CHAPTER XVI

DIVORCE

A. — Divorce by husband

307. Different forms of divorce.— The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage [s. 314], but she may, in some cases, obtain a divorce by judicial decree [ss. 328-334].

When the divorce proceeds from the husband, it is called *talak* (ss. 308-315); when it is effected by mutual consent, it is called *khula* (s. 319) or *mubara'at* (s. 320) according to the terms of the contract between the parties.

Shafei law.— From the grounds on which a wife may divorce her husband under shafei law see *Mohammad Kannu* v. *Kasim Beevi.* ('54) A. Trav.-Cochin 219.

308. Divorce by talak.— Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause *(a)*.

Macnaghten, p. 59; *Hedaya,* 75, Baillie, 208-209.

309. Contingent Divorce.— A divorce may be pronounced so as to take effect on the happening of a future event. In an Allahabad case the husband agreed to pay his wife maintenance within a specified time and in default the writing to operate as a divorce. It was held that on the husband's default the writing took effect as a valid divorce *(b)*.

Baillie, 218.

When the divorce takes place on the happening of a contingency, the husband can delegate to the wife his own right of pronouncing divorce. Payment is also enforceable, if there is an agreement to that effect. *Mohd. Khan* v. *Shahmali* ('72) A. J. & K. 8. See also *Buffatan Bibi* v. *Sheikh Abdul Salim* ('50) A. Cal. 304.

Shia law.— Contingent divorce is not recognized by Shia law, Baillie, II, pp 114-115.

In an Assam case *(c)* the husband agreed as follows: "If Khatun Maimuna due to any ill-feeling resides at her father's place for a period of 90 days, and if I fail to bring her back to my own house by persuasion within the said period of 90 days and to live with me, then on the completion of the said 90 days, my 1, 2, 3 talak bain (words) upon you will be effective and she will be able to take another husband after the period of iddat." It was held on the merits that the contingency mentioned in the document had not occurred and the wife's suit for a declaration that she was divorced was dismissed. It was observed, however, that the above document amounted to an authority conferred by the husband on the wife, and that it was for the wife to pronounce talak either to the husband or in the presence of witnesses. It is submitted that no authority was conferred by the husband to pronounce talak, but it was a case of a talak pronounced by the husband to be effective on a certain contingency.

A divorce pronounced by the husband in a quarrel over the visits of the wife to a lady friend that she was divorced if she went to the friend again was held not operative because the wife did

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(a) Ahmad Kasim v. *Khatun Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27. *Sessions Judge Medak* v. *Hajju Bibi,* (1970) 1 And. W.R. 138.

(b) Bachchoo v. *Bismillah* (1936) All. L.J. 302, 163 I.C. 228, ('36) A.A. 387.

(c) Mirjan Ali v. *Maimuna Bibi* (1949) 53 C.W.N. 302, ('49) A. Ass. 14.

not go after the pronouncement. *Bilquees Begum* v. *Manzoor Ahmad* P.L.D. 1962 (W.P.) Karachi 491.

310. Talak may be oral or in writing.— A talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama *(d)*.

(1) *Oral Talak.*— No particular form of words is prescribed for effecting a talak. If the words are express *(saheeh)* or well understood as implying divorce no proof of intention is required. If the words are ambiguous *(kinayat)*, the intention must be proved *(e)*. It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her *(f)*. In a Calcutta case the husband merely pronounced the word "talak" before a family council and this was held to be invalid as the wife was not named *(g)*. This case was cited with approval by the Judicial Committee in a case where the talak was valid though pronounced in the wife's absence, as the wife was named *(h)*. The Madras High Court has also held that the words should refer to the wife *(i)*. The talak pronounced in the absence of the wife takes effect though not communicated to her, but for purposes of dower it is not necessary that it should come to her knowledge *(j)*; and her alimony may continue till she is informed of the divorce *(k)*. As the divorce becomes effective for purposes of dower only when communicated to the wife, limitation under Art. 104 for the wife's suit for deferred dower ran from the time when the divorce comes to her notice *(l)*, under the act of 1908. See also the Limitation Act 1963.

Hedaya, 76, Baillie, 213, 229, 233.

Shia law.— Baillie, II, pp. 113-115.

Words of divorce.— The words of divorce must indicate an intention to dissolve the marriage. If they are express *(saheeh), e.g.,* "Thou are *divorced,*" "I have *divorced thee,*" or "I divorce my wife for ever and render her *haram* from me" [*Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21], they clearly indicate an intention to dissolve the marriage and no proof of intention is necessary. But if they are ambiguous *(kinayat), e.g.,* "Thou art my cousin, the daughter of my uncle, if thou goest" [*Hamid Ali* v. *Imtiazan* (1878) 2 All. 71] or "I give up all relations and would have no connection of any sort with you" [*Wajid Ali* v. *Jafar Husain* (1932) 7 Luck. 430, 136 I.C. 209, ('32) A.O. 34], the intention must be proved.

Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential. *Ghansi Bibi* v. *Ghulam Dastagir* (1968) 1 Mys. L.J. 566.

If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier.

Statement by husband in pleadings filed in answer to petition for maintenance by wife that he had already divorced petitioner (wife) long ago — Effect of — Operates. *See* Criminal Procedure Code, 1973 (II of 1974), S. 125 (1)(a) (1975) 1 A.P.L.J. 20.

Wife shall be treated to have been divorced on the date on which statement to that effect was

(d) See *Ma Mi* v. *Kallander Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I.C. 1, ('27) A.PC. 15 *affirming* 2 Rang. 400.

(e) Ma Mi v. *Kailander Ammal, supra; Asha Bibi* v. *Kadir* (1909) 33 Mad. 22, 3 I.C. 730; *Wahid Khan* v. *Zainab Bibi* (1914) 36 All. 458, 25 I.C. 387; *Ibrahim* v. *Syed Bibi* (1888) 12 Mad. 63.

(f) Ma Mi v. *Kallander Ammal, supra; Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27; *Fulchand* v. *Nazib Ali* (1909) 36 Cal. 184, 1 I.C. 740; *Sarabai* v. *Rabiabai* (1905) 30 Bom. 536 (obiter).

(g) Furzund Hussein v. *Janu Bibee* (1878) 4 Cal. 588.

(h) Rashid Ahmad v. *Anisa Khatoon* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25.

(i) Asha Bibi v. *Kadir, supra.*

(j) Fulchand v. *Nazib Ali, supra.*

(k) Ma Mi v. *Kallandar Ammal, supra; Abdul Khader* v. *Azeeza Bee* (1944) 1 M.L.J. 17, 214 I.C. 38, ('44) A.M. 227.

(l) Kathiyumma v. *Urathel Marakkar* (1931) 133 I.C. 375, ('31) A.M. 647.

made by husband in his plaint. *Smt. Ajmerylussan* v. *Moin Ahmad* 1983 All. L.J. 1332.

Shia Law:— A divorce must be pronounced orally in the presence of competent witnesses and a talak communicated in writing is not valid unless husband is incapable of pronouncing it orally. (Obiter) Under Hanafi Law a talak is valid whether oral or in writing. *Sattar Sheikh* v. *Mst. Sahdunnissa* 1969 A.L.J. 415.

Under Shia Law divorce must be pronounced only in Arabic and that too in a specific form. It is not however necessary that the husband himself must be knowing Arabic. He can engage the services of an agent who knows Arabic to pronounce the same on his behalf. It is only if nobody knowing Arabic is available that in specific circumstances it may be pronounced in any other language.

This is an established principle of Shia Law that pronouncement of Talak (divorce) must be uttered orally in the presence and hearing of two male witnesses who are Muslims and of approved probity. It is not however necessary nor has it been provided anywhere in text of Shia Law that the divorce must be pronounced in the presence of 'Imam'. The only mandatory requirement for a valid divorce is that it must be orally pronounced in Arabic in the presence and hearing of two 'Aadil' witnesses. *Dilshada Masood* v. *Gh. Mustaffa.* 1986 - J & K - 80.

In proceedings initiated by the wife for maintenance, the husband raised a plea of divorce. It was held that the plea by itself was sufficient to terminate the marriage and that wife was entitled to maintenance for the period of *iddat* only and not for a earlier period unless the circumstances justified it. *Chunnoo Khan* v. *State,* (1967) All. W.R. (H.C.) 217.

A written Statement setting up a divorce filed by the husband amounts to a divorce. (Hanafi Law: conditions, mode and time of taking effect of a divorce set out.) *Manoli Pathayi* v. *Moideen* (1968) M.L.J. Cr. 660 (Kerala). *Mohammad Ali* v. *Fareedunnissa Begum* A ('70) A.P. 298.

[See in connection with maintenance the case summarised in S. 279.]

(2) *Talak in writing.*— A talaknama may only be the record of the fact of an oral talak *(m);* or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the kazi *(n)* or of the wife's father *(o)* or of other witnesses *(p).* The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed it is said to be in unusual form. If it is in customary form it is called "manifest" provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed. Otherwise the intention to divorce must be proved. In the undernoted case *(q)* the talaknamas were held to be customary and manifest and so operative without proof of intention. On the other hand if the deed is in the form of a declaration not addressed to the wife or any other person, it is not in customary form and is not effective if there was no intention to divorce *(r).* If the talaknama is customary and manifest it takes effect immediately (s. 313) even though it has not been brought to the knowledge of the wife *(s).* In a Bombay case the talaknama was communicated to the wife within a reasonable time and the Court observed that this was sufficient *(t).* This, however, was not a finding that communication within a reasonable time is necessary and the talaknama operated from the date of execution. But as in the case of an oral talak, communication may be necessary for certain purposes

(m) See *Rashid Ahmed* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, ('32) A.P.C. 25.

