce *amin* (amen) in a loud voice and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Amil-bil-hadis* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. Shias may worship in a mosque where the rest of the congregation are Sunnis but they are not entitled to have a separate call to prayer or to hold a congregation behind an Imam of their own; and there is no rule of Mahomedan law to entitle the members of a new sect to pray as a separate congregation behind an Imam chosen by themselves *(m)*.

A mosque is not capable of human ownership or possession as it belongs to God and is dedicated to His Worship.

The Court will not, in framing a scheme under a decree by which it is declared that the members of a particular sect are entitled to use a particular mosque, vest in the religious head of the sect the power to exclude at his discretion any member of the community from joining in congregational prayers, or to prevent him from attending the mosque for prayers *(n)*.

As to management of mosques, see note to sec. 204, "Powers of Court."

219. Whether mosque a juristic person. — In the undermentioned case *(o)* the Lahore High Court held that a mosque is a juristic person. The question was discussed in the *Shahidganj* case *(p)*, and although their Lordships of the Privy Council reserved their opinion on it, the trend of their observations seems to show that the view of the Lahore High Court did not commend itself to them. Their Lordships however held that suits cannot be brought by or against mosques as artificial persons. The Rajasthan High Court has held that a mosque is not a juristic person *(q)*.

220. Sajjadanashin; Khankhah.— A *sajjadanashin* is a head of a *khankhah*, a Mahomedan institution analogous in many respects to a *math* where Hindu religious instruction is given. He is the teacher of the religious doctrine and rules

I.C. 1000; *Jiwan Khan* v. *Habib* (1933) 14 Lah. 518, 144 I.C. 658, ('33) A.L. 759; *Syed Ahmed* v. *Hafiz Zahid* (1934) 153 I.C. 1095 ('34) A.A. 732.

(h) P. Majilissae Islamia v. *Sheik Muhammad* ('63) A. Ker. 49. Follg. ('52) A.S.C. 245.

(i) (1889) 12 All. 494, *supra*.

(j) (1950) 1 Lah. 317 *supra*. (1933) 14 Lah. 518, *supra*.

(k) Mt. Iqbal Begum v. *Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80; *Haji Mohammad* v. *Abdul Ghafoor* ('55) A.A. 688.

(l) Mohd. Wasi v. *Bachan Sahib* ('55) A.A. 68.

(m) Hakim Khalil v. *Malik Israfi* (1917) 2 Pat. L.J. 108, 37 I.C. 302; *Safat Ali Khan* v. *Syed Ali Mian* (1933) All. L.J. 513, 144 I.C. 298, ('33) A.A. 284.

(n) Akbarally v. *Mahomedally* (1932) 57 Bom. 551, 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356.

(o) Maula Bux v. *Hafizuddin* (1926) 94 I.C. 7, ('26) A.L. 372.

(p) Shahidganj v. *Gurdwara Parbandha Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116.

(q) Mahomed Shafluddin v. *Chatur Bhuj* (1958) Raj. L.W. 461.

of life, and the manager of the institution and the administrator of its charities, and has, ordinarily speaking, a larger right in the surplus income than a mutawalli *(r)*. But this does not mean that in every case the whole income from a *khankhah* is at the disposal of the *sajjadanashin*. At certain shrines the members of the founder's family other than the *sajjadanashin* are entitled to share in the surplus offerings which remain after payment of expenses *(s)*.

These Khankhahs exist in all parts of India and, so far as can be gathered from the works relating to them, have come into existence under the following circumstances: "A dervish or a Sufi of a particular sanctity has settled in some locality; so long as he has not attained sufficient importance, his place of abode is called a *takia* or *astana* according to his position in public estimation. His previous life and teachings attract public notice, disciples gather round him, and a place is constructed for their lodgement and the humble takia grows into a Khankhah. After his death his grave becomes a shrine and an object of pilgrimage, not only for his disciples, but for people of distant parts both Hindus and Mahomedans. The process of development indicated here is observable in the very Khankhah which forms the subject of dispute in the present case." *Mohiuddin* v. *Sayiduddin* 20 Cal 810.

The word "*sajjadanashin*" (spiritual superior) is derived from *sajjada*, that is, the carpet used by Mahomedans for prayer, and *nashin*, that is, sitting. The *sajjadanashin* takes precedence on the carpet during prayers. The office of a mutawalli is a secular office; that of a *sajjadanashin* is a spiritual office, and he has certain spiritual functions to perform *(t)*. All dargahs are not Khankhas but there is nothing uniform or rigid. All Sajjadanashins are not necessarily mutawallis of the properties of the institution. The office of mutawalli may be in another person. A *Sajjadanashin* was said in this case to resemble a Mahant of a Hindu Math. A *sajjadanashin* of a Khankhah enjoys the unique position of being a spiritual preceptor *and* a mutawalli. Differences between a *sajjadanashin* and a mutawalli were pointed out in *Ikramiul Haq Shah* v. *Board of Wakfs* (Rajasthan) A.I.R. 1973 Raj. 57 D.B. The founder is generally the first *sajjadanashin* and after his death the spiritual line is continued by a succession of *sajjadanashins (u)*. In the absence of a direction in the wakfnama the succession to the office of *sajjadanashin* is regulated by custom. One custom is that the *"bhek"* or order *i.e.*, an electoral body consisting of *fakeers* and *murids*, instal a competent person generally a son or nominee of the late *sajjadanashin (v)*. In a case before the Privy Council the *"bhek"* delegated their power to elect a *sajjadanashin* and it was held that the appointment of the *sajjadanashin* made in this manner was valid *(w)*. If the Court is appointing a *sajjadanashin* it should take account of the spiritual tradition and appoint if possible a descendant of the founder *(x)*. As to the importance of nomination by the last *sajjadanashin* see the observations of Agha Haider J., in *Ghulam Mahommad* v. *Abdul Rashid (y)*. The Lahore High Court *(z)* has decided that in the absence of directions in the Deed of Trust, or usage, a *sajjadanashin* can nominate his successor.

The status of a *sajjadanashin* is higher than that of a mutawalli. He is the head of the institution and has a right to exercise supervision over the mutawalli's management *(a)*. But the *sajjadanashin*

(r) Vidya Varuthi v. *Balusami* (1921) 48 I.A. 302, 312, 44 Mad. 831, 841, 65 I.C. 161, ('22) A.PC. 123; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058.

(s) Muhammad Hamid v. *Mian Mahmud* (1923) 50 I.A. 92, 105-106, 4 Lah. 15, 29, 77 I.C. 1009, ('22) A.PC. 384.

(t) Maule Shah v. *Ghane Shah* (1938) 40 Bom. L.R. 1071, 42 C.W.N. 1018, 175 I.C. 454, ('38) A.PC. 202; see *Piran* v. *Abdool Karim* (1891) 19 Cal. 203; *Secretary of State* v. *Mohiuddin* (1900) 27 Cal. 674; *Syed Husain Ali Shah* v. *Durgah Committee, Ajmer* ('59) A. Raj. 177.

(u) Syed Shah v. *Syed Abi* (1932) 11 Pat. 288, 136 I.C. 417, ('32) A.P. 33; *Ghulam Rasul* v. *Ghulam Qutab-ud-din* ('42) A.L. 142.

(v) 11 Pat. 288 *supra; Ghulam Mahommad* v. *Abdul Rashid* (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905; *Ali Shah* v. *Fateh Mahammad Mutawalli* (1935) 159 I.C. 237, ('35) A.L. 657; *Ismailmiya* v. *Wahedani* (1912) 36 Bom. 398, 14 I.C. 469.

(w) Maule Shah v. *Ghane Shah* (1938) Bom. L.R. 1071, 42 C.W.N. 1018, 175 I.C. 454, ('38) A.PC. 202.

(x) Najihudin Ahmad v. *Amir Hasan* (1934) 153 I.C. 557, ('34) A.P. 443.

(y) (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905.

(z) Ahmad Yar v. *Ghulam Nabi* (1948) Lah. 116, ('49) A.L. 65, ('49) P. Lah. 470.

(a) Sardar Ali v. *Gahana Shah* (1933) 142 I.C. 847, ('33) A.L. 444.

may be a mutawalli and in that case, with reference to the wakf property he is in no better position than a mutawalli. He has no power to borrow money for the purpose of carrying out the objects of the trust, but he may like a mutawalli borrow money and incur debt, with the sanction of the Court, for the preservation f the wakf property *(b)*. The Court may remove a *sajjadanashin* for misconduct and when framing a scheme may separate the offices of *sajjadanashin* and mutawalli *(c)*. A minor cannot be appointed a *sajjadanashin (d)*.

If land purchased by the founder of a *khankhah* has been held by the *sajjadanashin* for several generations it is presumed to be wakf and attached to the *khankhah (e)*. But this presumption is rebuttable and it may be shown that the grant was a personal gift to the *sajjadanashin* even though his descendants make provision out of the income for the upkeep of the *khankhah (f)*. Property given for the upkeep of buildings and schools connected with a *khankhah* cannot be attached in execution of a personal decree against the *sajjadanashin (g)*.

A provision in a wakfnama for *naubat nawaz* (drum-beaters) attached to a *khankhah* is not invalid *(h)*.

Members of the founder's family.— In the absence of an express provision in the grant or proved custom, members of the family of the founder have no right to share in the surplus offerings; though the *sajjadanashin* may in his discretion make an allowance to indigent members *(i)*

Alienation by sajjadanashin.— The right of a *sajjadanashin* to receive a share of the offerings is a right attached to his office and each successive incumbent of the office is entitled to receive that share as long as he holds the office. An alienation, therefore, of his share in the offerings made by a *sajjadanashin* cannot bind his successors *(j)*. But where a *sajjadanashin* has made a grant of land for building purposes for the benefit of the endowment, the grant will be binding on his successors *(k)*.

Offerings.— In a case in respect of the tomb of Khwaja Moinuddin Chisti at Ajmer the Privy Council held on the facts of the case that both the *sajjadanashin* and *Khadims* (servitors) were entitled to share in the offerings made at the tomb, but it was held that such offerings as qabarposhes (*i.e.*, coverings for the tomb) which were presented for the specific use of the Durgah were the property of the Durgah and must be kept by the trustees *(l)*.

Manager of a Pallivasal in South India.— A *sajjadanashin* can be only of a *durgah* or *khankhah*. The term *"sajjadanashin"* carries with it the meaning of religious superior. The manager of a *Pallivasal* (a holy place of South Indian Muslims) is something higher than a mutawalli but lower than a *sajjadanashin*. He may be described as holding a position analogous to a "swami" *(m)*

221. Kazi.— The Mahomedan law does not regard the office of Kazi as hereditary *(n)*. A claim to such a right, though supported by custom, is not one that can be recognised by a Civil Court *(o)*.

A Kazi may be appointed by the Government *(p)* or by some internal arrangement among the Mahomedans of each locality *(q)*.

(b) Mahabir Prasad Marwari v. *Syed Shah Mahomed Yahia* (1936) 15 Pat. 88, 163 I.C. 869, ('36) A.P. 390.

(c) 11 Pat. 288 *infra.*

(d) Piran v. *Abdool Karim* (1891) 19 Cal. 203, 219.

(e) Miran Baksh v. *Ghulam Nabi* (1933) 14 Lah. 624, ('33) A.L. 725.

(f) Ahmad Ashraff v. *Murtaza Ashraff* (1935) 11 Lah. 93, 154 I.C. 1023, ('35) A.O. 299.

(g) Shah Mohammad v. *Mahammad* (1927) 2 Luck. 109, 100 I.C. 241, ('27) A.O. 113.

(h) Syed Shah v. *Syed Abi* (1932) 11 Pat. 288, 323, 136 I.C. 417, ('32) A.P. 33.

(i) Jaffar El Adroos v. *Mahomined El Edroos* (1937) 39 Bom. L.R. 277. 169 I.C. 232, ('37) A.B. 217.

(j) Altaf Hussain v. *Ali Rasul Ali Khan* (1938) O.W.N. 253, 172 I.C. 985, ('38) A.PC. 71.

(k) Narsingh Das v. *Safiullah* ('54) A.A. 773.

(l) Altaf Hussain v. *Ali Rasul Ali Khan* (1938) O.W.N. 253, 172 I.C. 985, ('38) A.P.C. 71.

(m) Syed Shah Abdul Latif v. *Mohammad Lebbai* (1958) 2 M.L.J. 199. *Chief Administrator of Auqaf* v. *Rashid-ud-Daula* P.L.D. 1961 (W.P.) Lah. 993.

(n) Jamal Walad Ahmed v. *Jamal Walad Jallal* (1877) 1 Bom. 633; *Daudshah* v. *Ismalsha* (1878) 3 Bom. 72; *Baba Kakaji* v. *Nassaruddin* (1893) 18 Bom. 103; *Mohd. Isak Saheb* v. *Najaruddin* ('62) A. Mys. 253.

(o) Kasamkhan v. *Jazi Abdullah* (1926) 50 Bom. 133, 93 I.C. 135, ('26) A.B. 153.

(p) See the Kazi's Act XII of 1880, and *Sheikh Ummar* v. *Budan Khan* (1912) 37 Mad. 228, 25 I.C. 898.

(q) See (1926) 50 Bom. 133, at p. 146, 93 I.C. 135, ('26) A.B. 153, *supra.*

(r) Mahomed Ismail v. *Ahmed Molla* (1916) 43 I.A.

Kazis Act (12 of 1880).— Under Section 2 it is the State Government that has to appoint a kazi after consulting the principal Muhammadan residents of such local areas.

In the instant case, the State Government has not exercised the power to appoint a kazi. From the orders of the Wakf Board addressed to the petitioner it is clear that the petitioner was appointed only as a kazi incharge by the Wakf Board itself but he did not acquire any right under those orders to hold the post of kazi. By the impugned order the Wakf Board recognised the right of the respondent to be the Kazi, she being the only legal heir and sole successor to late Kazi and terminated the appointment of the petitioner as Naib Kazi, to which post he was appointed earlier by the Wakf Board until further orders. The petitioner, having been appointed as Naib Kazi until further orders by the Wakf Board, cannot claim to continue the said post as of right and challenge the impugned order of the Board. *Mohd. Abbas Ali* v. *Wakf Board,* A.I.R. 1979 Andhra Pradesh 116.

The word kazi means a judge and the Privy Council have said that in the British system the place of a kazi is taken by the Civil Courts *(r)*. It has been generally supposed that the District Judge is the proper person to perform the functions of a Kazi *(s)*. But in *Burhan Mirdha* v. *Mt. Khodeja (t),* the Calcutta High Court has pointed out that the idea is derived from cases which refer to wakf property and particularly to sanction to the alienation of wakf property *(u)* and this is because under the Mahomedan regime the administration of wakf property was in exercise of a power specially conferred on the Chief Kazi *(v)*. The Court also said that jurisdiction is a question of procedure which is governed not by Mahomedan law but by the Code of Civil Procedure. The Court therefore held that a suit by a Mahomedan wife for a declaration that her marriage had been dissolved by a divorce was triable by a Subordinate Judge as the relief was valued at Rs.10 for a declaration of Rs.5 for an injunction. See sec. 6 supra, and sec. 334 infra. In a later case *(w)*, the Calcutta High Court observed that if a Subordinate Judge had jurisdiction to entertain a matter relating to a wakf, any exercise of that jurisdiction was valid.

If a kazi has exercised his office for a long time everything will be presumed in favour of the legality of the original appointment *(x)*.

222. Takia.— A takia may be the object of a valid endowment or wakf.

Takia means literally a resting place. Hence a burial ground is sometimes called a *takia (y)*. The fact that a place is called a *takia* does not prove that it is wakf property *(z)*. A *takia* may be the only place of assembly in a village and devoid of any religious significance, or it may be the platform in a Muslim graveyard where Prayers are said *(a)*. A man may take charge of a graveyard and call himself a *takiadar* but that does not show that the land is wakf or that he is the mutawalli *(b)*. A fakir or holy man may build a hut and take up his residence near the *takia* or prayer platform in the graveyard and impart religious instructions and call the place a *khankhah.* Nevertheless the *kankhah* is not wakf property. This seems to be what the Lahore High Court meant when it said that "khankhahs" and *takias* and such like institutions do not come within the strict purview of Mahomedan law" *(c)*. But a *takia* may become wakf by long use *(d)*. The fakir may collect

127, 43 Cal. 1085, 35 I.C. 30.

(s) Mafizuddin v. *Rahima Bibi* (1934) 37 C.W.N. 1043, 58 Cal. L.J. 73, 149 I.C. 1028, ('34) A.C. 104; *Abdus Salam* v. *Abdul Aziz* (1944) 48 C.W.N. 465, ('44) A.C. 299; *Mohammad Ali* v. *Ahmad Ali* (1945) All. 818, 221 I.C. 515, ('45) A.A. 261.

(t) (1937) 2 Cal. 79, 41 C.W.N. 314, 65 Cal. L.J. 21, 168 I.C. 639, ('37) A.C. 189.

(u) Shama Churn v. *Abdul Kabeer* (1899) 3 C.W.N. 158; *Nemai Chand* v. *Golam Hussain* (1910) 37 Cal. 179, 3 I.C. 353; *Fakrunnessa* v. *District Judge* (1920) 47 Cal. 592, 56 I.C. 475; *Abdul Rahman Molla* v. *Abdul Hossain Molla* (1936) 40 C.W.N. 584.

(v) Atimanessa v. *Abdul Sobhan* (1916) 43 Cal. 467, 32 I.C. 21.

(w) Mohammad Abdul Gani v. *Mt. Kulsan* (1945) 49 C.W.N. 273, ('45) A.C. 328.

(x) Mahammad Yusuf v. *Sayad Ahmed,* (1870) 1 Bom. H.C.R. App. xviii.

(y) See *Baqar Khan* v. *Babu Raghendra Pratap Sahi* (1934) 9 Luck 568, 148 I.C. 433, ('34) A.O. 263; *Mehar Din* v. *Hakim Ali* (1935) 157 I.C. 561, ('34) A.L. 912; *Chutko* v. *Gambhir* (1931) 6 Luck. 452, 130 I.C., 117, ('31) A.O. 45.

(z) Shafiq-ud-din v. *Mahbub* (1930) 11 Lah. 632, 125 I.C. 893, ('30) A.L. 714.

(a) Jani v. *Bishan Singh* ('35) A.L. 698.

(b) Mahomed Abid v. *Haji Baksh* (1936) 158 I.C. 916, ('36) A.O. 133.

(c) Ali Shah v. *Fateh Mohammad Mutawalli* (1935) 159 I.C. 537, ('35) A.L. 657.

(d) 6 Luck. 452, *supra.*

(e) Sardar Ali v. *Gehna Shah* (1933) 142 I.C. 847, ('33) A.L. 444.

numerous disciples at his residence which will then develop into an institution of public importance and be a real *khankhah*. Such *khankhahs* are called *takias (e)*; and may be the object of a valid endowment *(f)*. In a latter case the Privy Council said: "A *takia* is a place where a *fakir* or dervish (a person who abjures the world and becomes an humble servitor of God) resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement. A *takia* is recognized by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose" *(g)*.

223. Imambara.— An imambara is an apartment in a private house or a building set apart like a private chapel for religious purposes. It is intended for the use of the owner and members of his family, though the public may be admitted with the permission of the owner. It may be the object of a valid wakf—Sec. 178. Such a wakf is a private wakf and not a public wakf nor a trust for the purposes of sec. 92 of the Code of Civil Procedure *(h)*, but it may be proved that a particular imambara is a public wakf *(i)*.

224. Grant of land revenue.— A grant of land revenue for the remuneration of a village Mulla does not constitute a wakf or endowment. The land is partible and heritable and if the holders do not perform the duties of the office, Government enforces its objects by levying full assessment *(j)*.

225. Enactments relating to administration of trusts, which apply to wakfs also.— The following is the list of enactments which provide for the protection, enforcement and administration of public endowments:—

(i) Official Trustees Act II of 1913.
(ii) Charitable Endowments Act VI of 1890, secs. 2, 3, 4, 5, 6 and 8.
(iii) Religious Endowments Act XX of 1863, sec. 14.
(iv) The Code of Civil Procedure, 1908 secs. 92-93.

If a suit is to obtain one or more of the reliefs mentioned in sec. 92(1) of the Code in respect of a wakf for a "public purpose," it must be brought with the sanction of the Advocate-General as provided by that section, but not if the wakf is not for a "public purpose." A suit in respect of a private imambara is not a suit in respect of a wakf for a "public purpose" *(k)*. Nor is a suit in respect of a wakf where the effect of the deed of wakf to give the property in substance to the settlor's family *(l)*. But a wakf for a mosque or a *khankhah* is a wakf for a public purpose, and a suit in respect of it must be brought in accordance with the provisions of that section *(m)*.

This was a suit brought by the President of the Mosque management committee for possession of certain properties. The wakfnama was made in favour of the mosque on April, 23, 1948 Wakif was first mutawalli till his death in May 1951. The wakif has reserved a life interest till his death. After his death the income was to be applied for the benefit of the mosque. The wakf was challenged. Following the views of Abu Yusuf the reservation of life interest by the wakif was upheld relying on the Mussalman Wakf Validating Act, 1913. It was held that there is no difference between a wakf for a mosque and one for other charitable purposes. (Case law discussed). It was also held that a suit by a trustee against a stranger does not require sanction of the Advocate General under S. 92 C.P.C. *Amir Bi* v. *Nalasandra Mosque* ('69) A. Mys. 103.

(f) Hussain Shah v. *Gul Muhammad* (1925) 6 Lah. 140, 88 I.C. 816, ('25) A.L. 420.

(g) Maule Shah v. *Ghane Shah* (1938) Bom L.R. 1071, 42 C.W.N. 1018, 175 I.C. 454, ('38) A.PC. 202; *Mahomed Bedial* v. *Shah Shamsuddin* ('48) A.C. 159.

(h) Muhammad Yusuf v. *Muhammad Shafi* (1935) All. L.J. 40, 153 I.C. 344, ('34) A.A. 1013; *Delrus Banoo* v. *Kazee Abdoor Ruhman* (1875) 15 Beng. L.R. 167, 53 W.R. 453.

(i) See *Kaur Sen* v. *Mamman* (1895) 17 All. 87. *Mst. Mundaria* v. *Shyam Sundar* ('63) A.P. 98.

(j) Maktumsab v. *Dadabhai* (1934) 36 Bom. L.R. 1098, 154 I.C. 684, ('34) A.B. 495; *Jaafar Mohi-ud-din Sahib* v. *Aji Mohi-ud-din Sahib* (1864) 2 Mad. H.C. 19.

(k) Asghar Ali v. *Delroos Banoo* (1877) 3 Cal. 324.

(l) Muhammad Shafiq v. *Muhammad* (1929) 51 All. 30, 111 I.C. 93. ('28) A.A. 660.

(m) Syed Shah v. *Syed Abi* (1932) 11 Pat. 288, 344-345, 136 I.C. 417, ('32) A.P. 33.

(n) Syed Ali v. *Bibi Akhtari* (1931) 10 Pat. 506, 134 I.C. 417, ('31) A.P. 354.

(v) Charitable and Religious Trusts Act XIV of 1920.

Gujarat and Maharashtra.—

(vi) The Bombay Public Trust Act, 1950 (Bom. Act XXIX of 1950).

For the statutes relating to the control of wakfs, see secs. 212, and 212-A, above.

The provisions of the Mussulman Wakf Act, 1923, and those of the Charitable and Religious Trusts Act, 1920, overlap. This difficulty has been met in the Bengal Wakf Act, 1934, and the U.P. Muslim Wakfs Act, 1936, by excluding the provisions of the Charitable and Religious Trusts Act, 1920.

Prior to this local legislation, however, it was held that if the wakf is substantially for public purposes of a religious or charitable nature it falls within the scope of the Act of 1920 and a party interested might either apply under that Act *(n)* or file a suit under sec. 92 of the Code of Civil Procedure *(o)*. But if the wakf is a mixed wakf, *i.e.* a wakf partly for public purposes and partly for private purposes, application must be made under the Mussulman Wakf Act, 1923 *(p)*.

(o) Najihuddin Ahmad v. *Amir Hasan* (1934) 153 I.C. 557. ('34) A.P. 443.

(p) Shabbir Husain v. *Asuq Husain* (1929) 4 Luck. 429, 117 I.C. 739. ('29) A.O. 225; *Ali Bakhtiyar* v. *Khandkar Altaf Husain* (1933) 60 Cal. 790, 145 I.C. 638, ('33) A.C. 581; *Emda Ali Chaudhari* v. *Tubulla* ('37) A.C. 313; *Yusufally* v. *Yusufally* (1952) 54 Bom. L.R. 702, ('53) A.B. 92.

CHAPTER XIII

PRE-EMPTION

226. Pre-emption.— The right of *shufaa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which had been sold to another person.

Hedaya, 547, Baillie, 475.

S. 4 of the Partition Act is confined not only to joint Hindu families or other families adopting Hindu notions of jointness, but also applies to Muslims who are undivided. The policy of the law behind pre-emption is the same as that of S. 4 of the Partition Act namely (i) to prevent the introduction of a stranger into a residential house and (ii) to bring the property under one owner eventually. *Yacub Khan* v. *Mst. Zaibunissa* (1974) 40 C.L.T. 202.

Married daughter enforcing right under S. 4 of the Partition Act cannot be regarded as a member of the family. *Bai Fatma* v. *Gulam Nabi* ('36) A. Bom. 197.

A *ghardamad* can be a member of the family. *Ahmad Khan* v. *Shaik Naijar* (1971) I C W R 448.

There was some doubt formerly as to whether pre-emption is a mere personal right or an incident of property. It was held in Calcutta (*a*) and Bombay (*b*), that the right of pre- emption is a right or *re-purchase* from the buyer. In Allahabad (*c*), it was held that it is an *incident of property.* The Supreme Court had now decided that the right of pre-emption is *an incident annexed to the property (d);* but although it is essentially a right *in rem,* its exercise, from the time it arises upto the time of the decree, is restricted as a personal right, which is neither heritable nor transferable (*e*).

The Supreme Court has also held that even if the law or pre-emption creates a right which attaches to property, it creates a restriction on the right guaranteed under Art 19(1)(f) of the Constitution to acquire, hold and dispose of property. Accordingly, it requires to be considered in each case whether the right of pre-emption is reasonable and in the interests of the general public and is thereby saved by Act. 19(5): *Bhau Ram* v. *Baij Nath* ('62) A.S.C. 1476; *Sant Ram* v. *Labh Singh* ('65) A.S.C. 314.

On the constitutional validity of the right of pre-emption of different kinds, see sec. 231.

Pre-emption is a right of substitution and not of repurchase. Thus the right of pre-emptor cannot be defeated by subsequently transferring the property in favour of another person (1910) I.L.R. 32 All. 45 and A.I.R. 1924 All. 806, Relied on;

Hence, where a suit was filed on 2nd January, 1958 to pre-empt a sale dated 2nd January, the date on which the subsequent transferee is impleaded as a party, which was after the expiry of limitation, is not material and the contention that the suit was barred by limitation has no force: A.I.R. 1914 Oudh 216; A.I.R. 1914 L.H. 402 and A.I.R. 1939 All. 158, Referred to *Pyare Mohan* v. *Rameshwar.* A.I.R. 1980 Raj. 116.

The right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means. In order to claim a right of pre-emption, it is necessary, first of all, for the plaintiffs to allege and prove that they were owners of the property on the basis of which they were claiming the right of pre-emption. Strangers have no right to join as co-plaintiffs. *Pyare Mohan* v. *Rameshwar* A.I.R. 1980 Raj. 116.

227. Law of pre-emption not applied in the Madras Presidency.— The Mahomedan law of pre-emption is applied by the Courts of India to

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(a) Kudratulla v. *Mahini Mohan* (1869) 4 Beng. L.R. 134.

(b) Humedmiya v. *Benjamin* (1929) 53 Bom. 525, 532- 533, 118 I.C. 543, ('29) A.B. 206.

(c) Gobind Dayal v. *Inayatullah* (1885) 7 All. 775; *Abdul Aziz* v. *Khairunnisa* (1949) Nag. 740.

(d) Audh Bihari Singh v. *Gajadhar* ('54) A.S.C. 417 (1955) 1 S.C.R. 70. See also *Bishan Singh* v. *Khazan Singh* ('58) A.S.C. 838; *Sheo Kumar* v. *Smt. Sudama Devi* ('62) A.P. 125. *Ram Baran Prasad* v. *Ram Mohit* ('67) A.S.C. 744 (where a pre-emption clause in a contract was held to be binding on assignees or successors-in- interest.)

(e) Mohd. Ismail v. *Abdul Rashid* (1956) 1 All. 143 (F.B.).

Mahomedans as a matter of "justice, equity and good conscience," except in the Madras Presidency where the right of pre-emption is not recognized at all [unless by local custom as in Malabar (*f*)]

The reason given by the Madras High Court in the earliest case on the subject for refusing to recognize the rights is that the law of pre-emption places a restriction upon the liberty to transfer property, and is, therefore opposed to "justice, equity and good conscience." The right of pre-emption in that case was claimed on the ground of vicinage (*g*).

See notes to sec. 5 above.