(n) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

(o) *Waj Bibee* v. *Azmut Ali* (1868) 8 W.R. 23.

(p) *Rajasaheb, In re* (1920) 44 Bom. 44, 54 I.C. 573; *Ahmad Kasim* v. *Khatoon Bibi* (1932) 59 Cal. 833.

(q) *Sarabai* v. *Rabiabai* 30 Bom. 537, *Mahomed Ishaq* v. *Mt. Sairan* (1936) 163 I.C. 953, ('36) A.L. 611.

(r) *Rasul Bakhsh* v. *Mt. Bholan* (1932) 13 Lah. 780, 138 I.C. 134, ('32) A.L. 498.

(s) *Ahmad Kasim* v. *Khatoon Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27; *Rajasaheb, In re* (1920) 44 Bom. 44, 54 I.C. 573; *Mahomed Ishaq* v. *Mt. Sairan* (1936) 163 I.C. 953, ('36) A.L. 611.

(t) *Rajasaheb, In re* (1920) 44 Bom. 44, 54 I.C. 573.

connected with dower, maintenance and her right to pledge her husband's credit for means of subsistence *(u)*. If an acknowledgment of divorce is made by the husband, the divorce will be held to take effect at least from the date upon which the acknowledgment is made *(v)*.

Shia law.— A *talak* under the Shia law must be pronounced orally in the presence of two competent witnesses: Baillie, II, 117. A *talak* communicated in writing is not valid, unless the husband is physically incapable of pronouncing it orally: Baillie, II, 113-114.

Shia Law.— Writted divorce is exceptional: *Ali Nawaz* v. *Mohd. Yusuf* P.L.D. 1963 S.C. 51.

311. Different modes of talak.— A talak may be effected in any of the following ways:—

(1) *Talak ahsan.*— This consists of a *single* pronouncement of divorce made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *iddat* (s. 257).

When the marriage has not been consummated, a talak in the *ahsan* form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a *tuhr* is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing *(w)*.

(2) *Talak hasan.*— This consists of three pronouncements made during *successive tuhrs,* no intercourse taking place during any of the three *tuhrs.*

The first pronouncement should be made during a *tuhr,* the second during the *next tuhr,* and the third during the *succeeding tuhr.*

(3) *Talak-ul-bidaat or talak-i-badai.*— This consists of—

(i) three pronouncements made during a *single tuhr* either in one sentence, *e.g.,* "I divorce thee *thrice,*— or in separate sentences *e.g.,* "I divorce thee, I divorce thee, I divorce thee" *(x)* or,

(ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage *(y), e.g.,* "I divorce thee irrevocably."

Hedaya, 72, 73, 83; Baillie, 206, 207, 226.

Talak-us-sunnat and talak-ul-biddat.— The Hanafis recognized two kinds of *talak,* namely, (1) *talak-us- sunnat,* that is, *talak* according to the rules laid down in the *sunnat* (traditions) of the Prophet: and (2) *talak-ul-bidaat,* that is, new or irregular *talak. Talak-ul-biddat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-ul-sunnat* is of two kinds, namely, (1) *ahsan,* that is, most proper, and (2) *hasan,* that is, proper. The *talak-ul-biddat* or heretical divorce is good in law, though bad in theology, and it is the most common and prevalent mode of divorce in this country *(z)*, including Oudh *(a)*. In the case of *talak ahsan* and *talak hasan,* the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (s. 312), and the husband has the option to revoke it before then. But the *talak-ul-bidaat* becomes irrevocable immediately it is pronounced (s. 312). The essential feature of a *talak-ul-bidaat* is its irrevocability. One of tests of irrevocability is the repetition *three times* of the formula of divorce *within one tuhr.* But the triple repetition is

(u) Ahmed Kasim v. *Khatoon Bibi* (1932) 59 Cal. 833, 141 I.C. 869, ('33) A.C. 27. See Also: *Chandbi* v. *Bandesha* ('61) A.B. 121.

(v) Asmat Ullah v. *Khatun-un-nisa* (1939) All. 763, (1939) A L.J. 804, 184 I.C. 517, ('39) A.A. 592.

(w) Chandbi v. *Bandesha (supra).*

(x) In re Abdul Ali (1883) 7 Bom. 180; *Amir-ud-din* v. *Khatun Bibi* (1917) 39 All. 371, 39 I.C 513.

(y) Sarabhai v. *Rabiabai* (1905) 30 Bom. 537; *Sheikh Fazlur* v. *Musammat Aisha* (1929) 8 Pat. 690, 115 I.C. 546, ('29) A.P. 81.

(z) Amir-ud-din v. *Khatun Bibi* (1917) 39 All. 371, 375, 39 I.C. 513.

(a) Sheikh Fazlur v. *Musammat Aisha* (1929) 8 Pat. 690, 115 I.C. 546, ('29) A.P. 81.

not a necessary condition of *talak-ul- bidaat,* and the intention to render a *talak*-irrevocable may be expressed even by a *single* declaration. Thus if a man says: "I have divorced you by a *talak-ul-bain* (irrevocable divorce)", the *talak* is *talak-ul-bidaat* or *talak-i-badai* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain*" (irrevocable) manifests of itself the intention to effect an irrevocable divorce.

Talak-ul-bidaat and tuhr.— The High Court of Patna has expressed the opinion relying on a passage on p. 74 of the *Hedaya,* that a *talak-ul-bidaat* effected by a triple pronouncement is valid even if it is pronounced when the wife is in her menstruation *(b).*

Shia law.— The Shia lawyers do not recognize the validity of *talak-ul-bidaat.* Baillie II 118 *(c).*

312. When talak becomes irrevocable.— (1) A talak in the *ahsan* mode [s. 311(1)] becomes irrevocable and complete on the expiration of the period of *iddat* (s. 257).

(2) a *talak* in the *hasan* mode [s. 311(2)] becomes irrevocable and complete on the third pronouncement, irrespective of the *iddat.*

(3) A talak in the *badai* mode [s. 311(3)] becomes irrevocable immediately it is pronounced, irrespective of the *iddat (d).* As the talak becomes irrevocable *at once,* it is called *talak-i-bain,* that is, irrevocable talak.

A *talak rajai* can be revoked by conduct before it becomes irrevocable. The talak becomes irrevocable and complete on the expiration of the period of iddat. It is wrong to contend that the only manner of revocation of such a talak is either by resumption of sexual intercourse or by pronouncement of specific words of revocation in the presence of two witnesses.

The period of iddat prescribed by Muslim law is 90 days. In the instant case the suit was filed by the wife seeking declaration that she was divorced even before the period of iddat has expired. On the facts alleged in the plaint, it is obvious that the defendant had by his conduct revoked the talak within a week of giving it when he personally went to fetch the plaintiff, and by expressly stating before two muslims that he had revoked the talak. [Deoki Nandan, J] *Smt. Murium* v. *Mohammad Shamsi Alam,* A.I.R. 1979 All. 257.

Hedaya, 72-73; Baillie, 206-207, 226.

Until a talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or implied as by resuming sexual intercourse.

Hedaya, 103-104; Baillie, 287-288.

As to the right to contract another marriage after divorce see sec. 336(1). As to remarriage of divorced couples, see sec. 336(5).

313. When talak in writing becomes irrevocable.— In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (*talak-i-bain*), and takes effect immediately on its execution *(e).*

Baillie, 234,

In a Bombay case *(f),* a Hanafi Mahomedan appeared before the Kazi of Bombay and executed a *talaknama,* which ran as follows: "As on account of some disagreement between us there has arisen some ill-feeling, I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by *nika,* by one *bain-talak* (irrevocable divorce), and renounce her from the state of being my wife." In the course of his judgment, Batchelor, J., said: "To my mind this *talaknama* is decisive; it described the divorce as *talak-ul-bain* and emphatically declares that

(b) Sheikh Fazlur v. *Musammat Aisha* (1929) 8 Pat. 690, 115 P.C. 546, ('29) A.P. 81.

(c) See *Ali Nawaz* v. *Mohd. Yusuf* P.L.D. 1963 S.C. 51.

(d) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52, 135 I.C. 762, ('32) A.P.C. 25. (The Privy Council relied upon Sir R. K. Wilson's Digest of Anglo-Muhammadan Law, 5th ed. p. 136 where the law is summarised).

(e) Baillie, 233; *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537; *Mt. Hayat Khatun* v. *Abdulla Khan* ('37) A.L. 270.

(f) (1905) 30 Bom. 537, 546, *supra.*

all rights and liabilities between Adam and plaintiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce *as from the date of the document.*" The deed was not in customary form because it was not addressed to the wife [s. 310(2)], but the learned Judge appears to have thought it was, because it was in a form in common use. The question of intention was however immaterial as the intention to divorce appeared from the facts of the case *(g)*.