228. Special Acts.— The law of pre-emption in some Stages is regulated by special Acts, e.g., in the Punjab by the Punjab Pre-emption Act I of 1913, (*h*) which has since 1924 been extended with modifications to the North-West Frontier Province. It is regulated in Oudh by the Oudh Laws Act XVIII of 1876, and in Agra by the Agra Pre-emption Act XI of 1922. (*i*) These Acts apply to Mahomedans as well as non-Mahomedans, with the result that the rules of the Mahomedan law of pre-emption do not apply to Mahomedans in those places except on the footing of local custom (*j*). By section 3 of the Agra Act, however, there is a saving of the provisions of Mahomedan Law in certain cases where the vendor and the pre-emptor are both Mahomedans.

229. Pre-emption among Hindus.— The right of pre-emption is recognized by *custom* among Hindus who are either natives of, or are domiciled in (*l*) Bihar (*m*), Sylhet (*n*) and certain parts of Gujarat, such as Surat, Broach and Godhra (*o*), and it is governed by the rules of the Mahomedan law of pre-emption except in so far as such rules are modified by such custom (*p*).

Where the existence of any such custom is generally known and judicially recognized, it is not necessary to assert or prove it (*q*).

Under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans; Baillie, 447. Therefore, during the Mahomedan rule in India, claims for pre- emption were entertained by the Courts of the country, whether there were preferred by or against Hindus. In this way, the Mahomedan law of pre-emption came to the customary law of Behar and Gujarat. The law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being Sunnis of the Hanafi sect, and the same law is not

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(*f*) *Krishna Menon* v. *Kesavan* (1897) 20 Mad. 305.

(*g*) *Ibrahim* v. *Muni Mir Udin* (1870) 6 M.H.C. 26.

(*h*) See *Bhau Ram* v. *Baij Nath* ('62) A.S.C. 1476 where the provision for the right of pre-emption based on vicinage was held unconstitutional.

(*i*) See also: The Bhopal State Pre-emption Act, 1934; the Rewa State Pre-emption Act, 1946; The Berar Land Revenue Code (1928) Chap. XIV, s. 174.

(*j*) Wilson's Digest of Anglo-Muhammadan Law, s. 353.

(*l*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 988.

(*m*) *Fakir Rawot* v. *Emambaksh* (1863) Beng. L.R. (Sup. Vol.) 35; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Ramautar Singh* v. *Brijkishore* ('33) A.P. 653, 149 I.C. 931; *Rajakishore Kuer* v. *Mohammad Qaiyum* (1942) 198 I.C. 890, ('42) A.P. 366; *Sheo Kumar* v. *Smt. Sudama Devi* ('62) A.P. 125.

(*n*) *Geerischandra Bhattacharaya* v. *Rabindranath Das* (1934) 61 Cal. 694, 156 I.C. 512, ('35) A.C. 17.

(*o*) *Gordhandas* v. *Prankor* (1869) 6 B.H.C.A.C. 263 read with *Dahyabhai* v. *Chunilal* (1914) 38 Bom. 183, 185-188, 22 I.C. 289; *Jagjivan* v. *Kalidas* (1921) 45 Bom. 604, 60 I.C. 901. ('21) A.B. 188 [Surat – as to houses only, and not agricultural lands]; *Gokuldas* v. *Partab* (1916) 18 Bom. L.R. 693, 35 I.C. 871 [Godhra]; *Mahomed* v. *Narayan* (1916) 40 Bom. 358, 35 I.C. 933 [not in Khandesh]; *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 649, 42 I.C. 32 [not in Kolaba]; *Motilal* v. *Harilal* (1920) 44 Bom. 696, 57 I.C. 590 [Ahmedabad]; *Ram Chand* v. *Goswami* (1923) 45 All. 501, 74 I.C. 379, ('23) A.A. 513 [Benares – in respect of houses only, not agricultural lands].

(*p*) *Chakauri* v. *Sindari* (1906) 28 All. 590; *Jai Kuar* v. *Heera Lal* (1874) 7 N.W.P. I; *Jagannath* v. *Inderpal* (1935) All. L.J. 108, 153 I.C 172, ('35) A.A. 236. *Narayan* v. *Karthiayani* ('62) A. Ker. 122. *Sheo Kumar* v. *Smt. Sudama Devi supra.*

(*q*) *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575; 61 Cal. 694, *supra Audh Bihari Singh* v. *Gajadhar* ('54) A.S.C. 417.

applied to them in cases of pre-emption. But it is a necessary condition of the application of the Mahomedan law of pre-emption to Hindus in Behar and Gujarat that they should be either natives or, or domiciled in, those places. It is not enough that the party is a Hindu and owns immovable property in those places. Thus in a Calcutta case the right of a pre-emption was denied to a Hindu who was a co-sharer of certain immovable property in Behar, but who was neither a native of, nor domiciled in, that place (*r*). See notes to sec. 230 below. As to summary of the law in Bombay Presidency, see the under-mentioned case (*s*).

230. Pre-emption by contract.— (1) Rights of pre-emption may be created by contract between the sharers in a village (*t*).

(2) A Mahomedan vendor may agree with a Hindu purchaser that the Mahomedan law of pre-emption applying between the vendor and his co-sharer also a Mahomedan, should be applicable to the purchaser. Where such contract is entered into, and the vendor informs his co-sharer about it, and the co-sharer makes the "demands" as required by law [s. 236], he is entitled to pre-emption against the purchaser, though the purchaser may be a Hindu (*u*).

Introduction of the law of pre-emption into India.— In *Digambar Singh* v. *Ahmad* (*v*) their Lordships of the Privy Council said: "Pre-emption in village communities in British India had its origin in the Mahomedan law as to pre- emption and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provision and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Right of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights, and when they depend upon a custom or upon a contract the custom or the contract, as the case may be, must, if disputed be proved."

231. Who may claim pre-emption.— The following three classes of persons and no others, are entitled to claim pre-emption, namely:—

(1) a co-sharer in the property (*w*) [*shafi-i-sharik*];

A *mukarraridar* (lessee in perpetuity) holding under a co- sharer has no right to pre-empt as against another co-sharer (*x*);

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water (*y*) [*shafi-i- khalit*]; and

(3) owners of adjoining immovable property (*z*) [*shafi-i- jar*], but *not* their tenants (*a*), nor persons in possession of such property without any

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(*r*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 988.

(*s*) *Hamedniya* v. *Benjamin* (1929) 53 Bom. 525, 540- 542, 118 I.C. 548, ('29) A.B. 206.

(*t*) *Digambar Singh* v. *Ahmad* (1915) 37 All. 129, 141, 42 I.A. 10, 18, 28 I.C. 24.

(*u*) *Sitaram* v. *Syad Sirajul* (1917) 41 Bom. 636, 650-651, 42 I.C. 32.

(*v*) (1915) 37 All. 129, 140-141, 42 I.A. 10, 18, 28 I.C. 34.

(*w*) *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Syed Ebrahim* v. *Syed Khan* (1926 4 Rang. 13, 95 I.C. 83 ('23) A.R. 79 (co-heirs).

(*x*) *Mussamnat Bibi Salch* v. *Haji Amiruddin* (1929) 8 Pat. 251, 117 I.C. 865, ('26) A.P. 214.

(*y*) *Karim* v. *Priyo Lal* (1905) 28 All. 127; *Shivshankar* v. *Laxman* (1943) 45 Bom. L.R. 78, ('43) A.B. 83.

(*z*) *Aziz Ahmad* v. *Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504; *Abdul Shakur* v. *Abdul Ghafur* (1910) 7 All. L.R. 641, 6 I.C. 358.

(*a*) *Gooman Sing* v. *Tripool Sing* (1867) 8 W.R. 437.

lawful title (*b*) [Baillie, 481]. A wakif or mutawalli is not entitled to pre-empt, as the wakf property does not vest in him (*c*).

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed [Baillie, 500].

Exception.— The right of pre-emption on the third ground, viz., that of *vicinage* does not extend to estates of large magnitude, such as villages and zamindaris, but is confined to houses, gardens, and small parcels of land (*d*). The right, however, may be claimed by a *co-sharer (e)*.

Constitutional validity of pre-emption.— It has been held by the High Courts of Rajasthan, Madhya Bharat and Hyderabad and pre-emption on the ground of *vicinage* [sub-sec. (3) above] is void after 26th January 1950, as it imposes unreasonable restrictions on the rights guaranteed by Art. 19(1)(f) of the Constitution, but pre-emption as between co-sharers (*shafi-i-sharik*) or owners of dominant and servient tenements (*shafi-i-khalit*) is saved by Art. 19(5) of the Constitution (*f*).

In *Mahfooz Ali Khan* v. *Mohammed Ahsan* and others A.I.R. 1980 All 5 after stating that the Mahomedan Law of pre- emption would be unconstitutional if it violated fundamental rights to property, it was stated that the law entitling a *shafi-i-khalit* of pre-empt sale of property is a customary law and not a personal law of the Muslims and is unconstitutional under Art 19(i)(f) of the constitution. *Bhau Ram* v. *Baij Nath* (362) A.S.C. 1476 followed:

Muslim Law is also an existing law and can be declared void if violative of Art 19(i)(f). Babu Ram Verma's opinion to the contrary in his *Mahomedan Law in India and Pakistan* was rejected. Article 13(3)(a) includes "custom or usage having in the territory of India the force of law" and therefore, the customary law, of pre-emption is law within the meaning of law in article 13. Reference of law of pre-emption as 'existing law' is not very apposite as that expression is specially defined in Art. 366(10) and that definition does not apply. The observation of the learned judge — differently to 'existing law!'

"The very fact that the Muslim law of pre-emption was applied in certain parts of the country to owners of property irrespective of their religious permission shows that it was not applied as the personal law to the Muslims but as a customary law of that local area."

It was further held in Hyderabad that where the right arose before the commencement of the Constitution but was not exercised until after the commencement, it could not be enforced (*g*). Although the Bombay, Allahabad and Patna High Courts took a different view and upheld the constitutional validity of pre-emption by all the three clauses of persons mentioned above (*h*), the Supreme Court has now approved the views of the other High Courts. It

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(b) Beharee Ram v. *Shoobhudra* (1868) 9 W.R. 455.

(c) Jivraj Kunwar v. *Irfan Ali* ('52) A.A. 686.

(d) Mahomed Hossein v. *Mohsin Ali* (1870) 6 B.L.R. 41, 50; *Abdul Rahim* v. *Kharag Singh* (1892) 15 All. 104; *Munno Lal* v. *Hajira Jan* (1910) 33 All. 28. 7 I.C. 404; *Imambakhsh Shah* v. *Muhammad Khan* (1954) Kar. 374, 223 I.C. 634, ('46) A.S. 55; *Mahmood Hasan* v. *Bhikhari Lal* ('53) A.A. 705.

(e) Sitaram v. *Sayad Sirajul* (1917) 41 Bom. 636, 652-653, 42 I.C. 32; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659 [Mahal]; *Said-ud-din* v. *Latif-un-nissa* (1922) 44 All. 114, 64 I.C. 456, ('22) A.A. 391 [Zemindari]; *Ladhi Bibi* v. *Masaddar Ali* ('49) A. Ass. 81.

(f) Punch Guja v. *Amar Singh* ('54) A. Raj. 100 (F.B.) *Shankerlal* v. *Poonamchand* ('54) A. Raj. 231; *Babulal* v. *Gowardhandas* ('54) A. Madh. Bh. 1 (F.B.); *Moti Bai* v. *Kandkari Chanayya* ('54) A. Hyd. 161.

(f1) Mahfooz Ali Khan v. *Mohammed Ahsan* A.I.R. 1980 All. 5.

(g) Rangnath v. *Babu Rao* ('56) A. Hyd. 120.

(h) Bhimrao v. *Patilbua* ('60) A.B. 552. *Sant Ram* v. *Labh Singh* ('62) A. Al. 199; *Sheo Kumarw* v. *Smt Sudama Devi* ('62) A.P. 125; *Nathuni Ram* v. *Gopinath* ('62) A.P. 226.

has held a statutory (*i*) or a customary (*j*) right or pre-emption based on *vicinage* to be unconstitutional but has upheld the validity of such a right based on co-ownership and on certain appendages, such as a common staircase or a common entrance (*k*).

(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is not a co-sharer, nor a participator in the appendages of the house, nor an owner of *adjoining* property: *Pershadi Lal* v. *Irshad Ali* (1870) 2 N.W.P. 100.

(b) *A* owns a house which he sells to *B*. *M* owns a house towards the north of *A*'s house, and is entitled to a right of way through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*: see *Ranchoddas* v. *Jugaldas* (1899) 24 Bom. 114: *Karim* v. *Priyo Lal* (1905) 28 All. 127. It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act. In such a matter the rules of Mahomedan law are to be applied, and that law does not prescribe any period which would give a person the right to enjoy an immunity, such as a right of way *(l)*. This view has been doubted in a subsequent case of the same High Court and it has been observed that the right of way should be a right which has accrued under the Easements Act *(m)*.

Note.— In the above illustration, the house owned by *M* is a dominant heritage, and the pre-empted house is a servient heritage, for *M* has a right of way through it. But *M* would not the less be a "participator in the appendages," if the pre-empted property was the dominant heritage and his property was the servient heritage: *Chand Khan* v. *Naimal Khan* (1869) 3 B.L.R.A.C. 296; and *M* would still be a "participator," if his house and the pre-empted house were both dominant tenements having a right of easement against a third property: *Mahatab Singh* v. *Ramtahal* (1868) 6 Beng. L.R. at p. 43 (foot-note).

(c) *In Jagdish Saran* v. *Bijraj Kishore* ('72) A. All. 313 following the Supreme Court in *Bhauram* v. *Baijnath Singh* 1962 A.S.C. 1476 it was held that the right to discharge water from roof through a common spout was an appendage which could not exist in view of Art 19(1)(f) of the Constitution. Similarly, the right to rest the beams on the defendant's wall constituted the plaintiff a *Shafi-i-jar* and not *Shafi-i-sharik*.

Hedaya, 548-550; Baillie, 481, 484; 500.

(d) The custom of pre-emption is void under Art. 13 of the Constitution so far as it gives a right of pre-emption to a *Shafi-i-khalit* who is merely the owner of an easementary right in the property sought to be pre-empted. *Mahboob Hasan* v. *Ram Bharosey* ('66) A.A. 271.

Right of pre-emption arises from ownership.— The right of pre-emption cannot be resisted on the ground that the pre- emptor was not in possession of his own property at the date of the suit. It is *ownership,* and not *possession,* that gives rise to the right *(n)*. Therefore a mukarraridar under a co-sharer or a permanent tenant has no right or pre- emption *(o)*, while a birtdar who holds a rent-free grant has the right *(p)*.

Discussing the constitutionality of the law of pre-emption, it was said that the right of pre-emption on the ground of vicinage was unconstitutional and void because a mere right to easement is also not enough. However, a sharing in appendages, without which the property cannot be enjoyed, made the claim constitutional as it interfered with the pre-emptors right to hold, acquire

(i) Bhau Ram v. *Bhij Nath* ('62) A.S.C. 1476; See also *Sawanath* v. *Faqir Chand* ('65) A.J. & K. 62.

(j) Sant Ram v. *Labh Singh* ('65) A.S.C. 314. See also *Saliman Bibi* v. *Hafiz Mohd.* ('64) A. All. 372.

(k) Bhau Ram v. *Baij Nath* ('62) A.S.C. 1476. See also *Sewanath* v. *Fakir Chand* ('65) A. J. & K. 62.

(l) Baldeo v. *Badri Nath* (1909) 31 All. 519. 2 I.C. 458.

(m) Abdul Rahman v. *Mohamed Ismail* (1947) All. L.J. 282, 227 I.C. 203, ('47) A.A. 85.

(n) Sakina Bibi v. *Amiran* (1888) 10 All. 472.

(o) Mt. Bibi Solcha v. *Haji Amiruddin* (1929) 8 Pat. 251, 117, I.C. 865, ('29) A.P. 214; *Dashrathmal Chaganmal* v. *Bai Dhondubai* (1941) Bom. 460, 43 Bom. L.R. 581, ('41) A.B. 262.

(p) Chariter v. *Bhagwati* (1934) 152 I.C. 983, ('34) A.P. 596.

and dispose of property and thus came under Article 19(i)(f). Such a claim was held valid *(p1)*.

With the repeal of Article 19(i)(f) the position has altered and the application of these older cases must be carefully considered. *Phulchand* v. *Lala Neemchand,* A.I.R. 1978, All. 539.

A right of pre-emption imposes a restriction on the right of both vendor and vendee to acquire property and was, therefore, hit by Art. 19(i) of the Constitution of India . . . However, sub-clause (5) of the article permits reasonable restrictions. After considering several authorities the case held that the right of pre-emption by a servient tenement holder to pre-empt dominant tenement is not protected by sub-clause (5).

Full ownership in land pre-empted.— There must be also full ownership in the land pre-empted, and therefore the right of pre-emption does not arise on the sale of the leasehold interest in land *(q)*. If no right pre-emption can be claimed with respect to leasehold land, such a right cannot be claimed in respect of the house which stands on that land. *Nathuni Ram* v. *Gopinath* ('62) A.P. 226.

Pre-emptors of same class.— When pre-emption is claimed by two or more persons on the ground of participation in a right of way, all the pre-emptors have equal rights, although one of them may be a contiguous neighbour *(r)*. The reason is that the Mahomedan law does not recognize degrees of nearness in the same class or pre-emptors *(s)*. But nearness may be recognized by custom *(t)*. The rule of the law of pre- emption which gives preference to a partner in the house over a partner in the mansion and to a partner in the house over a partner in the party wall even when they are co-sharers belonging to the same class has been held to be reasonable and therefore not hit by Art. 14 or Art. 19 of the Constitution: *Jagan Nath* v. *Radhey Shyam*: ('60) A. Raj. 75.

Vendee in the category of pre-emptors.— The same rule applies if the vendee is himself in the category of pre-emptors. The property is in that case equally divided between the vendee and the pre-emptor *(u)*.

Tree with overhanging branches.— The fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi-i-khalit* on a sale of that land *(v)*.

Right to draw water from water-course.— Where the owner of lands have the right to draw water from a Government water course, they cannot claim the right of pre-emption, as *Shafi-i-Khalit.* This does not make them co-sharers in appendages or give them easement rights over the neighbour's land.

Easement of light and air.— The Rajasthan High Court has held that the right of pre-emption as *Shafi-i-Khalit* cannot be claimed on the basis of the right to light and air; and that such right does not extend to easement other than a right of way and water: *Ladu Ram* v. *Kalyan Sahai* ('63) A. Raj. 195.

Villages and zemindaris.— The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large magnitude is that the law of pre-emption "was intended to prevent vexation to holders of *small* plots of land who might be annoyed by the introduction of a stranger among them". But this principle applies only when the right of pre- emption is claimed merely on the ground of *vicinage.* It does not apply where the right is claimed by a co-sharer.

Female.— A female is not precluded from maintaining a suit for pre-emption, if she by law is entitled to inherit, even though it may be a widow's estate *(w)*. But a female entitled to maintenance

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(p1) Rajendra Kumar v. *Parmeshwardas Mittal* A.I.R. 1981 All. 391.

(q) Baboo Ram Golam Singh v. *Nursing Sahoy* (1876) 25 W.R. 43, (relied on in *Dashrathmal Chaganmal* v. *Bai Dhondubai) supra; Audh Bihari Lal* v. *Gajadhar* (1955) 1 S.C.R. 70, ('54) A.S.C. 417; *Rameshwar Lal Marwari* v. *Pandit Ramdeo Jha* ('57) A.P. 695.

(r) Karim Baksh v. *Chuda Bakhsh* (1894) 16 All. 247. See also *Bachan Singh* v. *Bijai Singh* (1926) 48 All. 221. 90 I.C. 238, ('26) A.A. 180.

(s) Said-ud-din v. *Latif-un-nissa* (1922) 44 All. 114, 116-117, 64 I.C. 456, ('22) A.A. 391; *Nageshar* v. *Ram Harakh* (1924) 46 All. 370, 79 I.C. 417, ('24) A.A. 541; *Imambakhsh Shah* v. *Muhammadali Khan* (1945) Kar. 374, 223 I.C. 643, ('46) A.S. 55.

(t) Dhanraj v. *Rameshwar* (1923) 46 All. 170, 78 I.C. 904, ('24) A.A. 227.

(u) Ramautar Singh v. *Brijkishore* ('33) A.P. 653, 149 I.C. 931.

(v) Aziz Ahmad v. *Nazir Ahmad* (1928) 50 All. 257. 103 I.C. 897, ('27) A.A. 504.

(w) Ishar Devi v. *Sheo Ram* (1924) 5 Lah. 435, 84 I.C. 484, ('25) A.L. 83.

only is not entitled to pre-empt *(x)*.

Sale by one of several co-sharers to another.— See sec. 235 below.

Shia law.— By the Shia law the only persons entitled to the right of pre-emption are co-sharers; Baillie, II, 179; *Qurban* v. *Chote (y)*, and that too if the number of co-sharers does not exceed two *(z)*.

232. Sale alone gives rise to pre-emption.— The right of pre-emption arises only out of a valid *(a)*, complete *(b)*, and *bona fide (c)* sale. It does not arise out of gift *(hiba)*, *sadaqah* (s. 171), wakf, inheritance, bequest *(d)*, or a lease even though in perpetuity *(e)*. Nor does it arise out of a mortgage even though it may be by way of conditional sale *(f)*; but the right will accrue, if the mortgage is foreclosed *(g)*. An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property and does not give rise to the right of pre-emption. But if one of the parties dies without cancelling the exchange, the transaction will mature into two sales and will give rise to the right of pre-emption *(h)*. It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for pre-emption *(i)*. On the other hand, the Chief Court of Oudh has held that the transaction amounts to a *hiba-bil-ewaz*, and no claim for pre-emption can therefore arise *(j)*. The right of pre-emption arises not only out of a private sale, but also out of a sale by the Court or a receiver *(k)*.

Where there is no law governing the case, the Courts in India have acted according to justice, equity and good conscience. Section 37(2) of the Bengal, Agra and Assam Civil Courts Act, 1887 accepts this position in express language. Foreign decisions have been applied in appropriate cases in this country as supplying rules of justice, equity and good conscience provided of course the circumstances relevant in this regard are similar. The right of pre-emption granted by Section 16(3) of the Act is similar in quality to that under Mahomedan Law, applicable to Bihar by custom, except that it can be claimed only by cosharers or adjoining raiyats and the right is of one uniform class. In Section 227 of Mulla's principles of Mahomedan Law, it is stated that Mahomedan law of pre-emption is applied by Courts of India as a matter of justice, equity and good conscience (except in the Madras Presidency). In the circumstances, I am of the view that the rule laid down by Mahomedan Law should be applied to decide the present question which is not answered by the

(x) Karan Singh v. *Muhammad* (1885) 7 All. 860; *Bhupal* v. *Mohan* (1897) 19 All. 324.

(y) (1899) 22 All. 102.

(z) Abbas Ali v. *Maya Ram* (1888) 12 All. 229; *Husain Bakhsh* v. *Muhfuz-ul-Haq* (1925) 47 All. 944, 48 I.C. 972, ('25) A.A. 559.

(a) Hedaya, 560; Baillie, 475-477; *Najm-un-nissa* v. *Ajaib Ali* (1900) 22 All. 343 [where the price was not ascertained at the date of the contract].

(b) Hedaya, 560; Baillie, 475-477.

(c) Parsashth Nath v. *Dhanai* (1905) 32 Cal. 988. *Chinna Kanji* v. *Kesavan* ('66) A. Ker. 260 (a case relating to a court sale).

(d) Baillie, 471.

(e) Dewanatulla v. *Kazem Molla* (1887) 15 Cal. 184.

(f) Gurdial v. *Tekharayan* (1865) B.L.R. Sup. Vol. 166.

(g) Batul Begam v. *Mansur Ali* (1901) 24 All. 17.

(h) Muhammad Yunis v. *Muhammad* (1931) 53 All. 169, 130 I.C. 295, ('31) A.A. 106.

(i) Fida Ali v. *Muzaffar Ali* (1882) 5 All. 65; *Nathu* v. *Shadi* (1915) 37 All. 522, 29 I.C. 495, doubted by Ameer Ali, 4th ed., Vol. I. p. 713.

(j) Bashir Ahmad v. *Musamat Zubaida* (1926) 1 Luck. 83, 93 I.C. 265, ('26) A.O. 186; *Chaudhri Talib Ali* v. *Musammat Kaniz* (1927) 2 Luck. 575, 102 I.C. 142, ('27) A.O. 204.

(k) Brij Narain v. *Kedar Nath* (1923) 45 All. 186, 71 I.C. 836, ('23) A.A. 57. *Chinna Kunj* v. *Kesavan* ('66) A. Ker. 260.

Act. In the Mahomedan Law, there are different classes of right of pre-emption and this aspect is irrelevant in the context of Section 16(3) as only one uniform class of right is envisaged by the section. However, when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed (see Baillie, 500, and Mulla Section 231). *Basudev Choudhary* v. *State of Bihar* A.I.R. 1984 Pat. 178.

It has however been held by the High Court of Allahabad that the right of pre-emption arises not only when an out-and-out sale has been completed, but also when a complete contract of sale without any option to the vendor, has been made *(l)*.

Explanation.— According to the Mahomedan law a sale is an exchange of property for property with the mutual consent of the parties, the exchange consisting in payment of price by the purchaser to the vendor and delivery of possession by the vendor to the purchaser. The execution of an instrument of sale is not necessary *(m)*. According to the Transfer of Property Act, 1882, sec. 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. It has been held by a Full Bench of the Allahabad High Court that, although the rules of the Mahomedan law of sale have been superseded by the provisions of the Transfer of Property Act the question whether a sale is complete so as to give rise to the right of pre-emption is to be determined by applying the Mahomedan law, and if a complete sale is effected under that law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act *(n)*. On the other hand, some judges have expressed the opinion that the right of pre- emption does not arise until after registration as required by the Transfer of Property Act *(o)*. In *Jadu Lal* v. *Janki Koer (p)*, Brett, J., suggested that a solution of the problem was to be found in determining in each case what was the intention of the parties as to the date when the sale should be considered as complete. The rule suggested by Brett, J., when adopted by some judges in Calcutta *(q)* and Patna *(r)* and also by the High Court of Bombay in *Sitaram* v. *Sayad Sirajul (s)*. The decision of the Bombay Court in *Sitaram's* case was affirmed on appeal by the Judicial Committee. In the course of the judgment their Lordships of the Privy Council said: "You are to look at the intention of the parties (that is, the vendor and the vendee) in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed" *(t)*. In a case decided while *Sitaram's* case was under appeal the Bombay High Court followed the Full Bench decision of the Allahabad High Court *(u)*. In a later case the Calcutta High Court said that if there is nothing

(l) Zamani Begam v. *Khan Muhammad* (1924) 46 All. 142, 81 I.C. 586, ('24) A.A. 251, follg. *Begam* v. *Muhammad* (1894) 16 All. 344, 347 (F.B.).

(m) Hedaya, 241; Macnaghten, 42; Baillie, 476; *Begam* v. *Muhammad* (1894) 16 All. 344, 346-348.

(n) Begam v. *Muhammad* (1894) 16 All. 344 [F.B.]; *Najm-un-nissa* v. *Ajaib Ali* (1900) 22 All. 343; *Janki* v. *Girjadat* (1885) 7 All. 482 [F.B.].

(o) Banerji, J., in (1894) 16 All. 344, 356 [F.B.] *supra;* Cardnuff, J. *Budhai* v. *Sonaullah* (1914) 41 Cal. 943, 949, 23 I.C. 385; Mullick J., in *Kheyali* v. *Mullick* (1916) 1 Pat. L.J. 174, 177-178, 34 I.C. 210.

(p) (1908) 35 Cal. 575, 599, affimd. in (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659.

(q) Richardson, J., in (1914) 41 Cal. 943, 953, 23 I.C. 385, *supra.*

(r) Roe, J., in (1916) 1 Pat. L.J. 174, 179, 34 I.C. 210, *supra.*

(s) (1917) 41 Bom. 636, 651-652, 42 I.C. 32.

(t) Sitaram v. *Jiaul Hasan* (1921) 45 Bom. 1056, 48 I.A. 475, 481, 64 I.C. 826, ('23) A.PC. 41.

(u) Abdullah v. *Ismail* (1922) 46 Bom. 302, 64 I.C. 913, ('22) A.B. 124.

to indicate what the intention of the parties was, the right of pre-emption arises on registration *(v)*.

The Supreme Court has now held in *Radhakisan Laxminarayan* v. *Shridhar (w)* that the transfer of property where the Transfer of Property Act applies has to be under the provisions of that Act only and Mahomedan Law or any other personal law of transfer of property cannot override the statute. Therefore unless the title has passed in accordance with the Act, no right to enforce pre-emption arises.

The importance of the question now under consideration arises in this way. A Mahomedan is not entitled to pre-empt unless he makes the "demands" required by law (s. 236). These demands should not be made before the sale is completed. They should be made after the sale is completed, and immediately after the pre- emptor hears of the sale, that is, a completed sale. Now a sale according to the Mahomedan law is completed by payment of the price by the purchaser to the vendor and by delivery of possession by the vendor to the purchaser. But a sale under the Transfer of Property Act is not complete unless made by a registered instrument. Hence the view taken by some Judges and not approved by the Supreme Court that the "demands" should be made after *registration* of the sale deed."

This principle in *Radhakisan Laxminarayan* case appears to have been confirmed by the Supreme Court in the subsequent case of *Ram Saran Lall* v. *Mst. Domini Kuer* ('61) A.S.C. 1747, where it was held that when a sale under s. 54 of the Transfer of Property Act could only be made by a registered document, the *talab-i-mowasibat* was prematurely made when registration of the sale deed was not complete by being copied out in the records of the Registration Office as provided in s. 61 of the Registration Act.