But the writing may show an intention to the contrary. Thus if the writing says, "when this my letter reaches thee, then thou art repudiated," the "talak does not take effect until the actual receipt of the letter: Baillie, 234. Similarly, if the writing says, "I have divorced thee on the 15th September 1913, and the period of the third divorce will expire on the 15th November 1913," the *talak* contemplated by the husband is a *talak hasan* [s. 311(2)], and there is no divorce unless two more pronouncements are made *(h)*.

In a petition for maintenance a husband pleaded that he had divorced his wife. It was held that the divorce operated from the date, but the wife would be entitled to maintenance under s. 488 Cr. P.C. or s. 125 of the Cr. P. C. (1974); *Umar Hyat Khan* v. *Mahboobunnissa* (1975) M.L.J. Cr. 570.

Where the husband in an application to the Kazi said that he had divorced his wife by *talak-ul-bain* and the Kazi recorded his statement, it amounts to an irrevocable divorce and the wife cannot inherit. *Mst. Saleha Bi* v. *Sheikh Gulla* ('73) A.M.P. 207.

A plea of divorce in the written pleadings amounts to a valid divorce at least with effect from the date of the statement. *Syed Jamaluddin* v. *Valian Bibi* (1975) 2 A.P.L.J. 20.

314. (1) Delegation of power to divorce.— Although the power to give divorce belongs primarily to the husband, he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked.

Talak by tafweez (delegation of power).— The husband may in *person* repudiate his wife, or he may delegate the power of repudiating her to a third party, or even to the wife; Baillie, 238; (the Shia law is the same: Baillie, II, 109) such a delegation of power is called *tafweez*. "When a man has said to his wife, 'Repudiate thyself,' she can repudiate herself at the meeting, and he cannot divest her of the power." Baillie, 254. "But if there is no reference to his pleasure, it is an appointment of agency which is not restricted to the meeting, and may be revoked." Baillie, 254. "When a man has said to his wife, 'choose thyself today,' or 'this month,' or 'a month,' or 'a year,' she may exercise the option at any time within the given period"; Baillie, 242.

(2) Stipulation by wife for right of divorce.— An agreement made, whether before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of any of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if a *talak* has been pronounced by the husband *(i)*. The power so delegated to the wife is not revocable, and she may exercise it even after the institution of a suit against her

(g) See the criticism in *Rasul-Bakhsh* v. *Mt. Bholan* (1932) 13 Lah. 780, 138 I.C. 134, ('32) A.L. 498.

(h) Ghulam Mohy-ud-din v. *Khizar Hussein* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A.L. 6.

(i) Hamidoola v. *Faizunnissa* (1882) 8 Cal. 327; *Ayaunnessa Beebe* v. *Karam Ali* (1909) 36 Cal. 23; *Maharam Ali* v. *Ayesa Khatum* (1915) 199 Cal. W.N. 1226, 31 I.C. 562; *Sainuddin* v. *Latifannessa Bibi* (1919) 46 Cal. 141, 48 I.C. 609 [agreement *after* marriage]: *Mahomed Yasin* v. *Mumtaz Begum* (1936) 161 I.C. 701, ('36) A.L. 716; *Suroj Mia* v. *Abdul Majid* ('53) A. Tripura 6; *Safiuddin Sekh* v. *Mst. Soneka Bibi* (1955) Assam 1, ('55) A. Assam, 153, 59 C.W.N. 139; *Aziz* v. *Mst. Naro* ('55) A.H.P. 32.

for restitution of conjugal rights *(j)*.

Baillie, 19.

[(a) *A* enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 for her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage *B* divorces herself from *A*, alleging, cruelty and non-payment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights: *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327].

The agreement in the above case may be supported on the doctrine of *tafweez*, which is an essential part of the Mahomedan law of divorce. It is a case of repudiation by the wife under an authority from the husband, in other words, as a talak by *tafweez*. Such a divorce, though it is *in form* a divorce of the husband *by the wife*, operates *in law* as a *talak* of the wife *by the husband*.

[(b) An agreement between husband and wife by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid: *Maharam Ali* v. *Ayesa Khatun* (1915) 19 Cal. W.N. 1226, 31 I.C. 562; *Sadiya Begum* v. *Ata Ullah* (1933) 144. I.C. 497, ('33) A.L. 885; *Badarannissa* v. *Mafittala* (1871) 7 Beng. L.R. 442. A single judge of the Calcutta High Court has held that such an agreement may be arrived at by the guardians where the parties to the marriage are minors *(k)*.]

At any time after the happening of the contingency.— Where a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again, she is not bound to exercise her option at the very first moment she heard the news. The wrong done to her is a continuing one, and she has a continuing right to exercise the power *(l)*.