A contention raised in this case that in view of s. 47 of the Registration Act a registered document operated from the time it would otherwise have operated and the sale was completed on the date of its execution, was rejected by the majority. But it is of interest to note the views on this point contained in the majority Judgment which observes: "A contention that though the Muslim Law of sale is superseded by the Transfer of Property Act and the Registration Act, but yet the provision contained in s. 47 of the Registration Act is inapplicable to determine when a sale effected by a registered instrument should be complete, could not be sustained on any principle of logic, or of course of any rule of interpretation of statutes"; ". . . the time when the sale becomes complete so as to entitle the pre-emptor to perform the *talabs,* should be determined by the application of the principle of intention laid down in s. 47 of the Registration Act which is as much a part of the positive law governing the right of pre-emption as the provision of s. 54 of the Transfer of Property Act which requires a registered instrument to effect a sale which gives rise to a right of pre-emption."

Another view in support of the principle of intention has been that unless this principle is followed, the vendor and vendee, with a view to defeat the pre-emptor may not execute and register a sale deed, and may complete the transaction by payment of price and delivery of possession so as to deprive the pre-emptor of the right of pre-emption. Hence the rule on the basis on 'intention' suggested by Brett J., and approved by the Judicial Committee. [*That view has much to commend itself.*]

Following *Ramsaranlal* v. *Mst. Domini Kuer* 1961 A.S.C. 1747 the necessary demands in a pre-emption suit has to be made after the sale and been completed not by execution or registration of the sale deed but by the sale deed having been copied out in the Sub Registrars' Books and it would be the date entered in that book which has to be considered as the date of sale. *S. K. Mohd. Rafiq* v. *Khalilul Rehman* ('72) A.S.C. 21 62.

However, the Supreme Court has now held that the right of pre- emption is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means "The right of

(v) Nareshchandra Dutta v. *Gireeschandra Das* (1936) 62 Cal. 979, 160 I.C. 730, ('36) A.C. 17.

(w) ('60) A.S.C. 1368.

pre-emption is a weak right . . . the courts would not go out of their way to help the pre-emptor" *Radhakishan* v. *Shridhar*: ('60) A.S.C. 1368 (see also: *Bishan Singh* v. *Khazab Singh* ('58) A.S.C. 838).

In *Munnilal* v. *Bishwanath* ('68) A.S.C. 450, the case concerned *Parjoti* (lease-hold) lands in the City of Benaras. The question was if they could be pre-empted. The plaintiff claimed that he owned a house and land to the South of the property sold, and was entitled to pre-empt by right of vicinage and appendages. The property to be pre-empted was a *Khandar* (ruins). He claimed a custom which was denied. It was also claimed that the right of pre-emption did not apply to lease-hold land, the Courts below had held the local custom proved and that it was co-extensive with Mahomedan Law. The Supreme Court, however, held that it was not proved that the custom extended to *parjoti* lands. It held that Mahomedan Law applied the right of pre-emption only to full ownership in the land to be pre-empted and not to lease-hold rights. The following cases were cited with approval: *Baboorain Golam Singh* v. *Nursing Sohoy* (1875) 25 Suth. W.R. 43, a case of *mokurruree* (permanent lease) land, *Phul Mohammad Khan* v. *Kazi Kutubbuddin* I.L.R. (1937) 16 Pat. 519 = ('37) A. Pat. 578 (*mokurruree* and *raiyati* lands); *Dasrathlal Chagganlal* v. *Bai Dhondubai* I.L.R. 1941 Bom. 460 = ('41) A. Bom. 262; *Rameshwarlal* v. *Ramdeo Jha* ('57) A. Pat. 659 (*raiyati* lands).

Both vendor and pre-emptor must be full owners of their respective hereditaments and this applies whether the claim is by right of cosharership, vicinage or participation in amenities and appendages. The case of *Bhagwati Prasad* v. *Balgobind* ('33) A. Oudh 161 was distinguished as that case was decided under Oudh Laws Act.

A right of pre-emption does not arise on sale of lease-hold right and the pre-emptor must also be full owner to maintain it. The Court also approved of *Oudh Behari Singh* v. *Gajadhar Jaipuria* ('55) A. All 698 which was also a case of *parjoti* lands in the same *mohalla* of the City of Benaras.

When there is a contract of sale and before the sale is complete, the vendor alone is not entitled to convey the property to a pre-emptor to the prejudice of the vendee and thus defeat the contract; the vendor and vendee must both agree for this to be done; though after the sale is completed, the vendee alone can surrender his rights: *Qamruddin Naib* v. *Brijmohandas* ('62) A.M.P. 25.

A agrees to sell his house to *B* in January 1918 for Rs. 300. On the 1st February 1918 *B* pays the purchase-money to *A*, and obtains possession of the house from *A*. The sale-deed is registered on the 1st March 1918. The pre-emptor comes to know of the payment of price and delivery of possession on the 15th February 1918, but he does not make the demands (s. 236) until the 2nd March 1918, being the date on which he first comes to know of the registration. Is he entitled to pre-emption? (1) No, according to the Allahabad High Court *(x)*, for the sale, according to that Court, became complete on payment of the price and delivery of possession, and the pre-emptor having failed to make the "demands" on the 15th February when he first came to know of it, the right of pre-emption is lost by delay. (2) According to the rule now settled by the Supreme Court, if the Transfer of Property Act applies, the sale is to be regarded as complete on *registration*. The pre-emptor is entitled to pre-emption, for he made the "demands" when he first came to know of the registration. In fact, if he had made the "demands" *before* registration they would have been premature, and he would not have been entitled to pre-emption unless he made the "demands" again immediately *after* he came to know of registration. (3) In accordance with the principle of "intention" previously followed in some cases and commended in the minority judgment in *Ram Saran Lall's* case, the intention of the parties would be the sole guide. Therefore, if in the case put above, possession was not given and no part of the price was paid till registration, the intention of the parties would be taken to be that they did not regard the sale to be complete till registration, and the "demands" in such a case should be made immediately after the pre-emptor hears of the registration *(y)*. But if the contract of sale says, "I have agreed to sell you my share for Rs. 29,000, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that a former deed of sale shall be executed and registered," and the agreement further contemplates a notice of the transaction to be given by the vendor of his co-sharer on the same day, and provides that if the co-sharer elects to purchase the vendor's share, the vendor should immediately return the Rs. 1,000

(x) Begam v. *Muhammad* (1894) 16 All. 344 [F.B.]. *Budhai* v. *Sonaullah* (1914) 41 Cal. 943, 950, 954, 23 I.C. 385.

(y) Jadu Lal v. *Janki Koer* (1908) 35 Cal. 575;

to the purchaser, it would have been the date of the agreement which would be taken as the date of the sale and it is with reference to that date that the co-sharer (pre-emptor) would have been required to perform the necessary ceremonies *(z)*.

Lease in perpetuity.— A lease even though in perpetuity does not give rise to the right of pre-emption. The Allahabad High Court has, however, held that a transaction, though in form a lease, may in truth and substance be a sale, as where the property is of the value of Rs. 2,000 and a lease is given for 99 years under which Rs. 1,950 are paid as premium and Rs. 1 is reserved as annual rent. In such a case the pre-emptor is entitled to pre-emption, though the transaction is in form a lease. The Mahomedan law does not recognize the device of dressing up a transaction of sale in the garb of a lease so as to defeat the right of pre-emption *(a)*. It is difficult to see how on the facts stated above, the lease could be regarded as a sale. See sec. 247 below.

The principle that a Court in determining whether a right of pre-emption exists should look to the real nature of the transaction is well established. A deed purporting to be a *sankalap* or gift to a guru but which is really a sale gives rise to a right of pre-emption *(b)*; and so does an ostensible usufructuary mortgage which is really a sale *(c)*. The Oudh Laws Act gives a right of pre-emption on the sale of a proprietary or under-proprietary tenure and the Chief Court has held that a transaction described as a permanent lease by which a superior proprietor carves out under-proprietary rights heritable and transferable without reserving a right of re-entry amounts to a sale of an under-proprietary tenure and gives rise to a right of pre-emption *(d)*. Under the same Act a member of the village community is entitled to pre-empt and a lessee with heritable and transferable rights has been held to be a member of the village community and entitled to pre-empt *(e)*.

Whether the demands were premature or had complied with the rules of Mahomedan law is a mixed question of law and fact which can only be decided on viewing the total evidence. *S. K. Mohd. Rafiq* v. *Khalilul Rehman* ('72) A.S.C. 2162.

Rights as between pre-emptor and vendee.— Where there is a defect in the vendor's title, the pre-emptor cannot compel the vendee to make good the defect *(f)*.

233. Ground of pre-emption must continue until the decree is passed.— The right in which pre-emption is claimed — whether it be co-ownership, or participation in appendages, or vicinage — must exist not only at the time of sale, but at the date of the suit for pre-emption *(g)*, and it must continue up to the time the decree is passed *(h)*. But it is not necessary that the right should be subsisting at the date of the execution of the decree *(i)* or at the date of the decree of the appellate Court *(j)*. The reason is that the crucial date in these cases is the date of the decree of the Court of first instance *(k)*. The pre-emptor must hold the land until the pre-emption matter is finally decided by the ultimate Court i.e., the Board of Revenue and that shall be the crucial date and not the date on which the order has been passed by the Land Reforms Deputy Collector. In *Bhagwan Das* v. *Chet Ram*, A.I.R. 1971 SC 369 also it was held

(z) Sitaram v. *Jiaul Husan* (1921) 45 Bom. 1056, 48 I.A. 475, 64 I.C. 826, ('23) A.P.C. 41.

(a) Muhammad v. *Muhammad* (1918) 40 All. 322, 44 I.C. 227.

(b) Pandit Bhugwan Dutt v. *Brij Bhukhan* (1935) 10 Luck. 289, 152 I.C. 666. ('35) A.O. 27.

(c) Bhagwana v. *Shadi* (1934) 16 Lah. 408, 155 I.C. 654, ('34) A.L. 878.

(d) Jagdeo Singh v. *Ram Naresh Singh* (1935) 10 Luck. 392, 153 I.C. 334, ('35) A.O. 217.

(e) Bhagwati Prasad v. *Balgovind* (1935) 8 Luck. 377, 142 I.C. 885, ('33) A.O. 161.

(f) Motilal Gorilal v. *Pampal Jogannath* ('57) A. Raj. 248.

(g) Janaki Prasad v. *Ishar Das* (1899) 21 All. 374.

(h) Ram Gopal v. *Piari Lal* (1899) 21 All. 441; *Tafazzul* v. *Than Singh* (1910) 32 All. 567, 6 I.C. 426; *Nuri Miran* v. *Ambica Singh* (1917) 44 Cal. 47, 34, I.C. 869; *Mohd. Ismail* v. *Abdul Rashid* (1956) 1 All. 143 (F.B.); *Sobh Nath* v. *Ambika Prasad* ('58) A.A. 419. *Satar Mohd.* v. *Saraf-ud-din* ('62) A. J. & K. 79.

(i) Ram Sahai v. *Gaya* (1884) 7 All. 107.

(j) Baldeo Misir v. *Ram Lagan* (1923) 45 All. 709, 77 I.C. 694, ('24) A.A. 82; *Umrao* v. *Lachman* (1924) 46 All. 321, 79 I.C. 217, ('24) A.A. 448.

(k) (1923) 45 All. 709, 710, 77 I.C. 694, ('24) A.A. 82, *supra*: *Haji Sultan* v. *Masitu* (1926) 48 All. 689, 96 I.C. 744, ('26) A.A. 749; *Sir Thakur Radhika* v. *Bohra Shiam* (1923) 45 All. 561, 74 I.C. 382, ('23) A.A. 526, *Narayana* v. *Karthiayani* ('62) A. Ker. 122.

that the pre-emptor in order to succeed must have a right to pre-empt not only at the time of sale of the land by the landlord but also at the time of institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial Court *(l)*.

Thus if a plaintiff, who claims pre-emption as owner of a contiguous property, sells his property to another person *after institution of the suit*, he will not be entitled to a *decree*, for he does not then belong to any of the three classes of persons to whom the right of pre-emption is given by law: see sec. 231 above. Similarly if a co-sharer or a pre-emptor of a superior class enforces his right while the suit is pending the plaintiff will not be entitled to a decree; but if the pre- emptor allows his right to become time-barred, a decree in favour of the plaintiff may be passed *(m)*. But once the decree is passed, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may be alienated the property before execution or alienated it before the date of the decree of the appellate Court. It need hardly be mentioned that a plaintiff does not forefeit his right of pre-emption merely because he had on a previous occasion mortgaged his own share on which his right of pre-emption depends *(n)*.

A pre-emptor can be non-suited by the vendee acquiring at any time before his suit is decreed a right of pre-emption equal or superior to his own. Thus the vendee's status may improve by subsequent legislation *(o)*.

The right is lost by joinder of plaintiffs not entitled to Pre- empt; S. 241. But see the full bench decision of the Punjab High Court in *Bachan Singh* v. *Bhupal Singh* ('66) A. Punj. 36 (a case under the Punjab Pre-emption Act I of 1913) holding that where a person having no right of pre-emption is made a co-plaintiff by a pre-emptor, the latter's right is not forfeited.

234. Doubt as to whether buyer should be a Mahomedan.— According to the Allahabad *(p)* and Patna *(q)* decisions, it is not necessary, to enforce the right of pre- emption, that the buyer should be a Mahomedan. According to the Calcutta *(r)* and Bombay *(s)* decisions, the buyer must be a Mahomedan except in the cases mentioned in secs. 229 and 230. All the three Courts, however, are agreed that the seller and the pre-emptor should both be Mahomedans *(t)*.

There are no Madras decisions, because in Madras the law of pre- emption is not applied even as between Mahomedans [s. 227].

In Hyderabad State, pre-emption is neither a customary nor a territorial law, but is administered only as part of the personal law. Hence, where both the vendor and pre-emptor are Muslims, they will be governed by their personal law, and pre-emption will apply to them *(u)*.

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan and subsequently wants to sell the pre- empted property, he is bound to offer it to his Mahomedan neighbors or partners before he can sell it to a stranger. But a non-Mahomedan is not subject to any such obligation, and he can sell it to any one he likes. The law of pre-emption contemplates both a right and an obligation, and if a non-Mahomedan were allowed to pre-empt, it would be

(l) Ishaque Hajam & others v. *Additional Member, Board of Revenue* A.I.R. 1986 Pat. 53.

(m) Sheik Salamat Ali v. *Nur Mahommed* (1934) 9 Luck. 475, 149 I.C. 258, ('34) A.O. 303.

(n) Ujagar Lal v. *Jia Lal* (1896) 18 All. 382. See, however, *Kutina Bibi* v. *B. C. Dutta*, ('61) A. Ass. 1.

(o) Satar Mohd. v. *Saraf-ud-din, supra; Nabir Ganai* v. *Mohd. Ismail Ganai* ('60) A. J. & K. 112.

(p) Govind Dayal v. *Inayatullah* (1885) 7 All. 775 F.B.; *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229.

(q) Achutananda v. *Biki* (1922) 1 Pat. 378, 69 I.C. 666 ('22) A.P.; 601.

(r) Kudratulla v. *Mahini Mohan* (1869) 4 Beng. L.R. 134.

(s) Sitaram v. *Sayad Sirajul* (1917) 41 Bom. 636, 649-650, 42 I.C. 32; *Mahomed* v. *Narayan* (1916) 40 Bom. 358, 32 I.C. 933; *Hamedmiya* v. *Benjamin* (1929) 53 Bom. 525, 118 I.C. 548, ('29) A.B. 206 [buyer a Bene Israel].

(t) Dwarka Das v. *Husain Bakhsh* (1878) 1 All. 564 (Hindu vendor); *Poorno Singh* v. *Harrychum* (1872) 10 B.L.R. 117 (European vendor); *Qurban* v. *Chote* (1899) 22 All. 102 (Shia pre-emptor against Sunni vendor and Sunni vendee).

(u) Pasha Begum v. *Syed S. Hasan* (1955) Hyd. 676.

allowing him the right without the corresponding obligation. This is the principle underlying the decision of Allahabad High Court in *Qurban's* case *(v)*, where it was held that a Shia Mahomedan could not maintain a claim for pre-emption based on the ground of *vicinage* when the vendor was a Sunni. The decision was based on the ground that by the Shia law a *neighbour* as such has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to anyone he liked, and his Sunni neighbours could not successfully assert any right of pre- emption.

The vendee also, according to the Calcutta High Court, should be a Mahomedan. Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a Hindu. According to that decision, the right of pre-emption is not a right that attaches to the land, but is merely a personal right. If it were a right attaching to the *land*, it might be claimed, even against a Hindu or any other non-Mahomedan purchaser. "We cannot, . . . in justice, equity and good conscience, decide that a Hindu purchaser is a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased to a Mahomedan pre-emptor." On the other hand, it has been held by the Allahabad High Court that it is not necessary that the vendee should be a Mahomedan and that pre-emption can therefore be claimed even against a Hindu purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee by a Mahomedan or a non-Mahomedan. The Bombay High Court has adopted the view taken by the High Court of Calcutta. According to the Calcutta and Bombay High Courts, the right of pre-emption may be enforced against a Hindu vendee in those cases only where the right is recognized by custom as stated in sec. 229, or is created by contract as stated in sec. 230. See however the decisions of the Supreme Court referred to in sec. 226 to the effect that the right of pre-emption is an incident annexed to the property.

235. Pre-emption in the case of a sale to a shafi.— Where there are two or more *shafis* of the same class, and the sale is made by one of them to another, the other *shafis* are entitled to claim pre-emption of their share against the *shafi* purchaser *(w)*. Similarly, where the sale is made to a *shafi* and a stranger, the other *shafis* are entitled to claim pre-emption of their share against the *shafi*-purchaser and the stranger *(x)*.

(a) *A*, *B* and *C* are co-sharers in certain property. *A* sells his shares to *B*. *C* is entitled to claim pre-emption of one-half of the property: *Enatullah* v. *Kowsher Ali* (1927) 54 Cal. 266, 98 I.C. 220, ('26) A.C. 1153.

(b) *A*, *B*, *C* and *D* own each a house situate in a private lane common to all the four houses. *A* sells his house to *B*. Here *B*, *C* and *D* are "participators in the appendages of the house sold, the appendage being the right of way. *C* and *D* are each entitled to claim pre-emption of a third of the house: *Amir Hasan* v. *Rahim Baklish* (1897) 19 All. 466.

(c) *A*, *B* and *C* are co-sharers in certain property. *A* sells his share to *B* and *S*. *C* is entitled to claim pre-emption of one-half of the property sold: *Saligram* v. *Raghubardyal* (1887) 15 Cal. 224.

It was at one time held by the High Court of Calcutta *(y)*, that where there are several co-sharers, and one of them sells his share to another, none of the other co-sharers is entitled to claim pre-emption against the purchaser. The ground of the decision was thus stated by Garth, C.J.: "The object of the rule (of pre-emption) . . . is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or

(v) (1899) 22 All. 102. *supra.*

(w) Amir Hasan v. *Rahim Baksh* (1897) 19 All. 466; *Abdullah* v. *Amanatullah* (1899) 21 All. 292; *Muhammad Yakub* v. *Kanahai Lal* (1922) 44 All. 83, 64 I.C. 673, ('22) A.A. 157, dissenting on the point from *Baldeo* v. *Badri Nath* (1909) 31 All. 519; *Zia-ud-din* v. *Abul* (1923) 45 All. 487, 77 I.C. 27, ('23) A.A. 520; *Nadir Husain* v. *Sadiq Hussain* (1925) 47 All. 324, 326, 86 I.C. ('25) A.A. 361; *Vithaldas* v. *Jametram* (1920) 44 Bom. 887, 58 I.C. 279 [F.B.]; *Enatullah* v. *Kowsher Ali* (1927) 54 Cal. 266, 98 I.C. 220, ('26) A.C. 1153, overruling *Lalla Nowbutt Lall* v. *Lalla Jewan Lall* (1878) 4 Cal. 831; *Ramautar Singh* v. *Brij Kishore* ('33) A.P. 653, 149, I.C. 931; *Ladhi Bibi* v. *Masaddar Ali* ('49) A. Ass. 81; *Mahmood Hasan* v. *Bhikari Lal* ('23) A.A. 705, *Jagan Nath* v. *Radhey Shyam* 1960 Raj. 75.

(x) Saligram v. *Raghubardyal* (1887) 15 Cal. 224.

(y) (1878) 4 Cal. 831, *supra.*

near neighbour. But it is obvious, that no such annoyance can result from a sale by one co-parcener to another." A different view was taken by the High Courts of Allahabad and Bombay, one of the grounds of the decisions being that the rule laid down in the *Hedaya*, that "when there is a plurality of persons entitled to the privilege of *shuffa*, the right of all is equal," applies as much when the sale is made to a *shafi* as when it is made to a stranger. A special Bench of the Calcutta High Court has now taken the same view as that taken by the Allahabad and Bombay High Courts *(z)*.

236. Demands for pre-emption.— No person is entitled to the right of pre-emption unless—

(1) he has declared his intention to assert the right *immediately* on receiving information of the sale. This formality is called *talab-i-mowasibat* (literally, demand of jumping, that is, immediate demand): and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *talab-i-mowasibat* had already been made *(a)*, and has made a formal demand—

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale *(b)*, and

(b) in the presence at least of two witnesses *(c)*. This formality is called *talab-i-ishhad* (demand with invocation of witnesses) *(d)*.

See note (3) below.

Explanation I.— The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if it is made before the completion of the sale [s. 232].

Explanation II.— It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a manager or a person *previously* authorized by the pre-emptor to make the demand *(e)*. When the pre-emptor is a minor, his *de facto* guardian may make a demand on his behalf *(f)*. A demand made by the father or brother of the pre- emptor is not sufficient, even if he has a right to pre-empt, unless he has been previously authorized to make the demand *(g)*. When the pre-emptor is at a distance, the demand may be made by means of a letter *(h)*.

Explanation III.— If the *talab-i-ishhad* is made in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed *(i)*.

(z) (1927) 54 Cal. 266, 98 I.C. 220, ('26) A.C. 1153, *supra*.

(a) Rujjub Ali v. *Chandi Churn* (1890) 17 Cal. 543 F.B.; *Mubarak Hussain* v. *Kaniz Bano* (1904) 27 All. 160; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 923, 39 I.A. 101, 108, 15 I.C. 659, affirmg. (1908) 35 Cal. 575; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290, 71 I.C. 460, ('23) A.A. 251; *Medni Proshad* v. *Suresh Chandra* (1943) at Pat. 795, 204 I.C. 41, ('43) A.P. 96.

(b) Kulsum Bibi v. *Faqir Muhammad* (1896) 18 All. 298; *Muhammad Usman* v. *Muhammad Abdul* (1912) 34 All. 1, 11 I.C. 319. But see *Sonaji* v. *Narhar* ('52) A. Hyd. 159. For the meaning of "on the premises" see *Akhtar Husain* v. *Hasmat Ali* (1951) All. L.J. 414, ('51) A.A. 713; *Mt. Nanhi* v. *Bunyadi Begam* ('54) A.A. 87.

(c) Jadu Singh v. *Raj Kumar* (1870) 4 Beng. L.R. 171 A.C., 13 W.R. 177; *Ramdular Misser* v. *Jhumack Lal Misser* (1872) 8 Beng. L.R. 455, 17 W.R. 265.

(d) Narayana v. *Karthiayani* ('62) A. Ker. 122.

(e) Abadi Begam v. *Imam Begum* (1877) 1 All. 521; *Ali Muhammad* v. *Muhammad* (1896) 18 All. 309; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Harihar* v. *Sheo Prasad* (1884) 7 All. 41 [pre-emptor bound by acts and omissions of his agents]; *Shamsuddin* v. *Allauddin* (1931) All. L.J. 1083, 134 I.C. 462, ('32) A.A. 138. [must be *previously* authorized].

(f) Sonabashi Kuer v. *Ramdeo Singh* ('51) A.P. 521.

(g) Shamsuddin v. *Allauddin* (1931) All L.J. 1083, 134 I.C. 462, ('32) A.A. 138.

(h) Syed Wajid v. *Lala Hanuman* (1869) 4 Beng. L.R., A.C. 139; *Muhammad* v. *Muhammad* (1916) 38 All. 201, 33 I.C. 349.

(i) Ali Muhammad v. *Muhammad* (1896) 18 All. 309.

Explanation IV.— When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the other to do so, and he makes the demands on their behalf also. If a suit is brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf the suit will proceed as regards him, but it must be dismissed as to the rest *(j)*.

Where there are two or more buyers, and the *talab-i-ishhad* is not made in the presence of the vendor or on the property sought to be pre-empted, the demand must be made to all the buyers *(k)*. If it is made only to some of them, the shares of those buyers only can be pre-empted *(l)*. [s. 244].

Explanation V.— No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted *(m)*.

Hedaya, 550, 551; Baillie, 487-490.

(1) The *talab-i-mowasibat* is spoken of as the first demand, and the *talab-i-ishhad* is the second demand. The third demand consists of the institution of the suit for pre- emption. The *talab-i-mowasibat* and the *talab-i- ishhad* are conditions precedent to the exercise of the right of pre-emption *(n)*. The *talab-i-ishhad* is an indispensable as the *talab-i-mowasibat (o)*. It is stated in the *Hedaya* (p. 550) that "the right to *suffa* (pre-emption) is but a feeble right, as it is the disseizing of another of his property merely in order to prevent apprehended inconveniences" (see notes to s. 235 above). Hence the formalities must be strictly observed, and there must be a clear proof of their observance *(p)*. When a right of pre-emption is found to apply to non-Muslims, the Court may, as between Hindus, administer a modification thereof, but the preliminary forms of the law must be followed *(q)*. A petition by the pre-emptor to the sub-registrar praying that the registration of the sale-deed may be stayed cannot be treated as a *talab-i- mowasibat* there being no assertion of the right of pre-emption *(r)*. The *talab-i-mowasibat* should be made as soon as the fact of the sale is known to the claimant. A finding as to the promptness of the demand is a finding of fact which cannot be interfered with in second appeal *(s)*. Any unreasonable or unnecessary delay will be construed as an election not to pre- empt *(t)*. A delay of twelve hours was held in an Allahabad case to be too long *(u)*. So also a delay of twenty four hours was considered too long by the Nagpur High Court *(v)*. And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took our Rs. 47.25 P." (evidently to tender the amount to the buyer), and then performed the *talab-i- mowasibat,* he was not entitled to claim pre-emption, for the delay was quite unnecessary *(w)* [s. 238].

(2) It is not necessary to the validity of *talab-i- mowasibat* that it should be performed in the presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But it is of the essence of *talab-i- ishhad* that it should be performed before witnesses *(x)*. It is also

(j) Shamsuddin v. *Allauddin* (1931) All L.J. 1083, 134 I.C. 462, ('32) A.A. 138.

(k) Alinan v. *Ali Hussain* (1923) 45 All. 449, 73 I.C. 1029, ('23) A.A. 355.

(l) Muhammad Askari v. *Rahimulla* (1927) 49 All. 716, 105 I.C. 771, ('27) A.A. 548.

(m) Jog Deb v. *Mahomed* (1905) 32 Cal. 982; *Muhammad Nazir* v. *Makhdum* (1912) 34 All. 53, 11 I.C. 737.

(n) Deonandan Prashad v. *Ramdhari* (1917) 44 Cal. 675, 683, 44 I.A. 80, 82, 39, I.C. 958.

(o) Muhammad v. *Madho Prasad* (1917) 39 All. 133, 35 I.C. 911.

(p) Jadu Sing v. *Rajkumar* (1870) 4 B.L.R. A.C. 171; *Abdur Rasheed* v. *Mahomed Idris* (1946) 49 C.W.N. 761, 223 I.C. 496, ('46) A.C. 135; *Jaganath* v. *Ranchhod* ('50) A. Madhya Bharat 40.

(q) Audh Bihari Singh v. *Gajadhar* (1955) 1 S.C.R. 70, ('54) A.S.C. 417.

(r) Kheyali v. *Mullick* (1916) 1 Pat. L.J. 174, 34 I.C. 210.

(s) Nareshchandra Dutta v. *Gireeschandra Das* (1936) 62 Cal. 979 160 I.C. 730, ('36) A.C. 17.

(t) Baijnath v. *Ramdhari* (1908) 35 Cal. 402, 35 I.C. 60.

(u) Ali Muhammad v. *Taj Muhammad* (1876) 1 All. 283.

(v) Abdul Gaffarkhan v. *Abdul Jikar* ('54) A.N. 113.

(w) Jarfan Khan v. *Jabbar Meah* (1884) 10 Cal. 383.

(x) Ganga Prasad v. *Ajudhia* (1905) 28 All 24; *Pachumudin Nayek* v. *Abdul Gaffar* ('37) A.C. 283, 163 I.C. 480; *Shivshankar* v. *Lavnan* (1943) 45 Bom. L.R. 78, ('43) A.B. 83.

necessary when the *talab-i-ishhad* is made that the pre-emptor should refer expressly to the fact of the *talab-i-mowasibat* having been previously made *(y)*.

There may be instances where separate *talab-i-mowasibat*, namely, the first demand, may not be necessary, as in the case where a person for the first time gets information about the sale by his co-sharer, and immediately on such information, gives out his intention to assert the right of pre-emption and demands the pre-emption standing upon the disputed property invoking witnesses. Thus the two demands of *talab-i-mowasibat* and *talab-i- ishhad* may be combined. Of course in that case it has got to be seen whether there was any occasion or opportunity for making the first demand of *talab-i-mowasibat* separately *(y1)*.