The mere happening of the event under which the wife would be entitled to exercise the right does not *ipso facto* dissolve the marriage. She must actually exercise the power *(m)*.

315. Talak under compulsion.— If the words of divorce used by the husband are "express" (s. 310), the divorce is valid even if it was pronounced under compulsion *(n)*, or in a state of voluntary intoxication, or to satisfy his father or some one else *(o)*.

Hedaya, 75, 76; Baillie, 208-210.

Shia law.— A divorce pronounced in the circumstances stated in this section is invalid under the Shia law: Baillie, II, 108.

316. Talak when marriage solemnized in England according to English law.— A civil marriage, solemnized at a Registrar's office in London between a Mahomedan domiciled in India and an English woman domiciled in England, cannot be dissolved by the husband handing to the wife a *talaknama* [writing of divorcement (s. 313)], although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage under Mahomedan law *(p)*.

The reason is that such a marriage is a Christian marriage by which is meant the voluntary *union for life of one man and one woman* to the exclusion of all others; it is not a marriage in the Mahomedan sense which can be dissolved in Mahomedan manner. A Mahomedan marriage, being a polygamous marriage, is not, for certain purposes of English law, regarded as a marriage. But this reason ceases to apply when the wife becomes a convert to Islam. The Bombay High Court has held that a civil marriage in Scotland between a Christian woman subsequently converted to Mahomedanism and a Mahomedan domiciled in India can be dissolved by *talak*. This is on the

(j) (1919) 46 Cal. 141, 48 I.C. 609, *supra*.

(k) Marfatali Mirja v. *Jabedunnessa Bibi* (1941) 1 Cal. 401, 45 C.W.N. 910, 197 I.C. 326 ('41) A.C. 657.

(l) Ayatunnessa Bebbe v. *Karam Ali* (1909) 36 Cal. 23, 1 I.C. 513.

(m) Aziz v. *Mst. Naro* ('55) A.H.P. 32.

(n) Ibrahim v. *Enayetur* (1869) 4 Beng. L.R. A.C. 13.

(o) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52-53, 135 I.C. 762, ('32) A.PC. 25.

(p) Rex v. *Hammersmith, Superintendent Registrar of Marriages* [1917] 1 K.B. 634.

ground that the rights and liabilities arising out of the marriage contract are governed by the *lex domicili (q).*

317. Ila.— Divorce by *Ila* is a species of constructive divorce which is effected by abstinence from sexual intercourse for the period of not less than four months pursuant to a vow. According to Shafei law, the fulfilment of such a vow does not *per se* operate as a divorce, but gives the wife the right to demand a judicial divorce.

Baillie, 296-304; *Hedaya,* 109. See the opening passages of Sura XXXIII and Sura LVIII of the Koran and Sale's notes thereon in his translation.

318. Zihar.— *Zihar* is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply for a judicial divorce. Cases of *zihar* are unknown in India and it has been doubted by text book writers whether the wife's right under *zihar* would be enforced by Courts in India. But the law of *zihar* has now received statutory recognition in sec. 2 of the Shariat Act, 1937.

Hedaya, 117 & 602; Baillie, Book III, Chap. 9.

319. Khula and mubara'at.— (1) A marriage may be dissolved not only by *talak,* which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of *khula* or *mubara'at.*

(2) "A divorce by *khoola* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her *dyn-mahr* (dower) and other rights, or make any other agreement for the benefit of the husband" *(r).* Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce *(s),* though the husband may sue the wife for it.

A *khula* divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce *(talak-i-bain)* [ss. 311 (3), 312], and its operation is not postponed until execution of the *khulanama* (deed of *khula*) *(t).*

(3) A *mubara'at* divorce like *khula,* is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called *khula.* When the aversion is mutual, and both the sides desire a separation, the transaction is called *mubara'at.* The offer in a *mubara'at* divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a *talak-i-bain* as in the case of *khula.*

(q) Khambatta v. *Khambatta* (1935) 59 Bom. 278, 36 Bom. L.R. 1021, 154 I.C. 1075, ('35) A.B. 5 affirming 36 Bom. L.R. 11, 149 I.C. 1232, ('34) A.B. 93. Cf. *Hyde* v. *Hyde* (1866) 1 P. & D. 130 and *In re Bethell* (1886) 38 C.D. 220 and *Nachinson* v. *Nachinson* (1930) P. 85 & 217.

(r) Moulvee Buzul-ul-Raheem v. *Luteefutoon-Nissa* (1861) 8 M.I.A. 379, 395; *Saddan* v. *Faiz Bakhsh* (1920) 1 Lah. 402, 55 I.C. 184; *Umar Bibi* v. *Mohammad Din* (1944) Lah. 542, 220 I.C. 9, ('45) A.L. 51.