(3) *Talab-i-ishhad.*— In *Ganga Prasad* v. *Ajudhia (z)* the High Court of Allahabad held that to constitute a valid *talab-i-ishhad* it was necessary that the witnesses should have been specifically called upon to bear witness to the demand being made. This was dissented from in two later Allahabad cases which held that the omission of this invocation addressed invocation addressed to the witnesses was not necessarily fatal *(a)*. But the Calcutta High Court approves *Ganga Prasad's* case and considers that the witnesses must be asked to witness the demand by some such words as "by ye witnesses to this" *(b)*. This reason of the judgment is that the enforcement of the right of pre-emption must be preceded by an observance of the preliminary forms prescribed by Mahomedan law *(c)*. The Patna High Court has recently held that the invocation of the witnesses to bear testimony to the demand in an essential element of *Talab-i- Ishhad (d)*. The property must be described sufficiently so as to be identifiable *(e)*. In a recent judgment *(f)* the Bombay High Court has, dissenting from *Pachimuddin Nayak* v. *Abdul Gaffar* and approving *Imam-ud-din* v. *Muhammad (a)* held that it is not obligatory under the Mahomedan Law to utter the formula "Be ye witnesses thereof". It is sufficient if the pre-emptor informs the witnesses of his right to pre-empt and the witnesses are taken to the purchaser for the purpose of attesting the Talab. It was further held that it was not necessary to tender the amount, and the demand would be valid if the pre-emptor expressed his desire to purchase the property at the same price as was paid by the purchaser, unless that price was not paid in good faith. The Patna High Court has held that though the *talab-i-ishhad* may be made by means of a letter or a messenger, this is permissible only when a person is unable to make the demand personally *(g)*.

(4) The *talab-i-ishhad* may be combined with the *talab- i-mowasibat.* Thus if at the time of *talab-i-mowasibat,* the pre-emptor has an opportunity of invoking witnesses *in the presence of the seller or the buyer or on the premises* to attest the *talab-i-mowasibat,* and witnesses are in fact invoked to attest it, it will suffice both the *talabs* (demands). This, however, is the only case in which the *talab-i-ishhad* may be combined with the *talab-i- mowasibat (h)*. If under these circumstances a *talab-i- ishhad* is made subsequently, and there is no express reference to *talab-i-ishhad,* the right of pre-emption is not defeated, as the subsequent demand is superfluous *(i)*.

(5) The *talab-i-mowasibat* may be made by using some such words as "I do claim my *shuffa*" (right of pre- emption): *Hedaya,* 551. The *talab-i-ishhad* may be made by the pre-emptor saying, "such a person has bought such a house of which I am the *shaffee;* I have already claimed my privilege of *shuffa* and now again claim it: be ye therefore witness thereof": *Hedaya,* 551, But no

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(y) Mubarak Hussain v. *Kaniz Bano* (1904) 27 All. 160; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290 71 I.C. 460, ('32) A.A. 251; *Chander Sekhar* v. *Ram Prasad* (1950) 28 Pat 861. (51) A.P. 93.

(y1) Golam Kibria Molla v. *Abdur Rouf Molla,* A.I.R. 1976 Cal. 205.

(z) (1905) 28 All. 24, *supra.*

(a) Ahmad Hakim v. *Muhammad* (1927) 49 All. 385, 100 I.C. 30, ('27) A.A. 289; *Imam-ud-din* v. *Muhamad,* (1930) 52 All. 1005, 133 I.C. 304, ('31) A.A. 736.

(b) Pachumuddin Nayak v. *Abdul Gaffar* (1937) 42 C.W.N. 300, ('37) A.C. 283, 163 I.C. 480.

(c) Fakir Rawot v. *Emambaksh* (1863) Beng. L.R. Sup. Vol. 35; *Jadu Lal* v. *Janki Koer* (1912) 39 I.A. 101, 39 Cal. 915, 15 I.C. 659.

(d) Medni Proshad v. *Suresh Chandra* (1943) 21 Pat. 795, 204 I.C. 41, ('43) A.P. 96.

(e) Sonabashi Kuer v. *Ramdeo Singh* ('51) A.P. 521; *Fakir Shaikh* v. *Syed Ali Shaikh* ('55) A.C. 349.

(f) Shivshankar v. *Laxman* (1943) 45 Bom. L.R. 78 ('43) A.B. 83.

(g) Medni Proshad v. *Suresh Chandra* (1943) 21 Pat. 795, 204 I.C. 41, ('43) A.P. 96.

(h) Baillie, 490; *Nathu* v. *Shadi* (1915) 37 All. 522, 29 I.C. 495; *Rajjub Ali* v. *Chundi Churn* (1890) 17 Cal. 543 [F.B.]; *Mahbooban* v. *Fatima Begum* ('52) A.A. 167; *Mohd. Umar* v. *Amir Mohd.* ('58) A.M.P. 123.

(i) Abdul Majid v. *Qamaruddin* (1945) All. 525, ('45) A.A. 375.

particular form is necessary [*Hedaya,* 551]; what the law requires is that the demand must be to that effect and no more. If there are several purchasers, it is not necessary that the names of *all* the purchasers should be mentioned either at the time of the first or the second demand. Thus where a pre- emptor claimed the right of pre-emption against five purchasers, and form used was "whereas Jagdeb Singh and others have purchased the property and I have claimed pre-emption, etc., and this was proclaimed in the presence of two of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim *(j).*

(6) Explanation I.— See sec. 232. Expl., and notes thereto.

Shia law.— Shia law of pre-emption is the same as the Hanafi law. It may be that according to Shia law the same degree of alacrity is not required for making a *talab* as in Hanafi law, but when *talab-i-ishhad* is made, a reference to *talab-i-mowasibat* is absolutely necessary, otherwise the *talab-i-ishhad* is defective in an essential particular *(k).*

The requirements of Talabs in the area of former Jaipur State have become unnecessary after the notification dated the 7th April, 1927 published in the Jaipur Gazette dated the 15th April, 1927 and to this extent this notification has modified the customary right of, Pre-emption as prevailing in the former Jaipur State in respect of 'Talabs' *(k1).*

237. Transfer of property by purchaser after demands.— When once a pre-emptor has made the "demands" required by law [s. 236], a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee *(l).*

238. Tender of price not essential.— It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad* [s. 236]; it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer *(m).*

Oudh Laws Act, 1876.— Section 13 of this Act requires the Court to fix the fair market value if the price named in the sale deed is fictitious. But the price actually paid is treated as evidence of the market value *(n).*

Punjab Pre-emption Act, 1913.— Section 25 of this Act requires the Court to determine the market value if the price was not fixed in good faith or paid. But if the price named in the sale deed has been paid, that is the price for pre-emption unless there is clear proof of a refund by the vendee to the vendor *(o).*

239. Death of pre-emptor.— If the pre-emptor dies pending the suit for pre-emption, the suit may be continued by his legal representatives.

A sues *B* for pre-emption. *A* dies *before* obtaining a decree in the suit. According to the Hanafi law, the right to sue is extinguished and the suit cannot be prosecuted by *A*'s heirs *(p).* According to the Shia and the Shafei law, the right to sue is not extinguished, and the suit may be continued by *A*'s heirs: Baillie, II, 190; *Hedaya,* 561. According to the Probate and Administration Act, 1881, sec. 89 [now Indian Succession Act 39 of 1925, sec. 306], the right is not extinguished, and the suit

(j) Jog Deb v. *Mahomed* (1905) 32 Cal. 982.

(k) Ummi-ul-Nisa v. *Fatima Begum* (1946) All. 491, 226 I.C. 545, ('47) A.A. 89.

(k1) Radha Ballabh Haldiya v. *Pushalal Agarwal,* A.I.R. 1986 Raj. 88.

(l) Muhammad Abdul v. *Muhammad* (1924) 46 All. 889, 79 I.C. 1053, ('24) A.A. 806.

(m) Baillie, 494; *Heera Lal* v. *Moorut Lal* (1869) 11 W.R. 275; *Lajja Prasad* v. *Debi Prasad* (1880) 3 All. 236; *Nundo Pershad* v. *Gopal* (1884) 10 Cal. 1008; *Karim Baksh* v. *Khuda Baksh* (1894) 16 All. 247, 248. See *Jagat Singh* v. *Baldeo Prasad* (1921) 43 All. 137, 59 I.C. 679, ('21) A.A. 290 [sale to mortgagee].

(n) Lalloo Singh v. *Jagjivan Prasad* (1936) 159 I.C. 609; ('36) A.O. 100.

(o) Ali Akbar v. *Multan* (1936) 160 I.C. 452, ('36) A. Pesh. 12.

(p) Baillie, 505-506; *Muhammad Hussain* v. *Niamat-un-nissa* (1897) 20 All. 88; *Mohd. Ismail* v. *Abdul Rashid* (1956) I All. 143.

may be continued by A's legal representative, that is his *executor or administrator.* That Act applies to Mahomedans, and the effect of a Bombay decision is that whatever be the sect to which the parties belong, the rule applicable to cases of this kind is that laid down in the Act, that is to say, if *A* dies leaving a will, the suit may be continued by his *executor,* and if he dies intestate it may be continued by his heirs *on obtaining letters of administration (q).*

240. Right lost by acquiescence.— The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale *(r).* But a mere offer by a pre-emptor to purchase from the buyer at the sale- price, made with the object of avoiding litigation, does not amount to acquiescence *(s).*

241. Right lost by joinder of plaintiffs not entitled to pre-empt.— If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim pre-emption, and the suit must be dismissed. But the right is not lost if he joins with himself as co-plaintiff a person who, but for his failure to make necessary demands [sec. 236], would have been entitled to pre-empt *(t).*

242. Right not lost by refusal to buy before sale.— As the right of pre-emption accrues *after* the completion of sale, it is not lost because *before* the completion of sale the property was offered to the pre-emptor and he refused to buy *(u)* [sec. 236, Expl. I]. *A fortiori* it is not lost because he had previous notice of the sale and he made no offer to the seller to buy the property *(v).*

234. Right not lost by previous notice of sale.— As the right of pre-emption arises *after* the completion of sale, it is not lost because the pre-emptor had notice that the property was for sale and he did not offer to purchase it *(w)* [sec. 236, Expl. I].

244. Sale to two or more persons.— Where the property is sold to two or more persons, the pre-emptor may pre-empt the share of any of them *(x)* [sec. 236, Expl. IV].

The decision in the case cited proceeded on the ground that the Mahomedan jurists regard each vendee as if he had entered into a separate transaction. It is however contrary to a line of decisions in Lahore *(y)* to the effect that the pre-emptor must take over the bargain in its entirety.

245. Suit for pre-emption: what the claim must include.— Where the property is sold to a single buyer, a person claiming to pre-empt must pre-empt the whole interest comprised in the transfer to the buyer. A suit which does not ask for pre-emption of the whole of such interest is defective, and should not be entertained *(z).*

(q) Sayyad Jiaul Hussain v. *Sitaram* (1912) 36 Bom. 144, 12 I.C. 720 [Shefei]; *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 653, 42 I.C. 32, affd. on app. to P.C. in *Sitaram* v. *Jiaul Hasan* (1921) 45 Bom. 1056, 1061, 48 I.C. 475, 479, 64 I.C. 826, ('23) A.PC. 41. See also Code of Civil Procedure, 1908 O. 22, r. 1.

(r) Habib-un-nissa v. *Barkat Ali* (1886) 8 All. 275; *Amir Haidar* v. *Ali Ahmad* (1925) 47 All. 635, 88 I.C. 234, ('25) A.A. 424 [minor]; *Narayandas* v. *Jagan Nath* ('50) A. Madhya Bharat 85.

(s) Muhammad Nasir-ud-din v. *Abdul Husan* (1894) 16 All. 300; *Muhammad Yunus* v. *Muhammad Yunus* (1897) 19 All. 334.

(t) Dwarka Singh v. *Sheo Shankar* (1926) 48 All. 810, 98 I.C. 1007, ('27) A.A. 168; *Mahanth Tokh Narayan* v. *Ram Rachhya* (1926) 5 Pat. 96, 90 I.C. 806, ('25) A.P. 743; *Narayana* v. *Karthiayani* ('62) A. Ker 122.

(u) Abadi Begum v. *Inam Begum* (1877) 1 All. 521; *Kanhai Lal* v. *Kalka Prasad* (1905) 27 All. 670.

(v) Muhammad Askari v. *Rahmatullah* (1927) 49 All. 716, 105 I.C. 771, ('27) A.A. 548.

(w) Ibid.

(x) Ibid.

(y) Muhammad Shafi v. *Allah Din* (1934) 153 I.C. 128, ('34) A.L. 429 and the cases there cited. See also: *Bishan Singh* v. *Khazan Singh* ('58) A.S.C. 838. See, however: *Mir Mohd.* v. *Bhagwan Das* ('61) A. J & K 36.

(z) Durga Prasad v. *Munshi* (1884) 6 All. 423; *Dhola* v. *Khanum* (1935) 160 I.C. 576, ('35) A.L. 635.

The principle of denying the right of pre-emption except as to the whole of the property sold is that if the pre-emptor was allowed to split up the bargain, he would be at liberty to take the best portion of the property and leave the worst part of it with the vendee *(a)*. "The right of pre-emption was never intended to confer such a capricious choice upon the pre- emptor" *(b)*. But if the same sale deed embodies two transactions of sale, the pre-emptor may pre-empt the one and not the other *(c)*. Again if the sale includes properties which are not subject to pre-emption, the pre-emptor is entitled to exclude them and to pre-empt the rest *(d)*. Where the purchase himself sells part of the property to another, the pre- emptor is entitled to pre-emption in respect of that portion which remains with the purchaser *(e)*.

Limitation.— A suit to enforce the right of pre- emption must be instituted within one year from the date when the purchaser takes physical possession of the property, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered [Limitation Act, 1908 sch. I art. 10]. If the subject of sale does not admit of physical possession and there is no registered instrument the suit will be governed not by art. 10, but by art. 120 *(f)*. If the sale has been disguised as a usufructuary mortgage in order to defeat the right of pre-emption, limitation runs from the time when the fraud is discovered *(g)*. When the person entitled to pre-emption is a minor, the right may be claimed on his behalf by his guardian, but the suit must be instituted within the aforesaid period, and the period of limitation will not be extended by reason of the pre-emptor's minority [Limitation Act, 1908, sec. 8]. See Acts 97 and 113 of the Limitation Act of 1963.

When pre-empted property vests in pre-emptor.— See Code of Civil Procedure, 1908, O. 20, r. 14. Upon a pre-emption decree, the property and the right to mesne profits vest in the pre-emptor from the date when he pays the amount of the purchase price finally decreed; until that time, the original purchaser retains possession and is entitled to the rents and profits *(h)*.

Decree in a suit for pre-emption.— See Code of Civil Procedure, O. 20, r. 14.

Property subject to mortgage.— If the property of which possession is decreed is subject to a mortgage, the pre- emptor takes it subject to the mortgage *(i)*. If the property is in the possession of the mortgagee, the decree should provide that his possession should not be disturbed until redemption of the mortgage *(j)*.

246. Decree for pre-emption not transferable.— A decree for pre-emption is not transferable so as to entitle the transferee to obtain possession of the property in suit in execution of the decree *(k)*.

247. Legal device for evading pre-emption.— When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

Hedaya, 563; Baillie, 512 *et seq.* Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption *(l)*. See notes to sec. 232, "Lease in perpetuity."

(a) Sheobharos v. *Jiach Rai* (1886) 8 All. 462.

(b) Durga Prasad v. *Munshi* (1884) 6 All. 423, at p. 426.

(c) Abdul Karim v. *Ghulam Nabi* (1934) 151 I.C. 367, ('34) A.L. 402.

(d) Zainab Bibi v. *Umar Hayat Khan* (1936) All. L.J. 456, 161 I.C. 758 ('36) A.A. 732; *Mohmudi* v. *Mustaque Ali* (1958) All. L.J. 559.

(e) Ude Ram v. *Anna Ram* (1924) 5 Lah. 80, 80 I.C. 960, ('24) A.L. 431.

(f) Batul Begum v. *Mansur Ali* (1902) 21 All. 17; *Kaunsilla* v. *Gopal* (1906) All. W.N. 73.

(g) Bhagwana v. *Shadi* (1934) 16 Lah. 408, 155 I.C. 654, ('34) A.L. 878.

(h) Deokinandan v. *Sri Ram* (1889) 12 All. 234 F.B.; *Deonandan Prashad* v. *Ramdhari* (1917) 44 Cal. 675, 44 I.A. 80, 39 I.C. 958.

(i) Tejpal v. *Girdhari Lal* (1908) 30 All 130.

(j) Shamsuddin v. *Allauddin* (1931) All. L.J. 1083, 134 I.C. 462, ('32) A.A. 138.

(k) Ram Sahai v. *Gaya* (1884) 7 All. 107, 111; *Nadir Ali* v. *Wali* (1924) 5 Lah. 486, 85 I.C. 182, ('25) A.L. 202; *Mehr Khan* v. *Ghulam* (1921) 2 Lah. 282, 64 I.C. 191, ('22) A.L. 300.

(l) Jadu Lal v. *Janki Koer* (1908) 35 Cal. 575, affmd. in (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 69.

248. Sect-law as governing pre-emption.— (1) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shias *(m)*, the right of pre-emption is governed by the Shia law *(n)*.

(2) If the vendor is a Sunni, and the pre-emptor is a Shia, the right of pre-emption is, according to the Allahabad and Hyderabad High Courts, governed by the Shia law, on the principle of reciprocity explained in the notes to sec. 234 above *(o)*.

(3) If the vendor is a Shia, and the pre-emptor is a Sunni, then according to the Allahabad and Hyderabad High Courts, the right of pre-emption is governed by the Shia law *(p)*; but according to the Calcutta High Court, it is governed by the Sunni law *(q)*.

(4) The personal law of the buyer is immaterial in these cases *(r)*.

249. Points of difference between Sunni and Shia law of pre-emption.— (1) According to the Shia law, no right of pre-emption exists in the case of property owned by *more than two* cosharers *(s)*.

(2) The Shia law does not recognize the right of pre-emption on the ground of *vicinage (t)*, or on the ground of "participation in the appendages."

Baillie, II, 175-179. *A*, a Sunni, sells his land to *B*. *A*'s neighbour *C*, who is a Shia, sues *A* and *B* for pre-emption. According to the Allahabad High Court, the law to be applied, is the Shia law, and under that law a neighbour as such has no right of pre-emption. *C* is not therefore entitled to pre-empt. But if we deny *C* the right to pre-empt by applying his own law [Shia law] to him it is but fair when *C* sells how own property, we should apply the same law, so that if his neighbour is a Sunni and he claims the right of pre-emption on the ground of vicinage, we should not allow his Sunni neighbour the right of pre-emption. This is the line of reasoning followed by the Allahabad High Court in the cases referred to in sec. 248, sub-secs. (2) and (3). The tendency of the Calcutta High Court is to apply in all cases the Sunni law of pre-emption except perhaps in cases where both the vendor and pre-emptor are Shias. The reason given by that Court is that the law of pre-emption in force in this country is the Sunni law of pre-emption.

(m) See *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775.

(n) *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229.

(o) *Qurban* v. *Chote* (1889) 22 All. 102; *Pasha Begum* v. *Syed S. Hasan* (1955) Hyd. 676.

(p) *Pir Khan* v. *Faiyaz* (1914) 36 All. 488, 25 I.C. 445; *Pasha Begum* v. *Syed S. Hasan (supra)*.

(q) *Joy Deb* v. *Mahomed* (1905) 32 Cal. 982.

(r) *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775; *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982. But see *Kudratullah* v. *Mohini Mohan* (1869) 4 B.L.R. 134.

(s) *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229; *Hassain Baksh* v. *Mafuz-ul-haq* (1925) 47 All. 944, 88 I.C. 972, ('25) A.A. 559.

(t) *Qurban* v. *Chote* (1889) 22 All. 102.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

A. — MARRIAGE

250. Definition of marriage.— Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children.

Hedaya, 25; Baillie, 4.

Contract.— Marriage according to the Mahomedan law is not a sacrament but a civil contract. All the rights and obligations it creates arise immediately and, are not dependent on any condition precedent such as the payment of dower by husband to a wife *(a)*.

For a very informative consideration of the concept of marriage and divorce, see the recent judgment of the Pakistan Supreme Court in *Khurshid Bibi* v. *Mohd Amin* P.L.D. 1967, S.C. 97.

Mahmad Usaf Abasbhai Bidiwale v. *Harbanu Mansur Atar.* (1978) Mah. L.J. 26.

Zina.— *Zina* means fornication or adultery. Sexual intercourse not permitted by the Mahomedan law is *zina*. The offspring of such intercourse is illegitimate, and cannot be legitimated by acknowledgment [s. 344(2)].

251. Capacity for marriage.— (1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

A Mahomedan girl of 15 years who has attained the age of puberty is competent to marry without the consent of her parents. [Nagendra Prasad Singh and Muneshwari Sahay, JJ.] *Md. Idris* v. *State of Bihar.* 1980 Cri L.J. 764.

Marriage under the Mahomedan Law is a civil contract. Hence it should attract all the incidents of contract as any other stipulated in the Contract Act. The provisions of section 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally. The provisions of section 64 of the Contract Act are clear in this behalf and require only that person to return the benefits under the Contract, at whose opinion the contract is rescinded *Mahmad Usaf Abasbhai Bidiwale* v. *Hurbanu Mansur Atar* (1978) Maha. L.J. 26.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians [ss. 270-275].

(3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

The same rule applies in the case of a Shafei girl who has attained puberty *(b)*.

Explanation.— Puberty is *presumed,* in the absence of evidence, on completion of the age of fifteen years.

Hedaya, 529; Baillie, 4 Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to *marriage, dower,* and *divorce.* A Mahomedan wife who has attained puberty and is under eighteen years of age may file a suit for divorce without the appointment of a next friend *(c)*. See notes to sec. 115 above.

With reference to a girl the Judicial Committee observed that the age of puberty in Mahomedan law is nine years *(d)*. Their Lordships were no doubt referring to the passage in the Hedaya that "the earliest period of puberty with respect to a boy is twelve years and with respect to a girl is nine years."

(a) Abdul Kadir v. *Salima* (1886) 8 All. 149.

(b) Hassan Kutti v. *Jainabha* (1929) 52 Mad. 39, 113 I.C. 306, ('28) A.M. 1285; *Sayad Mohiddin* v. *Khatijabai* (1939) 41 Bom. L.R. 1020, 185 I.C. 390, ('39) A.B. 489.

(c) Naksetan Bibi v. *Habibar Rahman* (1948) 50 C.W.N. 689, ('48) A.C. 66.

(d) Sadiq Ali Khan v. *Jai Kishori* (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A.PC. 152.

Consent to marriage obtained by force or fraud.— When consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified *(e)*. Where consent to the marriage has not been obtained, consummation against the will of the woman will not validate the marriage *(f)*.

252. Essentials of a marriage.— It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential *(g)*.

Mahomedan Law— "Mahomedan" — Who is — Hindu convert — If to perform rites or necessaries to become a Mahomedan.

Under Mahommedan Law or religion, there is no particular ceremony or ritual for conversion. Any person who professes Mahomedan religion and acknowledges that there is but one God and Mohammad is his prophet is a Mahomedan. It is not necessary that he should observe any particular rites or ceremonies or be an orthodox believer in the religion. [Alladi Kuppuswamy, J.] *Syed Amanullah Hussain* v. *Rajammae* (1977) 1 An. W.R. 123; (1976) 2 A.P.L.J. 323.

For a description of the regular procedure for obtaining the consent of the girl and the usual form in which the proposal and acceptance is gone through where the women are in purdah see the undermentioned case *(h)*. But it was held by the Oudh Court that the proposal and acceptance need not be in any particular form. In this case there was evidence of the consent of the girl and that the husband had agreed to the dower and it was held that under the circumstances after the lapse of a long time after the marriage all the formalities required should be presumed to have been complied with *(i)*. Similarly, where the person who performed the nikah was dead, the evidence of a witness was enough to prove the nikah and it was held that the exact words of offer and acceptance need not be proved *(j)*.

Shafei School: The consent at marriage should be of the wife. The *wali* only communicates the wish of the bride. *Muhammad Ibrahim* v. *Ghulam Ahmed* (1862) Bom. H.C.R. 236 is not good law. An adult virgin of the Shafei school can giver herself in marriage through a *wali* and the marriage is not invalid because the father's consent was not obtained. The *wali's* powers emanate from the authority of the woman. She may choose a remote relative as *wali* in preference to a near one who is inimical to her interests. A marriage is not valid unless consented to be an adult girl — Shafei and Maliki schools hold that the consent must be given through a *wali*.

Under Hanafi law, the woman can give consent with or without a *wali*. *Kummali Abubukker* v. *Vengatt Marakkar* ('70) A. Kerala 277.

Hedaya, 25, 26; Baillie, 4, 5, 10, 14. The usual form of proposal is, "I have married myself to you," and that of acceptance is, "I have consented."

Registration of marriages.— As to registration of Mahomedan marriages, see the Kazi's Act, 1880, and Bengal Act I of 1876 read with Act VII of 1905.

Shia law.— According to the Shia law the presence of witnesses is not necessary in any matter regarding marriage: Baillie, II 4.

(e) Abdul Latif v. *Nyaz Ahmed* (1909) 31 All. 343, 1 I.C. 538 [wife's illness concealed]; *Kulsumbi* v. *Abdul Kadir* (1921) 45 Bom. 151., 59 I.C. 433, ('21) A.B. 205 [Pregnancy Concealed]

(f) Mt. Ahmad-un-nissa Begum v. *Ali Akbar Shah* (1942) 199 I.C. 531, ('42) A. Pesh. 19; *Jogu Bibi* v. *Mesal Shaikh* (1936) 63 Cal. 415 relied on; *Abdul Kasem* v. *Jamila Khatun Bibi* (1940) 1 Cal. 401, 44 C.W.N. 352, 188 I.C. 490. ('40) A.C. 251.

(g) Moung Kyi v. *Mo Shwe Baw* (1929) 7 Rang; 777, 121 I.C. 718, ('29) A.R. 341; *Jogu Bibi* v. *Mesal Shaikh* (1936) 63 Cal. 415, 164 I.C. 957, *Pakistan: Muhammad Zaman* v. *Naima Sultan* ('52) P. Pesh. 47.

(h) Mt. Ghulam Kurba Bibi v. *Mohammad Shaffi* ('40) A. Pesh. 2.

(i) Mt. Bashiran v. *Mohammad Husain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 193 I.C. 161, ('41) A.O. 284.

(j) Alamgir v. *The State* (1956) 35 Pat. 93, 98- 99.

253. Valid, irregular and void marriages.— A marriage may be valid (*sahih*), or irregular (*fasid*), or void from the beginning (*batil*).

Irregular or invalid marriages.— The term "fasid" is translated in Baillie's Digest as "invalid," but as the word "invalid" in the English language also means "void," "irregular" and has been substituted for "invalid" in conformity with the usage of modern writers on the subject. As to irregular marriages, see secs. 254 to 259 and sec. 263. As to void marriages, see secs. 260 to 262.

The Marriage of a Shafei virgin girl who has attained puberty if she is given in marriage in a proper form is valid. *Muhammad Haji Kammu* v. *Ethiyamma* (1967) Kerala L.T. 913.

254. Absence of witnesses.— A marriage contracted without witnesses as required by sec. 252 is irregular, but not void.

Baillie, 155. As to irregular marriages, see also secs. 264 and 267 below.

255. Number of wives.— A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular.

Shahulameeda v. *Subaida Bebee* (1970) M.L.J. Cr. 562.

Baillie, 30, 154 (fourth class); Ameer Ali, 5th ed., Vol. II, p. 280. As to irregular marriages, see secs. 262 and 267.

256. Plurality of husbands.— It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void *(k)*.

A Mahomedan woman marrying again in the lifetime of her husband is liable to be punished under sec. 494 of the Indian Penal Code *(l)*. The off-spring of such marriage is illegitimate *(m)* and cannot be legitimated by acknowledgment *(n)* [s. 344(2)].

257. Marriage with a woman undergoing iddat.— (1) A marriage with a woman before completion of her *iddat* is irregular, not void. The Lahore High Court at one time treated such marriages as void *(o)*; but in a later decision held that such a marriage is irregular and the children legitimate *(p)*.

(2) *Iddat.*— "Iddat" may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by *divorce,* the duration of the *iddat* if the woman is subject to menstruation, is three course; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by *death,* the duration of the *iddat* is four months and ten days. If the woman is pregnant at the time, the *iddat* lasts for four months and ten days *or* until delivery, whichever period is longer *(q)*.

If the marriage is dissolved by *death,* the wife is bound to observe the *iddat*

(k) Liaqat Ali v. *Karim-un-nissa* (1893) 15 All. 396, 398; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114; 121, 48 Cal. 856, 60 I.C. 827; *Budansa* v. *Fanna Bi* (1914) 26 Mad. L.J. 260, 22 I.C. 697. In the matter of Ram Kumari (1891) 18 Cal. 264, 269; *Nandi* v. *The Crown* (1920) 1 Lah. 440, 59 I.C. 33; *Government of Bombay* v. *Ganga* (1880) 4 Bom. 330.

(l) In the matter of Ram Kumari (1891) 18 Cal. 264; *Nandi* v. *The Crown* (1920) 1 Lah. 440; *Hamad* v. *Emperor* ('31) A.L. 194, 134 I.C. 589.

(m) Liaqat Ali v. *Karim-un-nissa* (1893) 15 All. 396, 398; *Budansa* v. *Fanna Bi* (1914) 26 Mad. L.J. 260, 23 I.C. 679.

(n) (1893) 15 All. 396, *supra.*

(o) Jhandu v. *Mst. Hussain Bibi* (1923) 4 Lah. 192, 73 I.C. 590, ('23) A.L. 949; *Mt. Raro* v. *Bagh Singh* (1935) 157 I.C. 779, ('35) A.L. 23.

(p) Muhammad Hayat v. *Muhammad Nawaz* (1935) 17 Lah. 48, 156 I.C. 40, ('35) A.L. 622.

(q) Jhandu v. *Hussain Bibi* (1923) 4 Lah. 192.

whether the marriage was consummated or not. If the marriage was dissolved by *divorce,* she is bound to observe the *iddat* only if the marriage was consummated; if there was no consummation, there is no *iddat,* and she is free to marry immediately.

The *iddat* of divorce commences from the date of the divorce and that of death from the date of death. If information of divorce or of death does not reach the wife until after the expiration of the period of *iddat,* she is not bound to observe any *iddat* [Baillie, 357].

Hedaya, 128-129; Bailiie, 38, 151, 352-358. As to *iddat* in the case of an irregular marriage, see sec. 267 (2)(ii).

Marriage during iddat.— *H* has four wives, *A, B, C* and *D.* He divorces *A after* consummation of the marriage with her. It is not permissible to *A* to marry another husband, nor to *H* to marry another wife, during *A*'s iddat. Nor is it permissible to *H,* if one of the other wives dies during *A*'s *iddat,* to marry *A's* sister (s. 263). But either party may marry, again after completion of *A's iddat,* and *H* may, if he chooses, marry *A's* sister. The primary object of *iddat,* is to impose a restraint on the marriage of the wife, but this invoives a corresponding restraint on the marriage also of the husband to the extent mentioned above. It must, however, be remembered that a marriage before completion of the *iddat* is not void, but merely irregular. As to irregular marriages see secs. 264 and 267.

Valid retirement.— When the husband and wife are alone together under circumstances which present no legal, moral or physical impediment to marital intercourse, they are said to be in "valid retirement" (*khilwat-us-sahiha*). A valid retirement in the Sunni law has the same legal effect as actual consummation as regards dower, [ss. 267, 336(2)], the establishment of paternity, the observance of *iddat* (s. 257), a wife's maintenance during iddat (s. 279), the bar of marriage with wife's sister (s. 263), and the bar of marriage imposed by the rule in sec. 255. But it has not the same effect as actual consummation as regards the bar of marriage with the wife's daughter (s. 261), or the bar of re-marriage between divorcees [s. 336(4)]. In both these cases there must have been *actual* consummation as stated in secs. 261 and 336 — (5): Baillie, 98-101.

258. Marriage between a Sunni and Shia.— A Sunni male may contract a valid marriage with a Shia female *(r),* and a Shia male may contract a valid marriage with a Sunni female *(s).*

The rights and obligations of the wife would be governed by the law to which she belonged at the time of her marriage. See sec. 32.

259. Difference of religion.— (1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia,* that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular *(t).*

Under Muslim Law, marriage between a Muslim male and a Christian female is not void or illegal. The prohibition is only against a Muslim woman marrying a non-Muslim.

There is no difference between the case of a Muslim woman who after marriages renounces Muslim faith, and the case of a non- Muslim woman who embraces Islam, marries a Muslim and then commits apostasy. The same consequences must follow apostasy in both the cases. No doubt the marriage between a Muslim male and a Christian is not declared under Muslim law void. But no exception is made in regard to the consequences of apostasy in such cases. It is nowhere laid down specifically that even after conversion of such a Muslim wife to Christian faith, the marriage would subsist. Merely because the marriage between a Muslim and a non- Muslim of Kitabia faith is not void, it does not necessarily follow that on the apostasy of one of the parties to the marriage,

(r) Syud Gholam Hossein v. *Musst. Setabah Begum* (1866) 6 W.R. 88; *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720.

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

(t) Ishan v. *Panna Lal* (1928) 7 Pat. 6, 103 I.C. 430, ('28) A.P. 19.

the marriage shall stand not dissolved. Whether a Muslim wife was a Christian or Muslim prior to her marriage has no bearing on the question as to the consequence of the apostasy on one of the parties to the marriage. All the texts are uniform and all the scholars and commentators on Muslim law agree that in the case of apostasy of the wife, the marriage shall stand dissolved. No exception to this view has been stated. Whether she re-embraces her original faith or embraces a new faith, it is nonetheless an apostasy. Apostasy being acceptance of any other faith by a Muslim, the consequence of apostasy must be the same on the continuance of the marital relations of Muslims.

In the instant case, admittedly the third defendant embraced the Christian faith in the year 1952. i.e., prior to the extension of the Muslim Dissolution of Marriages Act, 1939. The marriage, therefore stood dissolved in that year and is not saved by that enactment. Consequently the third defendant's right to recover the dower due to her commenced in 1952. The suit instituted in 1968 was, therefore, barred by time, though, in fact, she was entitled to it.

In view of the provisions in the Caste Disabilities Removal Act, 1850, the Muslim woman's conversion to Christian faith does not deprive her of the right to claim a share in her husband's matruka, when she does not marry any one else. [Madhava Reddy and Narasinga Rao, JJ.] *Kaneez Fatima* v. *Mrs. Angeal Cameron* alias *Siraj Sulthana* (1978) 2 A.P. L.J. 357.

Marriage — Validity — Marriage of Muslim male with Christian female — Validity.

A marriage between a Muslim male and a Christian female is not invalid. [Madhava Reddy and Narasinga Rao, JJ.] *Kaneez Fatima* v. *Mrs. Angeal Cameron* alias *Siraj Sulthana* (1978) 2 A.P.L.J. 337.

See also: *Kaneez Fatima* v. *Mrs. Angeal Cameron* alias *Siraj Sulthana.* (1978) 2 A.P.L.J. 337.

(2) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a *Kitabi,* that is, a Christian or a Jew. A marriage however, with a non-Muslim, whether he is a *Kitabi,* that is, a Christian or a Jew, or a non-*Kitabi,* that is, an idolator or a fire-worshipper, is irregular, not void.

Hedaya, 30; Baillie, 40-42, 151, 153.

Prof. A.A.A. Fyzee regards such a marriage as void. See also s. 264(3)(*d*) infra. In the opinion of the present editor there is force in Prof. Fyzee's opinion. However, it will have to be judicially decided.

As to irregular marriages, see secs. 264 and 267.

Kitabi.— *Kitab* means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions. The question whether a Buddhist woman can be regarded as a *Kitabia* arose in a case before the Privy Council, but it was not decided *(u).*

Indian Christian Marriage Act, 1872.— In India, a marriage between a Mahomedan male and a Christian woman must be solemnized in accordance with the provisions of sec. 5(4) of the Indian Christian Marriage Act, 1872 (XV of 1872), that is to say, by, or in the presence of, a Marriage Registrar appointed under the Act; any such marriage solemnized otherwise than in accordance with those provisions "shall be void." But since a Mahomedan woman cannot contract a valid marriage with a Christian man, such a marriage, it would appear, cannot be solemnized under that Act. See sec. 88 of the Act.

The claim to the property of a *sirdar* was made by Nathoo as his daughter. The opposite parties contested the claim on the ground that she was illegitimate. Her mother Rukko was a Hindu. She became the concubine or the *sirdar.* Nathoo's case was that Rukko has become a Muslim and her name was changed to Asghari, and the marriage with her Hindu husband was automatically dissolved. She then married the *sirdar.* In mutation proceedings the Director of Consolidation held in her favour. Although there was no proof of marriage, long cohabitation was held to have raised a presumption of marriage. Relying on *Government of Bombay* v. *Ganga* (1879) 4 Bom. 330; *Madras High Court* v. *Millard in re,* (1887) 10 Mad. 218 (a case of Roman Catholics); *Ramkumari* (1891) 18 Cal. 284 it was held that the marriage subsisted. *Mst. Nandi* v. *Crown* I.L.R. 1 Lah. 440

(u) Abdool Razack v. *Aga Mahomed Jaffer* (1893) 21 I.A. 56, 64-65, 21 Cal. 666, 674.

(1920 Lah. 379), Amir Ali Vol. II 437 were cited. There can be no dissolution without a decree of Court. Reference was also made to *Sayeda Khatoon* v. *M. Obadiah* 49 C.W.N. 745 where it was held dissenting from *Musst. Ayesha Bibi* v. *Subodh Ch. Chakravarty* 49 C.W.N. 439 (1949 Cal. 436) that there is no automatic dissolution. However, if the husband had died the result might be different. (Case sent back.) *Alumad Bux* v. *Smt. Nathoo* ('69) A. All. 75.

Shia law.— In the Shia law, a marriage between a Muslim male and a non-Muslim female is unlawful and void; and so also is a marriage between a Muslim female and a non-Muslim male. But a Muslim male may contract a valid *muta* marriage (s. 269) with a *Kitabia.* The Shias reckon fire-worhippers among *Kitabias:* Baillie, 29, 40.

The Sharai-ul-Islam (on which Baillie's Digest Vol. II is based) condemns such marriages.

260. Prohibition on the ground of consanguinity.— A man is prohibited from marrying (1) his mother or his grandmother how high soever; (2) his daughter or grand-daughter how low soever; (3) his sister whether full, consanguine or uterine; (4) his niece or great niece how low soever; and (5) his aunt or great aunt how high soever, whether paternal or maternal. A marriage with a woman prohibited by reason of consanguinity is void.

Hedaya, 27.; Baillie, 24. As to void marriage, see secs. 264 and 266 below.

261. Prohibition on ground of affinity.— A man is prohibited from marrying (1) his wife's mother or grandmother how high soever; (2) his wife's daughter or grand-daughter how low soever; (3) the wife of his father or paternal grandfather how high soever; and (4) the wife of his son, of his son's son or daughter's son how low soever. A marriage with a woman prohibited by reason of affinity is void.

In case (2), marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

Hedaya, 28; Baillie, 24-29, 154. As to void marriage, see secs. 264 and 266 below.

262. Prohibition on the ground of fosterage.— Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or foster-sister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.

Hedaya, 68, 69 Baillie, 30, 154, 194, 195. As to void marriages, see secs. 264 and 266 below.

263. Unlawful conjunction.— A man may not have at the *same time* two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void.

Hedaya, 28, 29; Baillie, 31, 153.

Wife's sister.— A man may not, as already stated, marry his wife's sister in his wife's lifetime. According to the Calcutta High Court *(v)* such a marriage is void, and the issue is illegitimate (s. 266). According to the High Courts of Bombay *(w)* and Madras *(x)* and the Chief Court of Oudh *(y)* such a marriage is merely irregular, and the issue is not illegitimate (s. 267). The Calcutta decision, it is submitted, is not correct.

There is, of course, nothing to prevent a man from marrying his wife's sister *after* the death or divorce of the wife: Baillie, 33.

(v) Aizunnissa v. *Karimunissa* (1895) 23 Cal. 130.

(w) Tajbi v. *Mowla Khan* (1917) 41 Bom. 845, 39 I.C. 603.

(x) Rahiman Bibi v. *Mahboob Bibi* (1938) Mad. 278, (1937) 2 M.L.J. 753, 176 I.C. 300, ('38) A.M. 141.

(y) Musammat Kaniza v. *Hasan* (1926) 1 Luck. 71, 92 I.C. 82, ('26) A.O. 231; *Taliamand* v. *Muhammad* (1931) 12 Lah. 52, 129 I.C. 12, ('30) A.L. 907.

Shia law.— In Shia law a man may marry his wife's aunt, but he cannot marry his wife's niece without the permission of the wife (that is, aunt): Baillie, II, 23.

264. Distinction between void and irregular marriages.—

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by reason of consanguinity (s. 260), affinity (s. 261), or fosterage (s. 262), is void, the prohibition against marriage with such a woman being perpetual and absolute *(z)*.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely—

(a) a marriage contracted without witness (s. 254);

(b) a marriage with a fifth wife by a person having four wives (s. 255);

(c) a marriage with a woman undergoing *iddat* (s. 257);

(d) a marriage prohibited by reason of difference of religion (s. 259);

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 263).

The reason why the aforesaid marriages are irregular, and not void, is that in cl. (a) the irregularity arises from an accidental circumstances; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the impediment ceases on the expiration of the period *iddat;* in cl. (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

Baillie, 150-555.

Shia law.— The Shia law does not recognize the distinction between irregular and void marriages. According to that law a marriage is either valid or void. Marriages that are irregular under the Sunni law are void under the Shia law.

265. Effects of valid (sahih) marriage.— A valid marriage confers upon the wife the right to dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him, to admit him to sexual intercourse, and to observe the *iddat.* It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance.

Baillie, 13. It may be noted that a Mahomedan husband does not by marriage acquire any interest in his wife's property *(a)*.

266. Effects of a void (batil) marriage.— A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate.

Baillie, 156. The marriages referred to in secs. 256 and 260 to 262 are *void.*

267. Effect of an irregular (fasid) marriage.— (1) An irregular marriage may be terminated by either party, either before or after consummation, by

(z) Women within the prohibited degree are called *Mooharim.*

(a) A v. *B.* (1896) 21 Bom. 77, 84.

words showing an intention to separate, as where either party says to the other "I have relinquished you" *(b)*. An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place—

(i) the wife is entitled to dower, proper or specified, whichever is less (ss. 286, 289);

(ii) she is bound to observe the *iddat,* but the duration if the *iddat* both on divorce and death is three courses [see s. 257(2)];

(iii) the issue of the marriage is legitimate *(c)*. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife [Baillie, 694, 701]. The Chief Court of Oudh has held that it does create such rights *(d)*, but the decision, it is submitted, is not correct.

Baillie, 156-158, 694, See secs. 254-259, 263 and 264.

268. Presumption of marriage.— Marriage will be presumed, in the absence of direct proof, from—

(a) prolonged and continual cohabitation as husband and wife *(e); or*

(b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided at the conditions of a valid acknowledgment mentioned in sec. 344 below are fulfilled *(f); or,*

(c) the fact of the acknowledgment by the man of the woman as his wife *(g)*.

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife *(h)*, nor does it apply if the woman was admittedly a prostitute before she was brought to the man's house *(i)*. The mere fact, however, that the woman did not live behind the purda, as the admitted wives of the man did, is not sufficient to rebut the presumption *(j)*.

(b) Mt. Bakh Bibi v. *Quaim Din* ('34) A.L., 907, 154 I.C. 677.

(c) Mt. Bakh Bibi v. *Quaim Din* ('34) A.L. 907, 154 I.C. 677; *Muhammad Hayat* v. *Muhammad Nawaz* (1935) 17 Lah. 48, 156 I.C. 40 ('35) A.L. 622; *Rahiman Bibi* v. *Mahboob Bibi* (1938) Mad. 278, ('38) A.M. 141.

(d) Mohammad Shafi v. *Raunaq Ali* ('28) A.O. 231, 107 I.C. 882.

(e) Khajah Hidayat v. *Rai Jan* (1884) 3 M.I.A. 295, 317-318, 323 [marriage presumed]; *Mahomed Bauker* v. *Shurfoon-Nissa* (1860) 8 M.I.A. 136, 159 [marriage not presumed]; *Ashrufood Dowlah* v. *Hyder Hoseine* (1866) 11 M.I.A. 94, 115 [marriage not presumed]; *Jariut-ool-Butool* v. *Hoseinee Begum* (1867) 11 M.I.A. 194, 209-210 [marriage not presumed]; *Maung Kyi* v. *Ma Shwe Baw* (1929) 7 Rang. 777, 121 I.C. 718, ('29) A.R. 341 [marriage presumed]; *Masitun-Nissa* v. *Pathani* (1904) 26 All. 295 [marriage not presumed]; *Abdul Halim* v. *Saadat Ali* ('29) A.O. 126, 112, I.C. 596, [marriage presumed]; *Hasan Ali Mirja* v. *Nashratali Mirja* (1935) 62 Cal. L.J. 428, 157 I.C. 1091, ('35) A.C. 572 [extension of muta marriage presumed]; *Ma Khatoon* v. *Ma Mys* (1936) 165 I.C. 232, ('36) A.R. 448; *Mahomed Amin* v. *Vakil Ahmed* ('52) A.SC. 358.

(f) Immabandi v. *Mutsadi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513; *Habibur Rahman* v. *Atlaf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159; *Mohamed Amin* v. *Vakil Ahmed* ('52) A.SC. 358.

(g) Mt. Bashiram v. *Mohammad Hussain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 1931 I.C. 161, ('41) A.O. 284; *Mahomed Amin* v. *Vakil Ahmed* ('52) A.S.C. 358.

(h) Abdool Razack v. *Aga Mahomed* (1893) 21 I.A. 56, 65, 21 Cal. 666, 674; *Fateh Mohammad* v. *Abdul Rahman* (1931) 12 Lah. 396, 134 I.C. 590, ('31) A.L. 223 [where the mad had *refused* to acknowledge the woman as his wife and her child as his child].

(i) Ghazanfar v. *Kaniz Fatima* (1910) 37 I.A. 105, 109, 32 All. 345, 350, 6 I.C. 674; *Jariut-ool- Butool* v. *Huseinee Begum* (1876) 11 M.I.A. 194. In *Irshad Ali* v. *Musammat Kariman* (1918) 20 Bom. L.R. 790, 46 I.C. 217. ('17) A.PC. 169, the woman was a prostitute, but there was a writing evidencing the marriage and the marriage was held proved.

(j) Mohabat Ali v. *Mohamad Ibrahim* (1929) 56 I.A. 210, 209, 10 Lah. 725, 117 I.C. 17, ('29) A.PC. 135.

In *Abdool Razack* v. *Aga Mahomed (k)*, their Lordships of the Privy Council said: "In the next place, it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument — indeed, it would be almost irresistible — if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife." It was held in that case that the conduct of the parties was incompatible with that relation, and their Lordships held that the presumption did not apply.

In *Ghazanfar* v. *Kaniz Fatima (l)*, their Lordships of the Privy Council said: "The learned judges fully recognized that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father's house was, according to the case on both sides, a prostitute."

269. Muta marriage.— (1) the Shia law recognizes two kinds of marriage, namely (1) permanent, and (2) *muta* or temporary.

(2) A Shia of the male sex may contract a *muta* marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Moslem *(m)*.

(3) It is essential to the validity of a *muta* marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years *(n)*, and that (2) some dower should be specified *(o)*. When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void. But if the dower is specified, and the term is not fixed, the contract, though void as a *muta*, may operate as a "permanent" marriage *(p)*.

(4) The following are the incidents of a *muta* marriage:—

(a) a *muta* marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents *(q)*;

(b) where the cohabitation of a man and a woman *commences* in a *muta* marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father *(r)*;

(c) even if there is evidence of the term for which the *muta* marriage was fixed and cohabitation continues after the expiry of that term, the inference is that the term was extended for the whole period of the cohabitation and that the children conceived during the extended term are legitimate *(s)*;

(k) (1893) 21 I.A. 56, 65, 21 Cal. 666, 674; See also *Fatma Binit* v. *Administrator-General* (1949) 2 Mad. L.J. 184, ('49) A.PC. 254.

(l) (1910) 37 I.A. 105, 109, 32 All. 345, 350, 6 I.C. 674.

(m) Baillie, II, 29, 40.

(n) Baillie, II, 42.

(o) Baillie, II, 41.

(p) Baillie, II, 42-43; Querry, Vol. 1, pp. 689, 693; *Shazada Qanum* v. *Fakher Jung* ('53) A. Hyd. 6 (a muta for life is also a permanent marriage).

(q) Baillie, II, 44; *Shoharat Singh* v. *Jafri Bibi* (1915) 17 Bom. L.R. 13, 24 I.C. 499 [P.C].

(r) (1915) 17 Bom. L.R. 13, 24 I.C. 499, *supra* [the cohabitation in this case was for 10 years].

(s) *Hasan Ali Mirja* v. *Nushrat Ali Mirja* (1935) 62 Cal. L.J. 428, 157 I.C. 1091, ('35) A.C. 572; *Mt. Sarwar Ara Begum* v. *Nawab Bahadur Ali Khan* (1935) 10

(d) a *muta* marriage is dissolved *ipso facto* by the expiry of the term. No right of divorce is recognized in the case of a *muta* marriage, but the husband may at his will put an end to the contract of marriage by "making a gift of the term" (*hiba-i-muddat*) to the wife, even before the expiration of the fixed term *(t);*

(e) if a *muta* marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term. If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower *(u);*

(f) a woman married in the *muta* form is not entitled to maintenance under the Shia law *(v).* But it has been held that she is entitled to maintenance as a wife under the provisions of sec. 488 of the Criminal Procedure Code *(w).*

Under the Shia law a marriage between a Muslim and a non-Muslim is unlawful and void, but a valid Muta marriage can be contracted with a Kitabia, which includes a Christian or a Jew but not a Hindu. Muta marriage is a temporary marriage as distinguished from the ordinary permanent marriage. A Shia of the male sex may contract a Muta marriage with a woman professing Mahomedan, Christian or Jewish religion or even with a woman who is a fire- worshipper but not with a woman following any other religion. It is essential to the validity of a Muta marriage that the period of cohabitation should be fixed, though such period may even be as short as day, and some dower should be specified. Muta marriage does not create mutual rights of inheritance between the husband and the wife but the children conceived are legitimate and capable of inheriting from both the parents. It is dissolved *ipso facto* upon the expiry of the term.

Syed Amanullah Hussain v. *Rajamma* (1977) 1 An. W.R. 123; (1976) 2 A.P.L.J. 323.

The Sunni law does not recognize *muta* marriages at all: Baillie, 18.

Under the Shia law a marriage between a Muslim and a non-Muslim is unlawful and void, but a valid Muta Marriage can be contracted with Kitabia, which includes a Christian or a Jew but not a Hindu. Muta marriage is a temporary marriage as distinguished from the ordinary permanent marriage. A Shia of the male sex may contract a Muta marriage with a woman professing Mahomedan, Christian or Jewish religion or even with a woman who is a fire- worshipper but not a woman following any other religion. It is essential to the validity of a Muta marriage that the period of cohabitation should be fixed, though such period may even be as short as a day, and some dower should be specified. Muta marriage does not create mutual rights of inheritance between the husband and the wife but the children conceived are legitimate and capable of inheriting from both the parents. It is dissolved *ipso facto* upon the expiry of the term.

Marriages may be established by direct proof or by indirect proof, i.e., by presumption drawn from certain factors. It may be presumed from prolonged cohabitation combined with other circumstances or from acknowledgment of legitimacy in favour of a child or the fact of the acknowledgment by the man of the woman as his wife. It is true that the presumption does not apply if the conduct of the parties is inconsistent with the relationship of husband and wife.

Syed Amanullah Hussain v. *Rajamma* (1977) 1 An. W.R. 123: (1976) 2 A.P.L.J. 323.

The expression "permanent" in sub-sec. (1) is used in contradistinction to "temporary". No Mahomedan marriage, either among Sunnis or Shias, is permanent in the sense in which a Christian or a Parsi marriage is, for the husband may divorce the wife at any time he likes.

Luck. 577, 153 IC. 803, ('35) A.O. 152.

(t) Baillie, II, 43; *Mohamed Abid* v. *Ludden* (1887) 14 Cal. 276.

(u) Baillie, II, 41; (1887) 14 Cal. 276, 284-285, *supra.*

(v) Baillie, II, 97.

(w) Luddun v. *Mirza Kamar* (1882) 8 Cal. 736. This decision is of doubtful authority because, as stated in *Sharaya-ul-Islam,* "the name of a *wife* does not in reality apply to a woman contracted in *Moota*"; Baillie; II, 344.

Marriage of Minors

270. Marriage of minors.— a boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

A boy or a girl who has attained puberty is at liberty to marry anyone he or she, likes, and the guardian has no right to interfere if the match be equal; Macnaghten, p. 58, secs. 14-16. See sec. 251 above.

If the bride is a minor she cannot appoint an agent or vakil to enter into the contract of marriage on her behalf *(x)*. The consent must be given by her legal guardian *(y)*. Sec. 271.

271. Guardianship in marriage (jabar).— The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high soever, and (3) brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

Hedaya, 36-39.

A Single Judge of the Allahabad High Court has held that the marriage of a minor contracted by a remoter guardian when a nearer one was present and available and when the latter did not consent or subsequently ratify the marriage, was void; and the consummation would not validate such a marriage. *Ayub Hassan* v. *Mst. Akktari* ('63) A. All. 525.

It is submitted that want of objection on the part of the brother was perhaps tantamount to consent.

The fact that a guardian has been appointed by the Court of the person of a minor does not take away the power of the guardian for the marriage to dispose of the minor in marriage. But the minor being in such a case a ward of the Court, the guardian for the marriage should not dispose of the minor in marriage without the sanction of the Court to the proposed marriage *(z)*.

Apostasy of guardian for marriage.— It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law an apostate has no right to contract a minor in marriage: *Hedaya*, 392. It is enacted, however, by Act XXI of 1850, that no law or usage shall inflict on any person who renounces his religion any "forfeiture of rights or property." and it was accordingly held by the High Court of Bengal in *Muchoo* v. *Arzoon (a)* that a Hindu father is not deprived of his right to the custody of his children and to direct their education by reason of his conversion to Christianity. In a subsequent case, however, decided by the same High Court, but without any reference to *Muchoo's* case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage *(b)*. *Muchoo's* case was followed by the Chief Court of the Punjab *(c)*, which was a case of conversion of a Mahomedan father to Christianity. In a Bombay case, it was held, following *Muchoo's* case, that a Hindu convert to Mahomedanism is not disqualified from giving his son in adoption to a Hindu *(d)*. It is submitted that the power to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo's* case is correct. But the Court may in its discretion deal with each case on its own merits.

Shia law.— The only guardians for marriage recognized by the Shia law are the father and the paternal grandfather how high soever; Baillie, II, 6. See notes to sec. 274.

(x) Shafi Ullah v. *Emperor* (1934) All. L.J. 387, 150 I.C. 139, ('34) A.A. 589.

(y) Jogu Bibi v. *Mesel Shaikh* (1936) 63 Cal L.J. 415, 164 I.C. 957.

(z) Monijan v. *District Judge, Birbhum* (1914) 42 Cal. 351, 25 I.C. 229.

(a) (1866) 5 W.R. 235.

(b) In the matter of Mahin Bibi (1874) 13 B.L.R. 160.

(c) Gul Muhammad v. *Mussammat Wazir* (1901) 36 Punj. Rec. 191.

(d) Shamsingh v. *Santabai* (1901) 25 Bom. 551.

272. Marriage brought about by father or grandfather.— When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted fraudulently or negligently, as where the minor to a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty *(e)*.

Hedaya 37; Baillie, 50; Ammer Ali, 5th ed., Vol. II, p. 370. See sec. 210 below.

It has been held by the High Court of Allahabad that a Shia girl given in marriage by her father to a Sunni husband has an option of repudiation on attaining puberty unless it has been ratified by consummation or otherwise, the reason given being that it would be contrary to all rules of equity or justice to force such a marriage on her if on attaining puberty she considers the marriage to be repugnant to her religious sentiments *(f)*. Following this case, a single judge of the Chief Court of Karachi has held that the wife was entitled to repudiate the marriage where the husband had been convicted for theft and was under trial on a charge of enticing or taking away or detaining with criminal intent a married woman *(g)*.

273. Repudiation under the Dissolution of Muslim Marriages Act, 1939.— By the Dissolution of Muslim Marriages Act, 1939, all restriction on the option of puberty in the case of minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under sec. 2(vii) of the Act a wife is entitled to the dissolution of her marriage if she proves the following facts, namely, (1) the marriage has not been consummated, (2) the marriage took place before she attained the age of 15 years, and (3) she has repudiated the marriage before attaining the age of 18 years *(h)*. The High Court of Lahore *(i)* has decided that a decree of Court is not necessary to invalidate the marriage which has been repudiated by the wife, but the High Court of Madhya Pradesh has held that a decree of the Court is necessary *(j)*.

Proof of age.— The question of age is a question of fact and even if a birth-certificate is not produced, age may be proved from other evidence *(k)*.

274. Marriage brought about by other guardians: Option of puberty.— When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty *(l)*. This is technically called the "option of puberty" *(khyar-ul-bulugh)*.

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to

(e) Aziz Bano v. *Muhammad* (1925) 47 All. 823, 838-839, 89 I.C. 690. ('25) A.A. 720.

(f) Aziz Bano v. *Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720; *Sibt Ahmed* v. *Amina Khatun* (1928) 50 All 733, 113 I.C. 434, ('29) A.A. 18.

(g) Zubeda Begum v. *Vazir Mahomed* (1940) 190 I.C. 94, ('40) A.S. 145.

(h) Dissolution of Muslim Marriages Act, 1939, sec. 2(vii); *Zubeda Begum* v. *Vazir Mahomed* (1940) 190 IC. 94, ('40) A.S. 145.

(i) Pirmahomed v. *State of Madhya Pradesh* ('60) A.MP. 24.