(s) (1861) 8 M.I.A. 379, 397-398, *supra.*

(t) (1861) 8 M.I.A. 379, 396, *supra.*

(4) As a *talak*, so in *khula* and *mubara'at*, the wife is bound to observe the *iddat*, as stated in sec. 257 above *(u)*.

Hedaya, 112-116; Baillie, 305-308. "*Khoola* means to put off, as a man is said to *khoola* his garment when he puts it off. In law it is the laying down by a husband of his right and authority over his wife for an exchange," Baillie, 306; *Hedaya*, 112, *Mubara'at* means mutual release: Baillie, 306; *Hedaya*, 116.

A muslim marriage may be dissolved by pronouncing talak. It may also be dissolved by an agreement between the husband and wife. When it is the latter it is known as khula. *Ghansi Bibi* v. *Ghulam Dastagir* (1968) 1 Mys. L.J. 566.

320. Effect of khula and mubara'at divorce.— Unless it is otherwise provided by the contract, a divorce effected by *khula* or *mubara'at* operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her *iddat*, or to maintain his children by her.

Baillie, 306-307; *Hedaya*, 116.

321. Apostasy from Islam.— (1) Before the Dissolution of Muslim Marriages Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage *(v)*.

(2) Under sec. 4 of the Dissolution of Muslim Marriages Act, 1939, however, mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution of any of the grounds mentioned in sec. 2 of the Act. Under this Act, therefore, the decisions mentioned below are no longer good law *(w)*.

(3) Sec. 4 only applies to the case of apostasy from Islam of a married Muslim woman, and apostasy of the Muslim husband would still operate as a complete and immediate dissolution of the marriage *(w)*.

(4) The provisions of sec. 4, however, do not apply to a woman converted to Islam from some other faith, who re-embraces her former faith. In such a case, the law as it stood before the Dissolution of Muslim Marriages Act, 1939, will apply, and the conversion will operate as a dissolution of the marriage *(w)*.

(5) Apostasy from Islam of the husband operates as a complete and immediate dissolution of the marriage *(w)*.

A Mahomedan husband becomes a convert to Christianity. The wife then marries another man *before* the expiration of the period of *iddat* (s. 257). Is she guilty of bigamy under sec. 494 of the Indian Penal Code? No, because apostasy operates as an *immediate* dissolution of marriage *(x)*. As to conversion to Mahomedanism, see sec. 19 above.

Right of inheritance not effected by apostasy.— Change of religion does not affect rights of inheritance or other rights: see Act XXI of 1850.

322. Agreement for future separation.— The High Court of Bombay has held that an agreement between a Mahomedan husband and wife which provides for *future* separation in the event of disagreement between them is void as being against public policy *(y)*. See secs. 280 and 281 (3).

(u) Ibid.

(v) Amin Beg v. *Saman* (1910) 33 All 90, 7 I.C. 342; *Mt. Sardaran* v. *Allah Baksh* ('34) A.L. 976; *Sardar Mohammad* v. *Mt. Maryam Bibi* (1936) 165 I.C. 383, ('36) A.L. 666; *Iqbal Ali* v. *Mt. Halima* (1939) All. 296, (1939) A.L.J. 65; *Resham Bibi* v. *Khuda Bakhsh* (1938) Lah. 277, 40 P.L.R. 722, ('38) A.L. 482; *Sarwar Yar Khan* v. *Jawahar Devi* 1964 (1) Andh. W.R. 60.

(w) Sec. 4 and first proviso, Dissolution of Muslim Marriages Act, 1939.

(x) Sec. 4, proviso 2, Dissolution of Muslim Marriages Act, 1939. *Abdul Ghani* v. *Azizul Huq* (1912) 39 Cal. 409, 14 I.C. 641; *Karan Singh* v. *Emperor* (1933) All. L.J. 733, 145 I.C. 156, ('33) A.A. 433.

(y) Bai Fatima v. *Alimahomed* (1913) 37 Bom. 280, 17 I.C. 946.

The Bombay decision was founded on sec. 23 of the Indian Contract Act, 1872, which says that an agreement against public policy is void. But this decision is of doubtful authority *(z)*. If a Mahomedan wife can lawfully stipulate for a divorce as stated in sec. 314, there is no reason why she cannot stipulate for *future* separation, at all events if the separation is to be for a justifiable cause. Such a stipulation can hardly be said to be against the policy of the Mahomedan law.

An ante-nuptial agreement that in case a *Khana Damad* does not live in the wife's parents' house, he should refund the marriage expenses is not opposed to public policy. Violation of the agreement may result in divorce between husband and wife. This is based on a custom of *Khanadamadi* obtaining in the Kashmir valley. *Mohd. Khan* v. *Shahmali* ('72) A. J. & K. 8.