(j) Mt. Razki v. *Muhib Dur Muhammad* (1946) Kar. 246, 231, I.C. 413, ('47) A.S. 102.

(k) Mahomed Shariff v. *Khuda Baksh* (1936) 164 I.C. 713, ('36) A.L. 683; *Abdul Karim* v. *Amina Bai* (1935) 59 Bom. 426, 37 Bom. L.R. 398, 157 I.C. 694, ('35) A.B. 308; *Jay Gunnesa Bibi* v. *Mohammad Ali Biswas* (1938) 1 Cal. 139, 174 I.C. 632, ('38) A.C. 71; *Ahmad Husain* v. *Amir Banu* (1939) 185 I.C. 837, ('40) A.A. 63. *Nizamuddin* v. *Huseni* ('60) A.M.P. 212.

(l) Bismillah v. *Nur Muhammad* (1922) 44 All. 61, 63 I.C. 702, ('22) A.A. 155; *Rahmat Ali* v. *Mst. Allah* (1930) 11 Lah. 172, ('29) A.L. 827; *Mst. Mukhan* v. *Haidar* ('32) A.L. 449, 137 I.C. 739; *Mt. Aishan* v. *Jodha Ram* (1938) 40 P.L.R. 305, 178 I.C. 732, ('38) A.L. 719; *Ayesha* v. *Mohammad Yunus* (1938) P.W.N. 656, 177, I.C. 514, ('38) A.P. 604.

repudiate it, she does not repudiate without unreasonable delay *(m)*. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has been been consummated. But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

Hedaya, 38; Baillie, 50-52; Macnaghten, p. 58, sec. 18. Consummation consented to by the wife before the exercise of the option: Baillie, 51. But consummation does not validate a marriage which is void *(n)*.

Filing a suit for dissolution is evidence of the fact that she has exercised her right of repudiation *(o)*.

Shia law.— According to the Shia law, a marriage brought about by a person other than a father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty *(p)*. See notes to sec. 271. *Shia law."*

Consent has been shown to be withheld:

(1) Suit — by institution of suit for dissolution.
(2) If marriage not consummated by marrying again (following *Muhammad* v. *Emp.* 140 I.C. 617.
(3) By serving a notice.

275. Effect of repudiation.— The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be.

Hedaya, 37, 38; Baillie, 50.

The woman may herself bring a suit for declaration that she has exercised her opinion and repudiated the marriage. Or she may plead the repudiation in defence to her husband's suit against her for restitution of conjugal rights, and the Court may in that suit declare that the marriage has been repudiated *(p)*. No such declaration, however, can be made, if she has permitted sexual intercourse with her after the exercise of the option.

Confirmed by the Court.— It is not clear that any order of the Court is necessary. The Calcutta High Court has held that no decree is required to confirm the repudiation, but that an order of the Judge is necessary to impress on the act a judicial imprimature, and the Madhya Pradesh High Court has approved the Calcutta view *(q)*. In a Lahore case the girl repudiated her marriage in an application to the Deputy Commissioner and then remarried. It was held that the marriage was not bigamous although the repudiation had not been confirmed by a Court *(r)*. In later decisions of the Lahore High Court (now in Pakistan) it has been held that exercise of the option of puberty puts an end to the marriage without the aid of any Court. In Pakistan it has been held that the Court does not dissolve the marriage by its own act but merely recognises the termination of the marriage *(s)*. The Allahabad High Court has even said that a remarriage is in itself an exercise of the option *(t)*. — but the observation is obiter as the Court had held that the first marriage was invalid.

(m) Abdul Kasem v. *Jamila Khatun Bibi* (1940) Cal. 401, 44 C.W.N. 352, 188 I.C. 490, ('40) A.C. 251; *Mt. Ahmed- un-nisa Begum* v. *Ali Akbar Shah* (1942) 199 I.C. 531 ('42) A. Pesh. 19.

(n) Ayesha v. *Mohammad Yunus* (1938) P.W.N. 656, 177 I.C. 514, ('38) A.P. 604.

(o) Mulka Jehan v. *Mohamed* (1873) LR. I.A. Sup. Vol. 192, 26 W.R. 26.

(p) Badal Aurat v. *Queen-Empress* (1891) 19 Cal. 79; *Batoolan* v. *Zahoor* ('52) A. Madhya Bharat 30; *Nizamuddin* v. *Huseni* ('60) A.M.P. 212.

(q) Mafizuddin Mandal v. *Rahima Bibi* (1933) 58 Cal. L.J. 73, 37 Cal. W.N. 1043, 149 I.C. 1028, ('34) A.C. 104; *Pirnahomed* v. *State of M.P.* ('60) A.M.P. 24.

(r) Ghulam Muhammad v. *The Crown* (1933) 140 I.C. 617, ('33) A.L. 88.

(s) Shafi Ullah v. *Emperor* (1934) All. L.J. 387, 150 I.C. 139, ('34) A.A. 589.

(t) Baillie, 441.

276. Marriage of lunatics.— The provisions of sections 270 to 275, relating to the marriage of minors, apply to the marriage of lunatics, with this difference that the option is to be exercised when the lunatic recovers his or her reason.

Baillie, 50-54.

B. — MAINTENANCE OF WIVES

277. Husband's duty to maintain his wife.— The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) *(u)*, so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him *(v)*, or is otherwise disobedient *(w)*, unless the refusal or disobedience is justified by non-payment of prompt (s. 200) dower *(x)*, or she leaves the husband's house on account of his cruelty *(y)*.

The mere decree for restitution of conjugal rights does not automatically bar the wife from claiming maintenance but that it is only a piece of evidence to be taken into account by the Magistrate in determining the wife's entitlement to maintenance. [Ramachandra Raju. J] *Syed Ghulam Sajjad* v. *Parveen Fatima* (1980) 2 An W.R. 335.

278. Order for maintenance.— If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement *(z)*. Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, section 488, in which case the court may order the husband to make a monthly allowance in the whole for her maintenance not exceeding five hundred rupees.

If the wife exercises her right under Mahomedan law and refuses to live with her husband on the ground of non-payment of prompt dower, she cannot enforce her right on to maintenance under sec. 488 of the Code of Criminal Procedure *(a)*. If the husband has married another wife, or keeps a mistress, the wife may refuse to live with her husband and still claim maintenance *(b)*. Where the suit is for maintenance, interim maintenance will be refused *(c)*.

The law has been altered by the Code of Criminal Procedure, 1974, (see infra).

Shafei law.— According to the Shafei school, the wife is entitled to *past* maintenance though there may be no agreement in respect thereof *(d)*.

Cherummel Abdulla v. *Povvalora Katheesa,* A.I.R. 1984 Kerala 94.

As regards the first question, there is no controversy that the plaintiffs are entitled to past maintenance, as they belong to the Shafi sect. (See *Mahamed Haji* v. *Kalimabi,* ILR 41 Mad 211: (AIR 1981 Mad 722).

There is a difference between the Hanafi law and Shafi law on this point. This is point out in Hedaya (Hamilton, Vol. I, page 398). The relevant passage is:

"Shafi says that the maintenance is in all circumstances to be considered as a debt upon the

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(u) Baillie, 442; *Mahomed Ali* v. *Mt. Ghulam Fatima* (1935) 160 I.C. 365, ('35) A.L. 902.

(v) *A.* v. *B.* (1896) 21 Bom. 77, at p. 82; *Mt. Khatijan* v. *Abdullah* (1942) Kar. 535, ('43) A.S. 65.

(w) Baillie, 442; *Najiman Nissa* v. *Serajuddin* (1946) 228 I.C. 198, ('46) A.P.

(x) 467. *Amir Mohammad* v. *Mst. Bushra* ('56) A. Raj. 102.

(y) *Abdool Futteh* v. *Zabunnessa* (1881) 6 Cal. 631.

(z) Rs. 500 was substituted for Rs. 100 by the Code of Criminal Procedure (Amendment) Act, 1955, (XXVI of 1955).

(a) *Muhammad Azizullah* v. *Abdul Halim* (1935) 154 I.C. 561, ('35) A.O. 285. Pakistan: *Mushaf Husain Shah* v. *Hamida Begum* (1957) 2 W.P. 113. ('57) P. Lah. 220.

(b) See proviso to sub-sec. (3) of sec. 488 of the Code of Criminal Procedure as amended by Act IX of 1949, and *Badruddin* v. *Aisha Begum* (1957) All. L.J. 300.

(c) *Mahomed Abdul Rehman* v. *Tajunnissa* ('52) A.M. 420.

(d) *Mahammad Haji* v. *Kalimabi* (1918) 41 Mad. 211, 42 I.C. 517.

husband in conformity with his tenant that it is not a gratuity but a return, wherefore it cannot drop like demands of the former description."

In Tohfatal Mierhaj, an authoritative commentary on the Mirhaj by Shahabuddin Ahmad Ibu Hayanul Hailini who flourished in the 16th century, it is stated that the maintenance is a debt on her husband even if it was not decreed by the Kazee. These views have got reflected in Tyabji's Principles of Muhammadan Law. All these aspects have been discussed in the Madras decision, ILR 41 Mad 211: (AIR 1918 Mad 722) *supra. E.V. Kunhumariam* v. *Ooramveettil Mammu,* AIR 1985 Kerala 239.

279. Maintenance on divorce.— (1) After divorce, the wife is entitled to maintenance during the period of *iddat (e)* [s. 257]. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce *(f).*

(2) A widow is not entitled to maintenance during the period of *iddat* consequent upon her husband's death *(g).*

A Muslim divorced wife filed an application under S. 125 for maintenance on her behalf and that of her daughter. The husband alleged that he had sent a letter to the wife making a conditional offer of divorce and had fixed a limit for a reply but the wife did not care to answer. He further alleged that he had sent his brother and one of his friends to the father's house of the wife with who she was residing to persuade her to come and live with her husband but the wife declined the request and stated that she would not claim maintenance. The alleged representation by the brother and friend of the husband was not set out in the written statement. Not a word was put to the wife and her father on this point in cross-examination. Though the brother of the husband said about the relinquishment the friend of the husband did not say a word about it.

Held that, the solitary evidence of the brother who was an interested witness could not be accepted.

Held further that, wife's silence to her husband's letters would not amount to acceptance of the terms and conditions contained in those letters and it could not be inferred that by her silence the wife had relinquished her right to claim maintenance [R. B. Lal, J.] *Syed Mukhtar Ahmad* v. *Smt. Moonis Fatima,* 1981 All. L.J. 785.

The Plaintiff was married to the defendant on May 17, 1950. A son was born to the marriage and thereafter the husband neglected the wife and refused to maintain her on the plea (held to be false) that he had divorced her on the night of the wedding. The trial Court, on being moved by the wife, granted a decree for maintenance to both mother and son.

The husband had served notices on May 12, 1960 and July 16, 1960 stating that he had divorced the wife on the night of the wedding. Following the view of the Allahabad High Court in *Asmatullah* v. *Mst. Khatunnissa* (39) A. All. 592 based on a principle stated by Macnaghten, the date of the divorce, in the face of the wife's denial, was held to be the date of the notice. Mahomedan Law gives not only the right to the husband to pronounce an oral divorce but also to do so by notice. When such a notice is given it amounts to a divorce.

She is then entitled to maintenance during the period of *iddat* (q.v.), in this case from May 12, 1960. She was held not entitled to past maintenance unless there was a specific agreement. *Mohammad Ali* v. *Fareedunnissa Begum* ('70) A. Andh P. 298 *Imam Saheb* v. *Hajju Bee* (1970) 1 An. W.R. 138.

Order of maintenance under Criminal Procedure Code, 1908 *sec.* 488.— Where an order is made for the maintenance of a wife under sec. 488 of the Criminal Procedure Code [s. 278] and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of *iddat (h).* The result is that a Mahomedan may defeat an order made against him under sec. 488,

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(e) Hedaya, 145; Baillie, 450; *Musammat Marian* v. *Kadir Bakhsh* ('29) A.O. 527.

(f) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52, 135 I.C. 762, ('32) A.PC. 25; *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833, 846-847, 141 I.C. 689. ('33) A.C. 27. See also; *Munnisa Begum* v. *Noore Mohd.* ('65) A.An. r. 231.

(g) Aga Mahomed Jaffer v. *Koolsom Beebee* (1897) 25 Cal. 9.

(h) In re Abdul Ali (1883) 7 Bom. 180; *In the matter of Din Muhammad* (1882) 5 All. 226; *Shah Abu Ulfat Bibi* (1896) 19 All. 50; *Ahmad Kasim* v. *Khatun*

by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat.* A divorced wife is entitled to sue in the place where she normally resides for her dower, maintenance or return of her jewels and clothes *(i).*

Once the husband divorces the wife or the wife obtains a divorce from her husband she becomes entitled to claim maintenance from her ex-husband provided she is unable to maintain herself and the husband has neglected to maintain her. Her right to claim maintenance would come to an end only if she remarries or lives in adultery or if she voluntarily surrenders her right to maintenance. In the instant case none of these eventualities has come to pass. The story of voluntary surrender has been found untenable. There is nothing in Chap. IX to warrant the inference that the ground of divorce or the previous conduct of either spouse are to be looked into and the wife is to be held entitled to a right to maintenance only if she was not guilty of any faulty conduct. Hence, a consideration of the previous conduct of the divorced wife is wholly irrelevant in a case under S. 125 Cr. P. Code. [R. B. Lal. J. (H.C.)] *Syed Mukhtar Ahmad* v. *Smt. Moonis Fatma* (1981) 18 A.C.C. 224.

It was contended that the wife had agreed to relinquish her right to maintenance allowance and, therefore, she was not entitled to claim maintenance allowance in view of the provisions of S. 127 (3)(c) of the Code, But no settlement of claim which does not have the special statutory right of the divorce under S. 125 can operate to mitigate that claim. The aforesaid contention, has to be repelled as having no merit in fact of law. 1979 Cri. L.J. 151 (S.C.). Followed [R.B. Lal, J. (H.C.)] *Syed Mukhtar Ahmad* v. *Smt. Moonis Fatima.* (1981) 18 A.C.C. 224.

Where to an application for maintenance under s. 488 by a Mahomedan wife the husband filed a written statement to the effect that he had already divorced the wife about 30 years ago, the statement, even if the fact of such divorce was not proved, was held to operate as a declaration of divorce from the date of the written statement and the wife entitled only to a maintenance for a period of iddat from that date *Chandbi* v. *Bandesha* ('61) A.B. 121.

See also: *Shaikh Jalil* v. *Sarfunissa* (N. P. Singh J.) 1977 83 Crim. L.J. 43.

In a case in which the wife refused the husband's offer to maintain her, it was held that this might not be sufficient to deny divorce under section 2(ii) of the Dissolution of Muslim Marriage Act but the duty of the husband to maintain her ceased since the wife refused to be looked after by her husband. *Aboobacker Haji* v. *Mamu Koya* 1971 K.L.T. 663 *A. Yusuf* v. *Sowramma* '71 A. Ker. 261.

In a petition by a Mahomedan wife for maintenance under S. 488 of the Criminal Procedure Code of 1898, the husband filed a written statement that he had divorced her. It was held that the divorce operated from the date of the statement and the wife was given maintenance for 3 months and 10 days. *Mohd. Haneefa* v. *Pathummal Beevi* 1972 K.L.T. 512.

Under Section 125 of the Code of Criminal Procedure (1974) maintenance is claimable by a wife who is divorced. It is not necessary that the divorce should have taken place *after* the coming into force of the new Act. At present right in respect of a past event, enforceable through a new statute does not make the law operate retrospectively since under sub-section (2) the allowance is payable from the date of the order or from the date of the application for maintenance. This law is both remedial and beneficial and the Courts must suppress the mischief and advance the remedy. *K. Raza Khan* v. *Mumtaza Khatoon* (1976) 1 An. W.R. 1.

However it was held in another case before the new Act that maintenance was payable to the wife only during the period of *Iddat,* but the children were entitled to maintenance. *Ali Mohammad* v. *Mst. Rehmani Meo* (1972) 74 P.L.R. 869.

Even if Muslim law entitles the divorced wife to maintenance only till the end of the period of *Iddat,* section 125 Cr. P. C. (1974) entitles her to maintenance so long as she does not marry again. *K. Raza Khan* v. *Mumtaza Khatoon* (1976) 1 An. W.R. 1.

Bibi (1932) 59 Cal. 833, 847, 141 I.C. 689, ('33) A.C. 27; *Mohd. Shamsuddin* v. *Noor Jehan Begum* (1955) Hyd. 418, ('55) A. Hyd. 144, (1955) Cr. L.J. 950; *Ahmad Giri* v. *Mst. Begha* ('55) A.J. & K. 1. (1955) Cr. L.J. 1067; *Shamshuddin* v. *Zamina Bibi* 1962, (2) Cr. L.J. 124.

(i) Tusliman Bibi v. Abdul Latif (1936) 63 Cal. 726, 161 I.C. 427, ('36) A.C. 97; *Mahomed Ibrahim* v. *Jaithoon Bivi* (1951) 1 Mad. L.J. 449, ('51) A.M. 831. See also: *Enamul Haque* v. *Bibi Taimunissa* ('67) A.P. 344 (Declaration of divorce operative from date of filing written statement in proceedings for maintenance).

No doubt, if a party had not pleaded a particular case, it could not be allowed to lead evidence and further, evidence on such a non-pleaded point cannot be looked into. But these strict rules of pleading and proof which are applicable to civil matters, should not be extended to cases under S. 125. Cr. P. Code. This section contains a beneficial socio-economic provision for the assistance of unprovided for and discarded wives and children and, therefore, this provision is to be construed liberally so far as the question of taking up a plea in the application is concerned. If no plea is taken up in the application and no evidence is led to prove that the wife is unable to maintain herself, her claim for maintenance may be negatived but where the parties have joined issue on this important point at the time of enquiry and have led evidence, then the technical contention that the plea was not taken up in the application, should not be allowed to prevail. Clause (a) of sub-s (1) of S. 125 Cr. P. Code clearly says that a wife who is unable to maintain herself can claim maintenance allowance from her husband if some other conditions are also fulfilled. It does not specifically lay down that this plea must be raised by the wife in the application. A party is not to be taken by surprise and it is for this reason that it is necessary and desirable that the plea sought to be relied upon is set out in the application. However, a case where the plea was not mentioned in the application but was raised at the time of enquiry and the parties joined issue on it and led evidence, it cannot be said that the other party (here the husband was taken by surprise or was prejudiced in his defence) [R. B. Lal, J. (H.C)] *Syed Mukhtar Ahmad* v. *Smt. Moonis Fatma* (1981) 18 A.C.C. 224.

It is true that the Explanation (b) to S. 125 (1) enlarges the scope of the term wife for the purpose of Chap. IX. But that does not create any jural relationship between a divorced woman and her erstwhile husband.

Evidently the object of the Explanation is to obviate repeated reference to the wife as well as the wife who has been divorced in appropriate places in the relevant sections. The operation of the Explanation is only to read the term wife in Chap IX as referring to wife as well as a divorced woman who has not remarried, if such reference would not be inappropriate. Though a divorced woman may be understood by the term wife by reason of the Explanation the person who was her husband prior to such divorce will not be comprised within the term 'husband'. Section 125(4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really not a husband as the husband, then sub-section (4) will not be applicable to the case of a divorced woman. There are other indications in sub-sec (4) which make the sub-section inapplicable to a divorced woman. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life. But that would not render her guilty of adultery for adultery is a term that denotes an offence against the institution of marriage. The inclusive definition of the term 'wife' will not be sufficient to read promiscuous or immoral living of a divorced woman as of one living in adultery. 1976 Ker LT 87, overruled.

Sub-section (4) of S. 125 conceives refusal to live with the husband without sufficient reason as sufficient justification for refusing maintenance. This presupposes a right and an obligation to live with the husband. Such a right and an obligation cannot be assumed in the case of a divorced woman nor can a corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. If so such a ground available for refusing allowance contemplated in s. 125(4) becomes inapplicable to the case of a divorced woman.

So is the case with the provision that if the husband and wife are living separately by mutual consent the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman. *Mariyumma* v. *Mohd. Ibrahim*, AIR 1978 Kerala 231.

280. Agreement for future maintenance.— An ante-nuptial agreement between a Mahomedan and his prospective wife, entered into with the object of securing the wife against ill-treatment and of ensuring her suitable maintenance in the event of ill-treatment, is not void as being against public policy *(j)*. Similarly, an agreement between a Mahomedan and his first wife,

(j) Muhammad Muin-ud-din v. *Jamal* (1921) 43 All. 650, 63 I.C. 883, ('21) A.A. 152; *Musammat Hamidan* v. *Muhammad* ('32) A.L. 65, 133 I.C. 886,

made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy *(k)*. Similarly, an agreement by a Mahomedan with his second wife that he would allow her to live in her parents' house and pay her maintenance is not against public policy *(l)*. See secs. 281 (3) and 321. It has been held in Bombay that an agreement for future separation between husband and wife is void as being against public policy under the Indian Contract Act, 1872, sec. 23. An agreement, therefore, which provides for a certain maintenance to be given to the wife in the event of a future separation between them, is also void *(m)*. If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in sec. 279, and not for life, unless the agreement provides that it is for life *(n)*.

EXCURSUS

The right to maintenance after the period of *iddat* came to be considered under sections 125 to 127 of the Code of Criminal Procedure. A large number of cases arose particularly in the seventies and eighties. They culminated in the case of *Mohd. Ahmed Khan* v. *Shah Bano Begum* (A.I.R. 1985 S.C. 945). Cases before it may be briefly mentioned here. This list is not intended to be exhaustive and is only illustrative. The reason for not mentioning or discussing other cases will be stated at the end.

In *Bai Tahira* v. *Ali Hussain* A.I.R. 1979 S.C. 362, the Court was not called upon to decide whether divorced *muslim* women could be brought within sections 125-127 of the Code of Criminal Procedure. The case turned entirely on neglect and non-payment of maintenance. The husband denied it on the basis of certain dealings between the parties. The claim for maintenance was upheld.

This case and the next that followed it (*Fuzulunbi* v. *K. Khader Vali* 1980 S.C. 1730) were approved later but one statement in the former at page 365 in the context of S. 127(3)(b) was disapproved. A short passage may well be quoted here. It was observed that:

"payment of Mahr money, as a customary discharge is within the cognisance of that provision." was incorrect because "... Mahr, not being payable on divorce does not fall within that provision."

In neither of these two earlier cases was the question whether sections 125 to 127 of the Code of Criminal Procedure would govern a Muslim divorced 'wife', notwithstanding the widened definition of 'wife' to include a 'divorced wife'. This question fell to be considered by a Bench of 5 Judges in the *Shah Bano* case, as it is called.

The following cases may also be seen. *Zohra Khatoon* v. *Mohammed Ibrahim* A.I.R. 1981 S.C. 1243.

(a) *Jagdish Chandra* v. *Smt. Somwati* 1981 A.W.C. 574 (although a case between Hindu parties, the reasoning was the same as in cases involving Mahomedans).

(b) *Syed Mukhtar Ahmed* v. *Smt. Moonis Fatma* 1981 All. L.J. 785.

(c) *Aijaz Ahmed Lalri* v. *Smt. Shahjehan Begum* 1982 Cr. L.J. 1022 (All). *Cherummal Abdulla* v. *Poovalora Kathessa* 1983 K.L.T. 544. (But see the comments of Mr. Danial Latifi in the Annual Survey of Indian Law (ILI) vol. XX page 307.) The last case followed the case of *Mohd. Ahmad Khan* v. *Shah Bano Begum* and is *Begum Subranu alias Saira Banu* v. *A. M. Abdul Ghafoor* A.I.R. 1987 1103.

(k) Mansur v. *Azizul* (1928) 3 Luck. 603, 109 I.C. 812, ('28) A.O. 303.

(l) Mt. Sakina Faruq v. *Shamshad Khan* (1936) 165 I.C. 937, ('36) A. Pesh. 195. In addition to the cases in footnotes *(z)*, *(a)* and *(b)*; See also: *Nizamul Haque* v. *Begum Noorjahan*, ('66) A.C. 465.

(m) Bai Fatma v. *Alimahomed* (1913) 37 Bom. 280, 17 I.C. 946. But see: *Mohd. Zaman* v. *Irshadi Begum*; P.L.D. 1967 Lah. 1104 where this case is dissented from.

(n) Muhammad Muin-ud-din v. *Jamal* (1921) 43 All. 650, 63 I.C. 883, ('21) A.A. 152 [stipulation for maintenance for life]; *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833, 854, 141 I.C. 689, ('33) A.C. 27 [no stipulation for maintenance for life]; *Mydeen Beevi* v. *Mydeen Rowther* ('51) A.M. 992 (stipulation for maintenance for life.

The leading case is the *Shah Bano* case. Briefly stated it decided that in S. 125 Cr. P.C. 'wife' includes also a divorce *muslim* woman so long as she has not remarried and that "section overrides the personal law, if there is any conflict between the two." The provision in the Constitution of India regarding a uniform Civil Code Art 44 (called by Iyer J. 'Common Civil Code' in the earlier case) was called in support. Chief Justice Chandrachud gave his own reading of the Koranic texts.

A great controversy raged and Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 (10 of 1986). The text of that Act is to be found at the end. A fairly accurate summary of the Act (omitting the asides of the Author) is to be found in the Islamic and Comparative Law Quarterly Vol VI (June & Sept.) 1986 pp 159-179. As the learned author (Dr. Tahir Mahmood) has correctly pointed out the provisions of sections 125-127 continue to apply but provision is made for the husband and the divorced wife to opt out of the provisions of the new Act and consent to be governed by the provisions of the Criminal Procedure Code. This, they must do on the first hearing of the application under section 3 of the new Act, by affidavit or other declaration in writing either jointly or separately. Thus the two sets of provisions are on the statute book. Under the new Act the children or the parents or other relatives (in that order) may be ordered to pay maintenance, and failing all of them, the State Waqf Board may be ordered to pay maintenance.

As a result of the decision in *Shah Bano's* case the decision in *Mst. Zohra Khatun* v. *Mohd. Ibrahim* (A.I.R. 1981 S.C. 1243) was reheard and decided in 1985/ 1986 and the judgment is reported in A.I.R. 1986 S.C. 587.

It has not been considered necessary to discuss the *Shah Bano* case on the new Act. Much that could be said on the two sides of the question has been said already by Mr. Danial Latifi who appeared in the case of Dr. Tahir Mahmood in the Journal, Islamic and Comparative Law Quarterly in the years 1986, 1987 and 1988. Numerous articles, speeches etc. were recorded and the parliamentary debates also give much insight. Mr. Danial Latifi gave a complete analysis of the word 'mataa' (maintenance) and quoted the Koranic texts in the Indian Law Institute Annual Survey Vol. XXI. Dr. Tahir Mahmood joined issue. Others who joined in this are Dr. Lucy Caroll of Cambridge University. She called the Act a retrograde step and Dr. Virendra Kumar Dean of Law Faculty Punjab University also joined in the fray. A book entitled *Shah Bano* by Janek Raj Jai has also appeared (Rajiv Publications 1986). On February 12, 1988 the Indian Post (city p. 3) give information about a case which was to be heard on the following Monday in which the wife was claiming Rs. 3 lakhs from her husband as 'reasonable and fair provision' under the new Act. It is not known what was decided. Meanwhile under the above phrase magistrates are having a field day and awarding under the new Act fantastic sums as maintenance while under the Criminal Procedure Code such sums were never awarded. Lastly a woman divorced by two husbands, one after the other, claimed and was awarded maintenance from both!

"The Muslim Women (Protection of Rights of Divorce) Act 1986, seeking to undo Shah Bano is now under challenge in several petitions lying before the Supreme Court. It will be the outcome of these petitions that will determine the legal position of the judicial decisions in Zohra Khatun and other similar cases." This conclusion of Dr. Tahir Mahmood at page 70 of Vol. VII of the I.C.L.Q. saves the Editors from entering into the controversy.

C.— JUDICIAL PROCEEDINGS

281. Suit for restitution of conjugal rights.— (1) Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights *(o)*.

Under the Mahomedan Law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the husband has another wife. Even if such a defence is raised, the suit will be decreed. Thus the position is that a decree for restitution of conjugal rights can be passed even though the husband has another wife. But the matter is quite different when one has to consider the provisions of S. 125 of the Criminal Procedure Code. The explanation of Sub-s. (3) makes it abundantly clear that if the husband had contracted a marriage with another woman, then that itself would be a just ground for his wife for refusal to live with him.

(o) Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551.

Consequently when a claim for maintenance under S. 125 of the Criminal Procedure Code, is made, the fact of the husband having the second wife will be relevant for the purpose of deciding as to whether the wife has a just ground to live separately from the husband. However, this very fact would not always be relevant while deciding the claim for restitution of conjugal rights. In this background, it will not be correct to contend that the existence of the decree for restitution of conjugal rights in favour of the husband, would be a good reply in each and every case to the claim for maintenance under S. 125 of the Cr. P. Code. The net result therefore is that in view of the explanation of sub-s. (3) of S. 125, the wife would be having a just ground to refuse to live with her husband if he has another wife. But the same will not be always the position if the matter is being fought out in a suit for restitution of conjugal rights. Under these circumstances the husband would not be entitled to resist the claim for maintenance under S. 125, simply because there is a decree for restitution of conjugal rights. 1966 Cr. L.J. 131 (Bom.), Rel. on; (1948) 49 Cr. L.J. 757 (Cal.) A.I.R 1952 All. 616 (2) and 1975 Cr. L.J. 137 (Raj.) Distinguished. [Gadgil J.] *Hafijjabi A. Aziz* v. *Abdul Aziz Kadirkha* 1983 Cr. L.J. 931 (Bom.).

The husband is not entitled to a decree if the marriage, though consummated, was an irregular marriage during the period of *iddat (p)*, nor if the marriage took place during the minority of the wife and has been validly repudiated *(q)*. See secs. 272 and 273.

In a earlier appeal it was held by Ghose C.J. and Masud Hasan J. that *Khana Damad* was not entitled to bring a suit for restitution of conjugal rights as custom imposed on him the obligation to stay in the house of the bride's father and he could not compel his wife to leave it and reside with him elsewhere. On the case being referred to a Full Bench it was ruled that if the wife refused to live with the husband in her own house and to perform her marital obligations, the husband was entitled to a decree.

A second point arose whether in the case an agreement between the husband and wife by which the husband gave a right to the wife to divorce him on certain conditions was invalid as opposed to public policy. It was so held, *Jani* v. *Md. Khan* ('70) A.J. & K. 154.

Mahomedan Law — Marriage Suit by Husband for restitution of conjugal rights — Husband taking a second wife — Right to relief.

The decision in a suit for restitution of conjugal rights does not entirely depend upon the right of the husband. The court should also consider whether it would make it inequitable for it to compel the wife to live with her husband.

Where it was found that the suit instituted by the husband for restitution of conjugal rights was not *bona fide* and the plaintiff had taken a second wife during the pendency of the suit; *held.*, the husband was disentitled to a decree for restitution of conjugal rights 11 M.I.A. 551; I.L.R. 55 All. 743 and A.I.R. 1960 All. 684, Rel on. [Venkataramiah, J.] *Raj Mohammed* v. *Saeeda Amina Begum* (1976) 1 Kar. L.J. 427: A.I.R. 1976 Karn. 200.

The *Khana Damad* custom abrogates the right of the husband to enforce the wife to live outside the wife's parents' house. *Mrs. Jani* v. *Mohd. Khan* ('71) A.J. & K. 40.

(The earlier Division Bench Case limited in operation by the Full Bench but not overruled.) The husband can, however, enforce his rights if he lives in the house of his wife's parents

(2) *Cruelty.*— Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 265) for the benefit of the wife, might, if properly provide, afford good grounds for refusing to him the assistance of the Court"*(r)*.

(p) Mt. Bakh Bibi v. *Quaim Din* ('34) A.L. 907, 154 I.C. 677.

(q) Mt. Bhawan v. *Gaman* (1934) 146 I.C. 292, ('34) A.L. 77; *Abdul Karim* v. *Amina Bai* (1936) 59 Bom. 426. 157 I.C. 694, ('35) A.B. 308.

(r) Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551, 615; *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L.R. 602, 608; *Husaini Begum* v. *Muhammad* (1907) 29 All. 222; *Hamid Hussain* v. *Kubra Begam* (1918) 40 All. 332, 44 I.C. 728; *Genu Meah* v. *Begumnah Bibi* ('33) A.R. 322; *Sofia Begum* v. *Zaheer Hasan* (1947) All. L.J. 157, 230 I.C. 239, ('47) A.A. 16; *Wali Mohd* v. *Taj Bano* 1960 A.P. 293.

The Allahabad High Court has held that the circumstances in which a Mahomedan takes a second wife are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first; and that the onus is on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult on cruelty to the first. *Itwari* v. *Asghari,* ('60) A. All. 684.

Restitution of conjugal rights is not to be lightly ordered. *Shakila Banu* v. *Gulam Mustafa* ('71) A. Bom. 166.

When the wife has a reasonable apprehension that her life is unsafe, she should not be compelled to live with her husband. In a husband's suit for restitution of conjugal rights wife's evidence regarding cruelty does not require corroboration.

(The above is supported by Rayden on Divorce 10th Edition, p. 167 and Halsbury Laws of England.) It is, however submitted that cruelty is required to be proved as a fact like every other fact. The passages relied upon in the case do not obviate the need for corroboration, if such other evidence is readily available. All that can be said is that Courts lean in favour of the wife's testimony if it is cogent and not successfully rebutted.

(3) *Agreement enabling wife to live separate from the husband.*— An agreement entered into before the marriage by which it is provided that the wife should be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights *(s)*. Similarly, an agreement, entered into after marriage between a husband and wife who were for some time before the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, *she should be free to leave him,* is void, and it is not a defence to the husband's suit for restitution *(t)*. See secs. 280 and 322. But an agreement to allow a second wife to live in a separate house and to give her a maintenance allowance has been enforced *(u)*.

(4) *Non-payment of prompt dower and restitution of conjugal rights.*— See sec. 293.

(5) *False charge of adultery by husband against wife.*— A false charge of adultery by a husband against his wife is a good ground for refusing a decree for restitution of conjugal rights *(v)*. But if the charge is true, and it was made at a time when the wife was actually living in adultery, it is no ground for refusing a decree for restitution of conjugal rights *(w)*. See sec. 333.

(6) *Expulsion of husband from caste.*— In a Bombay case, where the parties belonged to the Musssalman Kharwa community of Broach, the High Court refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been expelled from the caste, the wife was not bound to live with him *(x)*.

282. Suit for jactitation of marriage.— A suit will lie between Mahomedans in India for jactitation of a marriage *(y)*.

(s) Abdul v. *Hussenbi* (1904) 6 Bom. L.R. 728; *Iman Ali* v. *Arfatunnessa* (1913) 18 Cal. W.N. 693, 21 I.C. 87; *Fatima Bibi* v. *Nur Muhammad* (1920) 1 Lah. 597, 60 I.C. 88. See; *Mohd. Zaman* v. *Irshad Begum,* P.L.D. 1967, Lah. 1104; [Agreement enabling wife to live separately from the husband and to provide her maintenance if he took a second wife not void; bad conduct or gross neglect good defences to suit for restitution; husband failing to provide maintenance on taking second wife not entitled to decree for restitution. *Fatima Bibi* v. *Nur Muhammad* (1920) 1 Lah. 597 referred to in footnote *(j)* dissented from].

(t) Meherally v. *Sakerkhanoobai* (1905) 7 Bom. L.R. 602.

(u) Mt. Sakina Faruq v. *Shamshad Khan* (1936) 165 I.C. 937, ('36) A. Pesh. 195.

(v) Musammat Maqboolan v. *Ramzan* (1927) 2 Luck. 482, 101 I.C. 261, ('27) A.O. 154; *Jaum Beebe* v. *Beparee* (1865) 3 W.R. 93.

(w) Jamiruddin v. *Sahera* (1927) 54 Cal. 363, 101 I.C. 60, ('27) A.C. 579.

(x) Bai Jina v. *Kharwa Jina* (1907) 31 Bom. 366.

(y) Mir Aznat Ali v. *Mahmud-ul-nissa* (1897) 20 All. 96.

Jactitation is a false pretence of being married to another. "There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship and his heirs may be harassed by false claims after his death"*(z)*.

283. Suit for breach of promise to marry.— In a suit by a Mahomedan for damages for breach of promise to marry, the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments, clothes and other things *(a)*.

284. Suit for enticing away a wife.— A Mahomedan husband can maintain a suit for damages against a person who persuades or entices his wife to live apart from him. *(b)*.

(z) (1897) 20 All. 96, 97, *supra*.

(a) ***Abdul Razak*** v. *Mahomed* (1918) 42 Bom. 499, 38 I.C. 771; *Macnaghten* 250. See also *Mahomed Abid* ***Ali*** v. ***Ludden*** (1887) 14 Cal. 276 [*muta marriage*].

(b) *Muhammad Ibrahim* v. *Gulam Ahmed* (1864) 1 Bom. H.C.R. 236; *Abdul Karim* v. *Amina Bai* (1935) 59 Bom. 426, 37 Bom. L.R. 398, 157 I.C. 694 ('35) A.B. 308.

CHAPTER XV

DOWER

285. Dower defined.— *Mahr* or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

See Baillie, 91.

Consideration.— The word consideration is not used in the sense in which the word is used in the Contract Act. Under Mahomedan law dower is an obligation imposed upon the husband as a mark of respect to the wife *(a)*. Mahmood, J., in *Abdul Kadir* v. *Salima (b)* said that it had been compared to the price in a contract of sale because marriage is a civil contract and sale is a typical contract to which Mahomedan jurists are accustomed to refer by way of analogy. If dower were the bride price a post-nuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable *(c)*.

The Court describing the Mahomedan marriage as a contract with dower as consideration, held that the transaction was 'in the nature of a *hiba-bil-ewaz*'. It is submitted that the application of the doctrine of *hiba-bil-ewaz* was not quite appropriate. *Hiba-bil-ewaz* contemplates *two gifts* and it is difficult to think that there was a 'gift' from the wife as '*ewaz*' for the dower. *H. M. Mondal* v. *D. R. Bibi* ('71) A. Cal. 162.

Amount paid by a Mahomedan, in connection with daughter's marriage, to prospective bridegroom, for purchase of property in joint names of daughter and would-be son-in-law "Not Dowry" within S. 2 of the Dowry Prohibition Act (28 of 1961), Ss. 2 and 3 — "Dowry." *Kunj Moideen* v. *Sayeed Mohammed* 1986, Ker. 48.

286. Specified dower.— The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten *dirhams (d)*.

(2) Where a claim is made under a contract of dower, the Court should, unless it is otherwise provided by any legislative enactment, award the entire sum provided in the contract *(e)*.

Hedaya, 44; Baillie, 92.

Dirham.— The money value of 10 *dirhams* is between three and four rupees *(f)*.

'Dower is often high among Mahomedans, to prevent the husband from divorcing his wife, in which case he would have to pay the amount stipulated' *(g)* and the mere fact that the amount stipulated is excessive or beyond the means of the husband is no defence to the wife's claim *(h)*. If the husband transfers a field to his wife as dower she is entitled as against him to a decree for possession. If there are other sharers in the field they are not necessary parties to her suit and the decree does not affect their rights *(i)*. See: *Nasir Ahmad Khan* v. *Asmat Jehan Begum,* P.L.D. 1967, Pesh. 328. Where there is one agreement in private for payment of real amount and another inflated amount is announced for payment in public for the glorification of the bridegroom and his

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(a) Baillie, Vol. I, p. 91; *Abdul Kadir* v. *Salima* (1886) 8 All. 149; *Mt. Fatima Bibi* v. *Lal Din* ('37) A.L. 345, 171 I.C. 421.

(b) (1886) 8 All. 149 *supra.*

(c) Mt. Fatima Bibi v. *Lal Din, supra; Jahuran Bibi* v. *Soleman Khan* (1934) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 210.

(d) See *Mohammad Shahabuddin* v. *Mt. Umator Rasool* ('60) A.P. 511.

(e) Sugra Bibi v. *Masuma Bibi* (1877) 2 All. 573 F.B.; *Banoo Begum* v. *Mir. Anu Ali* (1907) 9 Bom. L.R. 188; *Basir Ali* v. *Hafiz* (1909) 13 Cal. W.N. 153, 4 I.C. 462.

(f) Asma Bibi v. *Abdul Samad* (1909) 32 All. 167, 5 I.C. 411.

(g) Zakeri Begum v. *Sakina Begum* (1892) 19 I.A. 157, 165, 19 Cal. 689. See also: *Mohd. Bashir* v. *Walayat Begum,* P.L.D. 1967 Lah. 391.

(h) Mahomed Sultan Begum v. *Sarajuddin Ahmed* (1936) 161 I.C. 300, ('36) A.L. 183; *A.M. Md. Ebrahim* v. *Ma Ma & Anr.* (1939) Rang. 383, 179 I.C. 47. ('39) A.R. 28.

(i) Mt. Gulbano v. *Akbar Khalid* (1936) 164 I.C. 329, ('36) A. Pesh. 178.

family, then if there is evidence, the dower agreed in the private agreement should be allowed. (Doctrine of *As-'Sunnat,* applied).

"Unless it is otherwise provided by any legislative enactment."— Under the Oudh Laws Act, 1876, sec. 5, the Court is not to award the amount of dower stipulated in the contract of marriage, but only such sum as "shall be *reasonable* with reference to the means of the husband and the status of the wife" *(j).* In *Zakeri Begum* v. *Sakina Begum (k)* the Privy Council held that the Act does not apply to a case in which a Mahomedan, residing *outside* Oudh, marries in Oudh a woman residing in Oudh.

Shia law.— Under the Shia law, there is no fixed legal minimum for dower: Baillie, II, 67, 68.

287. Dower may be fixed after marriage.— The amount of dower may be fixed either before or at the time of marriage or after marriage *(l);* and can be increased after marriage *(m).*

288. Contract of dower may be made by father.— A contract of dower made by a father on behalf of his minor son is binding on the son. Such a contract may be made even after marriage, provided the son was then a minor *(n).* Among Sunnis the father does not, by entering into such a contract, become personally liable for the dower debt, nor is he liable for it merely because he consents to the marriage *(o).* But by a recent decision of the Judicial Committee the rule is otherwise among Shias when the minor son has no means of his own *(p).* See Baillie, II, 80.

A person who guarantees the payment of dower by the husband is liable to the wife as surety *(q).*

"Minor" in this section means one who has not attained puberty *(r).*

289. "Proper" dower.— If the amount of dower is not fixed (s. 286), the wife is entitled to 'proper' dower (*mahr-i-misl*), even if the marriage was contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family such as her father's sisters.

Hedya, 45, 53; Baillie, 92, 95. The Judicial Committee has said that "Dower is an essential incident under the Mussalman law to the status of marriage; to such an extent is this so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles" *(s).*

Shia law.— The proper dower under the Shia law should not exceed 500 *dirhams;* Baillie, II, 71. As to *dirham,* see notes to sec. 286.

289A. Confirmation of dower.— The dower becomes confirmed:—

(a) by consummation of the marriage; or

(b) by a valid retirement (*khilwat-e-sahiha*); or

(j) Abdul Rahaman v. *Inayati Bibi* ('31) A.O. 63, 130 I.C. 113.

(k) (1892) 19 I.A. 157, 19 Cal. 689; *Rukia Begam* v. *Muhammad* (1910) 32 All. 477, 6 I.C. 568.

(l) Kumar-un-nissa v. *Husaini Bibi* (1880) 3 All. 266 F.B.; *Bashir Ahmad* v. *Zubaida* (1926) 1 Luck. 83, 92 I.C. 265, ('26) A.O. 186; *Musammat Amina Bibi* v. *Muhammad* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A.O. 520.

(m) Jahuran Bibi v. *Soleman Khan* (1933) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 210; *Mt. Nasiban Bi* v. *Mt. Iqbal Begum* ('35) A.L. 816, 160 I.C. 805; *Chan Pir* v. *Fakar Shah* (1940) 189 I.C. 725, ('40) A.L. 104; *Rukiaya Begum* v. *Radha Kishen* (1944) All. 325, ('44) A.A. 214.

(n) Basir Ali v. *Hafiz* (1909) 13 Cal. W.N. 153, 4 I.C. 462.

(o) Muhammad Siddiq v. *Shahab-ud-din* (1927) 49 All. 557, 100 I.C. 636, ('27) A.A. 364.

(p) Sabir Husain v. *Farzand Khan* ('38) A.PC. 80, reversing (1934) 56 All. 401, 151 I.C. 304, ('34) A.A. 52.

(q) Mt. Fatima Bibi v. *Lal Din* ('37) A.L. 345, 171 I.C. 421.

(r) Mozharul v. *Abdul* ('25) A.C. 322, 80 I.C. 914.

(s) Hamira Bibi v. *Zubaida Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 36 I.C. 87, ('16) A.PC. 46.

(c) by the death of either the husband or the wife.

Baillie, 96.

Shia law.— The right to dower is established by consummation or by death of either party, but not by "valid retirement". Baillie II, 73, 74.

290. "Prompt" and "deferred" dower.— (1) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred," which is payable on dissolution of marriage by death or divorce. See sec. 336(2).

The prompt portion of the dower may be realised by the wife at any time before or after consummation *(u)*. Dower which is not paid at once may for that reason be described as deferred dower but if it is postponed until demanded by the wife it is in law prompt dower *(v)*. But "deferred" dower does not become "prompt" merely because the wife demands it *(w)*.

(2) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shia law, the rule is to regard the whole as prompt *(x)* but according to the Sunni law, the rule is to regard part as prompt and part as deferred, the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled *(y)*. The Madras High Court, however, has taken the view that whether the parties are Shias or Sunnis dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed "at least in the Madras Presidency, whatever the nature of the decisions in other provinces may be" *(z)*. It is not clear whether, in a case in which no specific portion of the dower has been fixed as prompt, the Court has the power, under the Sunni law, to award the *whole* amount as prompt. The High Court of Bombay has held that the Court has such power *(a)*.

Baillie, 92, In *Eidan* v. *Mazhar Husain* (1877) 1 All. 483 the Court fixed *one-fifth* of a dower of Rs. 5,000 as "prompt," the wife having been a prostitute. In *Taufik-un-nissa* v. *Ghulam Kambar* (1877) 1 All. 560, the Court held that a *third* of the dower of Rs. 51,000 was reasonable as "prompt"; and the same proportion was fixed in *Fatma Bibi* v. *Sadruddin* (1865) 2 Bom. H.C. 291. In *Nasiruddin Shah* v. *Mt. Amatul Mughni Begum* (1948) Lahore 135 (F.B.) it was held that in absence of any custom, the presumption is that it is half and half. In all these cases the parties were Sunnis and the marriage contract was silent as to whether the dower was to be prompt or deferred.

It is true that under the Mahomedan Law, Mehr or dower means a sum of money or other property which the wife is entitled to receive from the husband in consideration of her marriage. However, the expression 'consideration' is not to be understood in the sense in which the word is used in the Contract Act. In effect dower is an obligation imposed upon a husband as mark of respect for the wife. Normally the extent of such obligation is determined by the contract entered into between the husband and wife either before or at the time of marriage. It may be fixed even

(u) Rehana Khatun v. *Iqtidar Uddin* (1943) All. L.J. 98, ('43) A.A. 184.

(v) Mahadev Lal v. *Bibi Maniran* (1933) 12 Pat. 297, 145 I.C. 213, ('33) A.P. 281.

(w) Manihar Bibi v. *Rakha Singh* ('54) A. Manipur 1.

(x) Mirza Bedar Bukht v. *Mirza Khurrum Bukht* (1873) 19 W.R. 315 [P.C.]; *Masihan Sahib* v. *Assan Bibi* (1899) 23 Mad. 371 F.B.

(y) Eidan v. *Mazhar Husain* (1877) 1 All. 483; *Taufik-un-nissa* v. *Ghulam Kambar* (1877) 1 All. 506; *Umda Begum* v. *Muhammadi Begum* (1910) 33 All. 291, 9 I.C. 200; *Muhammad* v. *Saghir-un-nissa* (1919) 41 All. 562, 50 I.C. 740; *Mussammat Bibi* v. *Sheikh Muhammad* (1929) 8 Pat. 645, 117 I.C. 207, ('29) A.P. 207; *Mangal Rai* v. *Mt. Sakina Begum* (1934) All. L.J. 64, 49 I.C. 1211, ('34) A.A. 441; *Fatma Bibi* v. *Sadruddin* (1865) 2 B.H.C. 291; *Rehana Khatun* v. *Iqtidar Uddin, supra; Nasir-ud-din Shah* v. *Amatul Mughni* (1947) Lah. 565, ('48) A.L. 135 (F.B.).

(z) Sheikh Muhammad v. *Ayesha Beebie* (1938) Mad. 609, (1937) 2 M.L.J. 779, 172 I.C. 708, ('38) A.M. 107; *Musihan Sahib* v. *Assan Bibi* (1900) 23 Mad. 371, 10 M.L.J. 123 (F.B.) considered and relied on.

(a) Husseinkhan v. *Gulab Khatun* (1911) 35 Bom. 386, 11 I.C. 558.

after the marriage has taken place. If the amount of dower is not fixed or the marriage has been performed on express condition that the wife will not claim any dower, the wife is even then entitled to receive proper dower (mehr-i-misi) from her husband. The wife can refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid to her (Baillies Digest of Mahommedan Law pages 124-125). We are, therefore unable to agree with the trial court that the right to claim prompt dower does not precede cohabitation and comes into existence along with it. Where there has been an agreement between the parties at the time of their marriage with regard to the amount of dower payable by the husband the amount becomes recoverable under the agreement. The agreement between the husband and wife for payment of dower undoubtedly is part of the cause of action for maintaining a suit for its recovery and the place where such agreement was entered into would be a place where a part of cause of action for such suit arises. *Smt. Nasara Begum* v. *Rejwan Ali,* A.I.R. 1980 Allahabad 118 H.N. Seth and V. K. Mehrotra, JJ.

291. Remission of dower by wife.— The wife may remit the dower or any part thereof in favour of the husband or his heirs. Such a remission is valid though made without consideration *(b).* [Baillie, 553].

But the remission must have been made with free consent. A remission made by a wife when she is in great mental distress owing to her husband's death is not one made with free consent and is not binding on her *(c).* The High Courts of Madras *(d)* and Patna *(e)* have held that a remission made by a wife who has not attained majority under the Indian Majority Act, 1875, is invalid, though she may have attained majority by Mahomedan law. The High Court of Allahabad has dissented from this view of the law and held that since the Indian Majority Act (sec. 2) does not affect the capacity of any person "to act in the matter of marriage or dower," a Mahomedan girl who has attained puberty is competent to relinquish her dower, though she may not have attained the age of majority (18 years) within the meaning of the Indian Majority Act *(f).* The Allahabad view is correct. A stipulation in a contract of dower that the wife should not be competent to remit her dower without the consent of her relations is valid *(g).*

292. Suit for dower and limitation.— If the dower is not paid, the wife, and, after her death, her heirs, may sue for it. The period of limitation for a suit to recover "prompt" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce [Limitation Act, 1908, Sch. I, art. 103]. The period of limitation for a suit to recover "deferred" dower is three years from the date when the marriage is dissolved by death or divorce [*ibid.*, art. 104]. Where, however, prompt dower has not been fixed, a demand and refusal is not a condition precedent for filing a suit for its recovery *(h).* [See however, the Limitation Act of 1963].

Limitation for prompt dower runs from the time when the dower is demanded and refused, but both demand and refusal must be unambiguous *(i).*

Limitation for "deferred" dower does not run against the widow during the period she is in lawful possession of her husband's property under a claim for her dower *(j).*

It is not necessary to go into the question about the date on which the plaintiff was divorced by the defendant in view of the fact that S. 29(3) of the Limitation Act provides that save as otherwise provided in any law for the time being in force with respect of marriage and divorce,

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(b) Jyani Begam v. *Umrav Begam* (1908) 32 Bom. 612.

(c) Nurannessa v. *Khaje Mahomed* (1920) 47 Cal. 537, 56 I.C. 8; *Hasnumiya Dadamiya* v. *Haliimunnissa Hafizulla* (1942) 44 Bom. L.R. 126, ('42) A.B. 128.

(d) Ali Dhunimsa v. *Mahommad* (1918) 41 Mad. 1026 44 I.C. 293.

(e) Najmunissa v. *Serajuddin Ahmed* (1938) 17 Pat. 303, 180 I.C. 208 ('39) A.P. 133.

(f) Qasim Husain v. *Bibi Kaniz* (1932) 54 All. 806, 139 I.C. 371, ('32) A.A. 694.

(g) Mt. Khadija Begum v. *Nisar Ahmed* ('36) A.L. 887.

(h) Muhammad Taqi Khan v. *Farmoodi Begum* (1941) All. 326 (1941) A.L.J. 118, 195 I.C. 353, ('41) A.A. 181.

(i) Mt. Amtul Rasul v. *Karim Bakhsh* (1933) 142 I.C. 833, ('33) A. Pesh. 31.

(j) Hamidullah Khan v. *Najjo* (1911) 38 All. 568, 10 I.C. 282.

nothing in this Act shall apply to any suit or proceeding under any such law. Neither of the two Courts below have adverted to this aspect of the matter nor was it raised in the arguments before this Court; but it cuts at the very root of the defendant's case and it cannot be said that the present suit for dower was barred by limitation inasmuch as the claim for dower being one under Muslim Law of Marriage and Divorce, the Limitation Act, 1963, cannot be said to be applicable to the present suit. In the Indian Limitation Act, 1908; the exception was only in respect of the proceedings under the Indian Divorce Act and there was specific Arts. 103 and 104, which prescribed the limitation for a suit for recovery of dower. There are no corresponding Articles prescribing limitation for a suit for dower in the schedule to the Limitation Act, 1963 and, in view of the express provisions of S. 29(3) it must be held that nothing in the Limitation Act can bar the suit [Deoki Nandan, J.] *Ahmadi Bibi* v. *Muhamed Mabood* (1979) 5 A.L.R. 474; A.I.R. 1979. All. 374.

Where a wife is divorced by a writing, time under articles 103 and 104 of the Limitation Act begins to run only from the date of communication of the writing to the wife *(k)*. The wife has the right to bring an action for the recovery of prompt dower both before and after consummation of marriage. The consummation has not the effect of converting prompt dower into deferred dower *(l)*.

The starting point of limitation for a suit for recovery of dower debt is the date of the knowledge of the divorce by the wife. [See however, the Limitation Act 1963]

In criminal proceedings for maintenance the husband took the plea that he had already divorced the wife. The plea also contained the words of divorce. It was held that even if the earlier divorce was not proved, the plea and the words of divorce in the written statement in the criminal case operated as a divorce and time would run from that date or at any rate from the date the written statement came to the knowledge of the wife. *Ahmad Ali Khan* v. *Asgarunnisa Begum* (1968) 1 Andh. L.T. 236.

293. Non-payment of prompt dower and restitution of conjugal rights.— The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid (Baillie, 125). If the husband sues her for restitution of conjugal rights *before* sexual intercourse takes place, non-payment of the dower is a complete defence to the suit, and the suit will be dismissed. If the suit is brought *after* sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional on payment of prompt dower *(m)*.

Under the Mahomedan Law, mekar or dower is a sum of money or other property payable to the wife in consideration of her marriage; but "consideration" does not mean the same thing as under the Contract Act, 1872. It is an obligation imposed upon the husband as a heart of respect for the wife *(n)*. The right to claim prompt dower proceeds co-habitation and cannot be said to come into existence along with co-habitation. The wife can refuse to live with the husband and admit him to sexual intercourse so long as prompt dower remains unpaid [Seth and Malhotra, JJ.] *Smt. Nasra Begum* v. *Rejwan Ali* 1979 A.W.C. 722.

Debitor non praesumitur donare.— The maxim means that a debtor is not presumed to give, that is, to make a gift. The maxim, however, has no application as between husband and wife. Thus where a Mahomedan paid various sums of money from time to time to his wife, and there was no evidence that the payments were allocated to the dower debt, it was held that the payments could not be treated as having been made in satisfaction of the debt, and that the wife was entitled to recover the full amount of her dower *(o)*.

(k) Bure Khan v. *Mt. Khadim Bibi* (1941) 198 I.C. 326, ('41) A.L. 166.

(l) Muhammad Taqi Khan v. *Fannoodi Begum* (1941) All. 326, (1941) A.L.J. 118, 195 I.C. 353, ('41) A.A. 181; *Mt. Pukhraj Begum* v. *Hidayat Ali Shah* (1938) 178 I.C. 182, ('38) A. Pesh. 72.

(m) Abdul Kadir v. *Salima* (1886) 8 All. 149; *Kunhi* v. *Moidin*, (1888) 11 Mad. 327; *Bai Hansa* v. *Abdullah* (1905) 30 Bom. 122; *Hamiddunnessa* v. *Zohiruddin* (1890) 17 Cal. 670; *[illegible]is Begum* v. *Muhammad Istafa* (1933) 55 All. 743, 148 I.C. 26, ('33) A.A. 634; *Bashiran Bi* v. *Abdul Wahab Khan* (1941) 188 I.C. 130. *Rabia Khatoon* v. *Mukhtar Ahmed* ('66) A.A. 548.

(n) Kulsumbi v. *Abdul Kadir* (1921) 45 Bom. 151, 59 I.C. 433, ('21) A.B. 205.

(o) Mohammad Sadiq v. *Fakhir Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13.

294. Liability of heirs for dower debt.— The heirs of a deceased Mahomedan are *not personally* liable for the dower debt. As in the case of other debts due from the deceased, so in the case of a dower debt, each heir is liable for the debt to the extent only of a share of the debt proportionate to his share of the estate [s. 43] *(p)*. Where the widow therefore, is in possession of her husband's property under a claim for her dower [s. 296], the other heirs of her husband are severally entitled to recover their respective shares upon payment of quota of the dower debt proportionate to those shares *(q)*.

A Mahomedan dies leaving a widow, a son, and two daughters. The widow is entitled to a dower debt of Rs. 3,200. The widow's share in the estate is 1/8 and she is liable to contribute Rs. 1/8 x 3,200 = Rs. 400. The son's share is 7/16, and he is liable to pay Rs. 7/16 x 3,200 = Rs. 1,400, and if the widow is in possession, he is entitled to recover his share on payment of Rs.1,400. The share of each daughter is 7/32, and she is liable to pay Rs. 7/32 x 3,200 = Rs. 700, and if the widow is in possession, she is entitled to recover her share on payment of Rs. 700.

295. Dower is a debt, but an unsecured debt.— (1) The dower ranks as a debt, and widow is entitled, along with other creditors of her deceased husband, to have it satisfied on his death out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that she has a right of retention to the extent mentioned in sec. 296 below *(r)*. She is not entitled to any *charge* on her husband's property, though such a charge may be created by *agreement (s)*.

Under the Mahomedan Law, if the dower is not paid, the wife and after her death, her heirs can claim the dower and the period of limitation for a suit to recover prompt dower is 3 years from the date when the dower is demanded and refused or when the marriage is dissolved by death or divorce and the period of limitation to recover deferred dower is three years from the date when the marriage is dissolved by death or divorce. Section 296 provides that the claim for dower does not entitle the wife to a charge on any specific property of her deceased husband. But when she is in possession of the property of the deceased husband without any force or fraud in lieu of her dower, she is entitled to retain the possession of the property until the dower is satisfied and this right is as against the heirs of her husband and against the creditors of her husband. A widow with the express or implied consent of the other heirs of her husband obtains possession of the whole or any part of his estates in satisfaction of or as security of her dower, is entitled to retain such possession till her dower is paid. The possession must be lawful and should not have been acquired by fraud or by force. If the widow is inducted into possession either by consent or otherwise except by force or fraud she is entitled to retain the possession in lieu of dower payable to her and the limitation of three years from the date of the death of the husband does not operate in event of possession of the property by the widow. In the instant case 3rd defendant is in possession of a portion of the house and in that event she is entitled to retain possession until the dower claim is satisfied. Therefore, the claim for dower by the 3rd defendant is not barred by limitation. [Raghuvir and Rama Rao, JJ.] *Syed Yusuf Akbar Hussaini* v. *Syed Mirtuza Akbar Hussaini* (1983) 1 An. W.R. 273.

(2) *Whether a charge for a dower debt may be created by a decree.*— There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt, so that if such a charge is created, and the decree has

(p) Imperial Bank, Gaya v. *Bibi Sayeedan* ('60) A.P. 132.

(q) Hamira Bibi v. *Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87.

(r) Beebee Bachun v. *Sheikh Hamid* (1871) 14 M.I.A. 377, 383-384; *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294, 301, 38 All. 581, 36 I.C. 87; *Mt. Saibanbi* v. *Kazi Muhammudalli* (1941) Nag. 164, (1940) N.L.J. 647, 192 I.C. 286, ('41) A.N. 8; *Muniram* v. *Mukhtyar Begam* (1940) A.L.J. 789, ('40) A.A. 521; *Kapore Chand* v. *Kidar Nissa* ('53) A.S.C. 413; *Shaikh Salma* v. *Md. Abdul Kadar* ('61) A. Andh. Pr. 428.

(s) Ameer-oon-Nissa v. *Mooradoon-Nissa* (1855) 6 M.I.A. 211.

not been appealed against and has become final, effect will be given to the charge; in other words, a decree creating a charge is not a nullity for want of jurisdiction *(t)*. But though it is not beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. To pass such a decree is to give the dower debt a priority over other debts due from the deceased. The proper decree to make is *simple money decree;* and no charge is created merely because the decree directs execution by sale of properties mentioned *(u)*. If a decree is passed creating a charge, the proper course for the Appellate Court is to set it aside to that extent *(v)*.

(3) *Alienation by heir before payment of dower debt.*— The right of an heir to alienate his own share as stated in sec. 42(1) above, is not affected by the fact that the dower debt has not been paid. But if the widow is in possession in lieu of the dower at the date of alienation, the alienation will be subject to her right to retain possession *(w)*.

The dower debt stands on the same footing as an ordinary debt. An heir therefore may alienate his own share before payment of the dower debt just as he can alienate it before payment of any other unsecured debt, as to pass a good title to the alienee.

296. Widow's right to retain possession of husband's estate in lieu of dower.— (1) The widow's claim for dower does not entitle her to a charge on any specific property of her deceased husband [s. 295]. But when she *is in possession* of the property of her deceased husband, having, "lawfully and without force or fraud" obtained such possession "in lieu of her dower" (that is on the ground of her claim for her dower, to satisfy her claim out of the rents and profits and with a liability to account for the balance), she is entitled as against the other heirs of her husband *(x)* and as against the creditors of her husband *(y) to retain that possession until* her dower is satisfied. The right to retain possession is extinguished on payment of her dower debt. This right is sometimes called a "lien," but it is not a lien in the strict sense of the term.

There is a conflict of opinion whether it is necessary, to entitle the widow to retain possession of her husband's property, that the possession should have been obtained by her not only "lawfully and without force or fraud," but also "with the express or implied consent of the husband or his other heirs." The High Courts of Madras *(z)* and Bombay *(a)* have held that no such consent is necessary. The High Court of Calcutta *(b)* and Patna *(c)* have held that it is. In the two earlier cases the High Court of Allahabad had held that such consent was necessary *(d)*; in later cases it has held that no such consent is necess-

(t) Qasim Husain v. *Habibur Rahman* (1929) 56 I.A. 254, 258, 8 Pat. 926, 31 Bom. L.R. 879, 117 I.C. 10, ('29) A.PC. 174; *Mahomed Wajid* v. *Tayyaban* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

(u) Mt. Ahmadi Begum v. *Abdullah* (1934) 151 I.C. 1013, ('34) A.O. 437.

(v) Abdul Rahman v. *Inayati Bibi* ('31) A.O. 63, 130 I.C. 113.

(w) Bazayet Hossein v. *Doolichand* (1878) 5 I.A. 211, 4 Cal. 402.

(x) Beebee Bachun v. *Sheikh Hamid* (1871) 14 M.I.A. 377; *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I.A. 145, 149-150, 47 All. 250; 254-255, 86 I.C. 179, ('25) A.PC. 63; *Jahuran Bibi* v. *Soleman Khan* (1933) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 210; *Mt. Nawab Begum* v. *Hussain Ali Khan* (1937) 18 Lah. 649, ('37) A.L. 738.

(y) Mt. Ghafooran v. *Ram Chandra Das* ('34) A.A. 168; *Kulsum Bibi* v. *Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

(z) Beeju Bee v. *Syed Moorthija* (1920) 43 Mad. 214, 53 I.C. 905.

(a) Hasnuniya Dadamiya v. *Halimunnisso Hafizulla* (1942) 44 Bom. L.R. 126, ('42) A.B. 128.

(b) Sabur Bibi v. *Ismail* (1924) 51 Cal. 124, 80 I.C. 294, ('24) A.C. 508, dissenting from *Shaebjan* v. *Ansaruddin* (1911) 38 Cal. 475, 9 I.C. 1031.

(c) Mohammad Zobair v. *Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210.

(d) Amanat-un-nissa v. *Bashir-un-nissa* (1894) 17 All. 77; *Muhammad Karim-Ullah* v. *Amani Begum* (1894) 17 All. 93.

ary *(e)*. In a recent case, however, it has again held that such consent is necessary *(f)*. When mutation of names in the Record of Rights is effected by the widow with the knowledge of the heirs, they may be deemed to have consented *(g)*.

(2) A widow, who has not obtained possession of her husband's estate in lieu of her dower, cannot exclude the other heirs of her husband from possession. They are entitled to joint possession with her, and if they claim such possession, she is not entitled to say, "I will *now* go into possession." Her only right is to *retain* possession of what she has before they obtained possession *(h)*.

If a widow has been in possession of her husband's property in his lifetime and continues in possession after his death, the presumption is that her possession has been lawfully obtained and is in lieu of dower *(i)* and it is not necessary that the widow should have entered possession upon a claim for her dower *(j)*. But if the husband has been in possession and the widow takes possession after the death and falsely claims that her dower has been increased, she has no right to retainer *(k)*. Nor is she entitled to a retainer on the mere ground of permissive occupation *(l)*. Where a wife pleaded possession of property in lieu of dower since marriage with the plaintiff's son, and a *Kabinnama* (marriage agreement in writing) supported her plea, it was held, negativing the possession of the plaintiff, that the property was given as dower. *H. M. Mondal* v. *D. R. Bibi* ('71) A. Cal. 162.

297. Right of retention not analogous to a mortgage.— The position of a widow claiming to retain possession of her husband's property until her dower debt is paid is essentially different from that of a mortgagee (usufructuary or other) to whom the owner pledges his property to secure repayment of a debt. There is no real or true analogy between the two *(m)*. See sub-sec. 2 of sec. 296.

[*A* died leaving a widow and a sister. Some time after *A*'s death, the widow applied to the Collector to have the entire estate of *A* registered in her name, alleging that she had been in possession of the lands as an heir *and also an account of her dower.* The application was opposed by the sister, but the properties were registered in the widow's name. After ten years, the sister brought a suit against the widow to recover her share (three-fourths) in the estate of *A*. The widow contended that she was entitled to remain in possession of the estate until the dower debt was paid. It was held by the Privy Council that the widow was entitled to retain possession until her dower was satisfied: *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M.I.A. 377].

1. *Having obtained possession lawfully and without force or fraud.*— In *Bebee Bachun's* case cited in the above illustration, their Lordships of the Privy Council at p. 384 said: "The appellant (widow) having obtained actual and lawful possession of the estate under a claim to hold them as lien for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied ... It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein* v. *Mussamut Khodeja* (1868) 10 W.R. 369. Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, *of which she had lawfully and without force or fraud,*

(e) Ramzan Ali v. *Asghari Begam* (1910) 32 All. 563, 56, 6 I.C. 405; *Muhammad Shoaib* v. *Zaib Jahan* (1928) 50 All. 423, ('27) A.A. 850; *Imtiaz Begum* v. *Abdul Karim* (1931) 53 All. 31, 128 I.C. 760, ('30) A.A. 881; *Zamin Ali* v. *Aziz-un-nissa* (1933) 55 All. 139, 144 I.C. 433, ('33) A.A. 329.

(f) Mt. Izhar Fatma Bibi v. *Mt. Ansar Bibi* (1939) A.L.J. 642, 182 I.C. 801. ('39) A.A. 348.

(g) Abdul Wahab v. *Mustaq Ahmad* (1944) All. 68, 211 I.C. 475, ('44) A.A. 68.

(h) Tahir-un-nissa v. *Naqwab Hasan* (1914) 36 All. 558, 24 I.C. 938.

(i) Abdul Sattar v. *Mt. Aqida Bibi* (1927) 100 I.C. 599, ('27) A.A. 319; *Fahiman* v. *Balaqi* (1935) 10 Luck. 440, 153 I.C. 93, ('35) A.O. 68; *Jahuran Bibi* v. *Soleman Khan* (1934) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 10.

(j) Mirvahedali v. *Rashidbeg* (1951) Bom. 169, 52 Bom. L.R. 884, ('51) A.B. 22.

(k) Jahuran Bibi v. *Soleman Khan, supra.*

(l) Mt. Sampatia Bibi v. *Mir Mahboob Ali* (1936) All. L.J. 911, 164 I.C. 290, ('36) A.A. 528.

(m) Maina Bibi v. *Chaudhri Vakir* (1925) 52 I.A. 145, 151, 47 All. 250, 256, 86 I.C. 579, ('25) A.PC. 63.

obtained possession, until her debt is satisfied, with the liability to account, to those entitled to the property, subject to the claim for the profits received."

2. The conflict referred to in the second paragraph of sub-sec. (1) of sec. 296 arose from the judgment of the Privy Council in a later case *Hamira Bibi* v. *Zubaida Bibi (n)*. In that case their Lordships said:—

"But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, *with the express or implied consent of the husband, or his other heirs*, obtain possession of the whole or part of his estate, to satisfy her claim with the rents . . . accruing therefrom, she is entitled to retain such possession until it is satisfied, this is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board."

3. The Madras High Court holds that the observations of their Lordships of the Privy Council in the clause printed in italics above where *obiter dicta*. The Calcutta High Court holds, dissenting from the Madras High Court, that their Lordships were, in the above passage, defining the nature of the widow's dower debt and her right to retain possession of her husband's property and that the observations were not *obiter*. It is noticeable that there is no suggestion as to the *consent* of the husband or her heirs in the judgment of the Privy Council in the subsequent case of *Maina Bibi* v. *Chaudhri Vakil Ahmad (o)*. It was argued in that case that the position of a widow in possession of her husband's estate was analogous to that of a mortgagee in possession. But this argument was not accepted by their Lordships. Their Lordships observed that "in the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor," but in the case of a Mahomedan widow who obtains possession under a claim for her dower "neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the *agreement or bounty of her deceased husband*. The possession of the property being once peaceable and lawfully acquired, the right of the widow to retain it till her dower is paid is conferred upon her by the Mahomedan law".

298. Right of retention gives no title." The right to hold possession does not give the widow any *title* to the property *(p)*. It enables her only to *retain possession* of the property of which she has obtained possession [sec. 296], and, if she is dispossessed, to sue for recovery of possession [s. 303]. The *title* to the property is in the *heirs* including, of course, the widow. But her right to hold possession has nothing to do with the interest which she has *as an heir* in the property. An an heir she has the rights and remedies of an *heir (q)*.

If the widow is inducted into possession of husband's estate either by consent or otherwise except by force or fraud she is entitled to retain the possession in lieu of dower payable to her and the limitation of 3 years from the date of the death of the husband does not operate in the event of possession of the property by the widow. *Syed Yousuf Akbar Hussaini* v. *Syed Murtuza Akbar Hussaini*, A.I.R. 1983 A.P. 225.

299. No right of retention during continuance or marriage.— The right of retention arises for the first time on the husband's death, unless the marriage is dissolved by divorce, in which case it arises on divorce *(r)*.

It follows from this that if a creditor of the husband obtains a decree against him, and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree, and she must deliver possession to him.

300. Liability of widow in possession to account.— A widow in possession

(n) (1916) 43 I.A. 294, 301, 38 All. 581, 588, 36 I.C. 87.

(o) (1924) 52 I.A. 145, 150-151, 47 All. 250, 255-256, 86 I.C. 578, ('25) A.PC. 63.

(p) Abdul Wahab v. *Mustaq Ahmad* (1944) All. 68, 211 I.C. 475 ('44) A.A. 68.

(q) See *Mashal Singh* v. *Ahmad Husain* (1928) 50 All. 86, 103 I.C. 363, ('25) A.A. 534.

(r) Narayana v. *Biyari* (1922) 45 Mad. 103, 69 I.C. 977, ('23) A.M. 57; *Abdul Rahman* v. *Inayati Bibi* ('31) A.O. 63, 130 I.C. 113. See also *Ameer Ammal* v. *Sankaranarayanan* (1900) 25 Mad. 658: *Aisa Khatun* v. *Amarendra Nath* (1940) 44 C.W.N. 586, 191 I.C. 783, ('40) A.C. 578.

of her husband's estate in lieu of dower is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate *(s)*. But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation is allowed in the form of interest on the dower debt *(t)*. The widow, however, may agree to give up her right to compensation *(u)*.

301. No right to alienate property to satisfy dower debt.— (1) The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise *(v)*. If she alienates the property, the alienation is valid to the extent of her own share; it does not affect the shares of the other heirs of her husband.

(2) If besides alienating the property, she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower debt. The widow is not entitled, on the alienation being set aside, to be restored back to possession; by giving up possession of the property, she lost her right to hold possession thereof. Whether she also loses her right to recover the dower debt is an open question *(w)*.

(3) If the widow alienates the property, but does not deliver possession thereof to the alienee, as where she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares, but they are not entitled to immediate and unconditional possession thereof.

If the widow sells or makes a gift of the property, the sale or gift is valid to the extent of her own share in the property. It has been said in some cases that the sale or gift is void altogether so as not to take effect to the extent even of the widow's share *(x)*, but there is nothing in the judgments in those cases to justify that view.

This section relates to the effect of an alienation and of delivery of possession by the widow to the alienee of the *property itself*. The next section relates to the effect of a transfer by her of her *right of retention*. See ill. (b) to sec. 302.

302. Where right of retention is heritable and transferable.— (1) There is a conflict of opinion whether the widow's right to hold possession is transferable

(s) Debee Bachun v. *Sheikh Hamid* (1871) 14 M.I.A. 377, 384; *Shaikh Salma* v. *Md. Abdul Kadar.* ('61) A. An. Pr. 428.

(t) Hamira Bibi v. *Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87, affing. (1910) 33 All. 182, 7 I.C. 497 [Interest allowed at 6 per cent per annum]; *Woomatool* v. *Meerunanissa* (1868) 9 W.R. 318; *Sahebjan* v. *Ansaruddin* (1911) 38 Cal. 475, 480, 481, 9 I.C. 1031; *Nawasi Begam* v. *Dilafroz* (1926) 48 All. 803, 98 I.C. 978, ('26) A.A. 39 [awarding of interest discretionary]; *Shankar Dass* v. *Mahbub Jan* ('42) A. Pesh. 92.

(u) Ram Prasad v. *Bibi Khodaijatul* (1944) 213 I.C. 306, ('44) A.P. 163.

(v) Chuli Bibi v. *Shams-un-nissa* (1894) 17 All. 19 [mortgage]; *Maina Bibi* v. *Chudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.PC. 63 affing. (1919) 41 All. 538, 51 I.C. 242 [gift]; *Beeju Bee* v. *Syed Moorthija* (1920) 43 Mad. 214, 238, 53 I.C. 905 [sale]; *Musammat Sitaram* v. *Ganesh* (1927) 2 Luck. 553, 101 I.C. 714, ('28) A.O. 209; *Fahiman* v. *Bulaqi* (1935) 10 Luck. 440, 153 I.C. 93, ('35) A.O. 68; *Ram Prasad* v. *Bibi Khodaijatul* (1944) 213 I.C. 306, ('44) A.C. 163; *Abdul Samad* v. *Alimuddin* (1944) 22 Pat. 750, ('44) A.P. 174.

(w) Maina Bibi v. *Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.PC. 63 [suit by heirs to recover *their own shares*]; *Musammat Sitaram* v. *Ganesh* (1927) 2 Luck, 553, 101 I.C. 714, ('28) A.O. 209 [suit by heirs to recover *their own shares*].

(x) Chuli Bibi v. *Shams-un-nissa* (1894) 17 All. 19; *Mussammat Bibi* v. *Mussammat Bibi* (1923) 2 Pat. 84, 70 I.C. 32, 23 A.P. 33; In *Abdul Samad* v. *Alimuddin* (1944) 22 Pat. 750. ('44) A.P. 174, it was held that the widow's share in the property passed to the transferee.

and heritable. One view is that the right is a *personal* right, and it cannot therefore be transferred by sale, gift or otherwise *(y)* nor can it pass to her heirs on her death *(z)*. The other view is that the right to hold possession is *property*. But is the right both heritable and transferable? It has been held in some cases that it is heritable, without expressing any opinion whether it is also transferable *(a)*. In other cases it has been held that it is not transferable and heritable *(b)*. If it is transferable, can it be transferred without transferring also the dower debt? Here again there is a difference of opinion. In some cases it has been held that the right to hold possession cannot be severed from the dower debt and transferred as a separate interest *(c)*. In other cases it has been held that it can be so transferred *(d)*. But a transfer merely of the dower debt does not pass to the transferee the right to hold possession *(e)*. In *Maina Bibi* v. *Chaudhri Vakil (f)*, the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty in that the right to hold possession is heritable. Though it cannot be said with certainty whether it is also transferable, the High Courts of Bombay and Mysore are in favour of the view that it is also transferable *(g)* but the Patna High Court has held that it is not transferable *(h)*.

(2) Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her, which fails to effect a transfer of the *ownership* with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession *(i)*.

Illustrations

(a) A Mahomedan dies leaving a widow, a daughter, and his father. The widow is in lawful possession of her husband's property in lieu of her dower. The widow dies leaving the daughter as her only heir. The daughter is entitled to retain possession of the property. The father is not entitled to possession of his share until he pays his proportionate share of the dower debt. But if the widow herself has not obtained possession in her lifetime, the daughter as her heir is not entitled to go

(y) Muzaffar Ali v. *Parbati* (1907) 29 All. 640; see *Mohammad Zobair* v. *Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210.

(z) Hadi Ali v. *Akbar Ali* (1898) 20 All. 262.

(a) Azizullah v. *Ahmad* (1885) 7 All. 353; *Majidmian* v. *Bibisaheb* (1916) 40 Bom. 34, 30 I.C. 870; *Janbi Bibi* v. *Abbas Ali* (1941) N.L.J. 181, 195 I.C. 706, ('41) A.N. 167; *Abdul Wahab* v. *Mustaq Ahmad* (1944) All. 68, 211 I.C. 475, ('44) A.A. 36.

(b) Ali Baksh v. *Allahabad* (1910) 32 All 551, 561, 6 I.C. 376; *Amir Hasan* v. *Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345; *Abdulla* v. *Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.C. 833 ('21) A.A. 262; *Beeju Bee* v. *Syed Moorthija* (1920) 43 Mad. 214, 237, 53 I.C. 905; *Majidmiyan* v. *Bibisaheb* (1916) 40 Bom. 34, 47-49, 30 I.C. 870; *Mussammat Bibi* v. *Musammat Bibi* (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33; *Mussammat Sogia* v. *Mussammat Kitaban* (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224; *Sheikh Abdur Rahman* v. *Sheikh Wali* (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72; *Ramija Bibi* v. *Sharafi Bibi* (1943) 1 M.L.J. 332, 209 I.C. 104, ('43) A.M. 561; *Hussain* v. *Rahim Khan* ('54) A. Mys. 24.

(c) Ali Baksh v. *Allahabad* (1910) 32 All. 551, 557, 6 I.C. 376; *Amir Hasan* v. *Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345; *Sheikh Abdur Rahman* v. *Sheikh Wali* (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72; *Nosh Ali* v. *Shamsunnissa Bibi* (1939) All. 322 (1939) A.L.J. 138, 183 I.C. 379, ('39) A.A. 319; *Mohitan* v. *Zubera* ('54) A. Pat. 17.

(d) Abdulla v. *Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A.A. 262; *Mussammat Bibi* v. *Mussammat Bibi* (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33; *Mussammat Sogia* v. *Mussammat Kitaban* (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224.

(e) Amir Hasan v. *Mohammad* (1932) 54 All. 499 136 I.C. 833, ('32) A.A. 345.

(f) (1925) 52 I.A. 145, 159, 47 All. 250, 262, 86 I.C 579, ('25) A.P.C. 63.

(g) Cooverbhai v. *Hayatbi* (1943) 45 Bom. L.R. 730 *Hussain* v. *Rahim Khan* ('54) A. Mys. 24.

(h) Zobair Ahmad v. *Jainandan Prasad* ('60) A.P 147.

(i) Maina Bibi v. *Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250; 86 I.C. 579 ('25) A.P.C. 63; *Musammat Sitaram* v. *Ganesh* (1927) 2 Luck. 553. 101 I.C. 714, ('28) A.O. 209; see *Mohammad Zobair* v. *Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210; *Aminuddin* v. *Ramkhelawan* (1949) 27 Pat. 218, ('49) A.P. 427

into possession *(j)*.

(b) Upon the death of her husband, a Mahomedan widow retains possession of her husband's property in lieu of her dower. When the widow herself dies leaving a sister and the husband's heirs secure possession, the sister cannot succeed in a suit to obtain possession from them. As the widow herself has no right to obtain possession which she could enforce, the sister cannot have a better right *(k)*.

(c) A Mahomedan dies leaving a widow and a brother. The widow is in lawful possession of her husband's property in lieu of her dower. The brother is not entitled to possession of his share until he pays his proportionate share of the dower debt [s. 305]. The dower debt remains unsatisfied, and the widow sells the whole property to satisfy the debt, and delivers possession thereof to the purchaser. The sale-deed does not purport or attempt to transfer the dower debt or the right to hold possession to the purchaser, assuming that they could be transferred. What is the effect of the sale? The sale passes to the purchaser only the widow's share and the right to the possession of that share [s. 301]. What is the effect of the delivery of possession to the purchaser? The effect is that the brother, who was not entitled, before delivery of possession, to possession of his share until he paid his share of the dower debt, becomes entitled to immediate possession of his share without paying his share of the debt [see s. 294]. The purchaser is not entitled to retain possession of the brother's share until the brother pays his share of the dower debt; the reason is that the deed does not purport to transfer to him either the dower debt or the right to hold possession. Nor is the widow entitled to have the possession restored back to her, for by giving up possession, she lost her right to hold possession. The purchaser has his remedy of the price paid by him, against the widow. Whether the widow is entitled to recover the dower debt out of the other properties of her husband, is an open question. Probably she is.

The heirs or legal representatives are entitled to sue for the dower debt. A.I.R. 1960 Pat. 147. Distinguished [S. Narain J.] *Md. Jamidul Haque* v. *Md. Zubair Haider.* A.I.R. 1981 Pat. 345.

303. Suit for possession by widow who is dispossessed.— If a widow who is in possession of her husband's property under a claim for her dower, is wrongfully deprived of her possession, she may bring a suit for recovery of possession *(l)*. If the property is immovable, the suit must be brought within six months from the date of dispossession *(m)* [Limitation Act, 1908, Sch. I, art. 3]. If it is movable, it must be brought within three years from the date on which she first learns in whose possession it is [*ibid.*, art. 48]. See; the Limitation Act 1963 for corresponding articles.

The widow's right to sue for possession has nothing to do with her right to hold possession. It is the ordinary right of a person who, though he has no title to the property (s. 298), is entitled to sue for possession, if he is wrongfully dispossessed. In the case of immovable property, such right is given by the Specific Relief Act, 1877, sec. 9. In the case of movables, the right to sue is a common law right.

304. Widow's possession no bar to a suit for dower.— (1) The fact that a widow is in possession of her husband's property under a claim of her dower, is no bar to a suit by her against the other heirs of her husband to recover the dower debt. But she must in such a suit offer to give up possession of the property *(n)*. She cannot both retain possession and have a decree for her dower debt.

(2) If she sues for part only of the dower debt, she cannot afterwards sue

(j) Tahir-un-nissa v. *Nawab Hasan* (1914) 36 All. 558, 24 I.C. 938.

(k) Zaibunnissa v. *Nazim Hasan* ('62) A. All. 197.

(l) Majidmian v. *Bibisaheb* (1916) 40 Bom. 34, 49-50, 30 I.C. 870 [suit by a widow and heirs of a deceased co-widow]. *Azizullah* v. *Ahmad* (1885) 7 All. 353 [suit by heirs of a deceased widow].

(m) Mashal Singh v. *Ahmad Husain* (1928) 50 All. 86, 103 I.C. 363, ('27) A.A. 534.

(n) Ghulam Ali v. *Sagir-ul-nissa* (1901) 23 All. 432. No reference was made to this case in *Mohitan* v. *Zubera* ('54) A.P. 47, in which it was held that the widow need not offer to give up possession of the property.

for the balance of the debt *(o)*. See Code of Civil Procedure, 1908, O. 2, r. 2.

It has been held in Calcutta *(p)* that if the widow is in possession of her husband's property under a claim for her dower the proper course for her to follow is to bring an administration suit in which the property can be placed in the hands of the Court, an account be taken of the profits received by her and of the interest due to her on the dower debt, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise.

305. Suit by heirs for their shares and res judicata.— Where in a suit against the widow by the other heirs of her husband for recovery of their shares a decree is passed for possession conditional upon their paying their proportionate amount of the dower debt within a specified time and the decree provides that if the plaintiffs fail to pay the decretal amount within that time the suit should be dismissed, and the suit is eventually dismissed for non-payment, the dismissal does not operate as *res judicata* so as to bar a subsequent suit by the same plaintiffs against the widow for possession of the same property based upon the ground that the dower debt has since been satisfied from the income of the property. The non-fulfilment of the condition attached to the decree extinguishes only the right to recover *immediate* possession. It does not extinguish the proprietary interest of the heirs of their right to recover possession when the dower debt is satisfied *at some future time* either by the plaintiffs or out of the profits of the property. The effect of dismissal is simply to relegate the parties to the position in which they were before the first suit was brought *(q)*. A decree obtained against the heirs of a deceased cannot be executed against the property in the possession of the widow for her dower, but the decree can be executed against that property as soon as the widow has given possession of the property to the heirs *(r)*.

306. Kharchi-i-pandan.— Kharchi-i-pandan literally means betel box expenses and is a personal allowance to the wife customary among Mahomedan families of rank. The allowance is also called an allowance for mewa khori *(s)*. Mewa Khori literally means "eating fruit." When the parties are minors the contract is made between the respective parents, and in such a case the wife as beneficiary is entitled to enforce it *(t)*.

(o) Kaniz Fatima v. *Ram Nandan* (1923) 45 All. 384, 73 I.C. 977, ('23) A.A. 331.

(p) Mirza Mohammad v. *Shazadi Wahida* (1914) 19 C.W.N. 502, 28 I.C. 191. See also *Davuthammal* v. *Pasari* ('25) A.M. 1064, 86 I.C. 367.

(q) Maina Bibi v. *Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.PC. 63; *Nawasi Begum* v. *Dilafroz* (1926) 48 All. 803, 98 I.C. 987, ('27) A.A. 39.

(r) Aminuddin v. *Ramkhelawan* (1949) 27 Pat. 218 ('49) A.P. 427.

(s) Sikandar Ara v. *Hasan Ara* (1936) 165 I.C. 70, ('36) A.O. 196.

(t) Khwaja Muhammad v. *Husaini Begum* (1910) 37 I.A. 152, 32 All. 410, 7 I.C. 237; *Muhammad Ali* v. *Fatima* (1930) 11 Lah. 85, 119 I.C. 486, ('29) A.L. 660; *Sajjad Ali Khan* v. *Badshah Begum* (1936) 164 I.C. 823, ('36) A.O. 385.