B. — Judicial divorce at suit of wife

323. The Dissolution of Muslim Marriages Act, VIII of 1939.— The Dissolution of Muslim Marriages Act was passed in order to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Isiam by a married Muslim woman on her marriage tie. The Act came into force on the 17th March, 1939, and lays down the following grounds of divorce: (1) the whereabouts of the husband are unknown for a period of four years (see sec. 324); (2) failure of the husband to provide for the maintenance of the wife for a period of two years (see sec. 325); (3) sentence of imprisonment on husband for a period of seven years (see sec. 326); (4) failure without reasonable cause to perform marital obligations (see sec. 327); (5) importance of husband (see sec. 328); (6) insanity of husband (see sec. 329); (7) repudiation of marriage by wife (see sec. 330 and sec. 273); (8) cruelty of husband (see sec. 331); and (9) any other grounds recognized by Muslim law (see sec. 332). Section 4 of the Act deals with the effect of apostasy from Islam of a married Muslim woman (see sec. 213). It is submitted that the grounds are independent of each other, and on proof of any one of them, a decree for dissolution of marriage can be made.

According to the preamble of the Act, it is a consolidating Act. In one case *(a)*, it has been assumed that the Act is a declaratory one, but this at most would apply to sec. 2 of the Act. But even as to sec. 2, it is submitted that the Act is not wholly declaratory. The statement of objects and reasons for the Bill shows that there is no provision in the Hanafi Law enabling a married Muslim woman to obtain a decree dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and "under other circumstances". "The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India." It is further stated that the Courts hesitate to apply the Maliki Law (which provides for dissolution in such circumstances) although the Hanafi jurists have clearly laid down that in cases of hardship under the Hanafi Law the principle of the Maliki Law may be applied.

Whatever the position may be in cases dealt with in sec. 2, there can be no doubt that the principle of a marriage being dissolved on account of the apostasy of a married woman has not been unknown to the Muslim jurists *(b)* and this principle has been recognized and given effect to by the decisions of the Courts for more than 70 years. Although, therefore, the preamble states that sec. 4 was enacted "to remove doubts as to the effect of renunciation of Islam by a married Muslim woman on her marriage tie," the section effects a material alteration in the law on the point and can hardly be described as declaratory in its nature.

The question then is whether the Act can be said to be retrospective in its operation. This question arose in three cases decided by the Lahore High Court since the Act came into force and

(z) Safiuddin Sekh v. *Mst. Soneka Bibi* (1955) Assam 1, ('55) A. Assam 153, 59 C.W.N. 139.

(a) Fazal Begum v. *Hakim Ali* ('41) A.L. 22.

(b) Baillie, Digest of Shia law, p. 29; Hedayah (Grady, p. 66); Tagore Lectures Vol II p. 347; *Mt. Rashid Bibi* v. *Tufail Muhammad* ('41) A.L. 291; Wilson's Digest referred to in *Mt. Rabian Bibi* v. *Gulam Ali* ('41) A.L. 292

were, curiously enough, cases decided by single judges of the same Court under sec. 4 of the Act. In the first of these cases *(c)* a wife sued for a declaration that her marriage with the defendant had come to an end on account of her conversion to Christianity. The suit was instituted on the 31st August, 1938, and decreed by the trial Court on the 28th November 1938. The first appellate Court reversed the decision on the 28th June, 1939, and dismissed the suit. In the meantime Act VIII of 1939 came into force on the 17th March, 1939. The High Court in second appeal confirmed the decision but on the ground that the case was governed by the Act which operated retrospectively. In the later two cases, it was held that the Act could not be applied retrospectively *(d)*. In *Mt. Rashid Bibi* v. *Tufail Muhammad*, the Court seems to have held that the statute as regards sec. 4 at least was not declaratory and that the law on the point was different before the Act. In both the later decisions it was pointed out that the language used by the Legislature, namely, "the renunciation of Islam . . . shall not by itself operate to dissolve her marriage" would appear to apply only to renunciations or conversions which might take place after the Act came into force.

In *Sarwar Yar Khan* v. *Jawahar Devi* 1964 (1) Andh. W.R. 60, a Division Bench of the Andhra Pradesh High Court has disapproved the view taken in *Fazal Begum* v. *Hakim Ali* and following the two later Lahore cases, has held that the Act had not retrospective operation.

It is a general principle that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require that construction. Except in special cases, a new Act ought to be construed so as to interfere as little as possible with vested rights, and where the words admit of another construction, they should not be so construed as to impose disabilities not existing at the passing of the Act. What the consequences of giving a retrospective effect to sec. 4 would be it is easy to imagine and is pointed out in the cases noted below *(d)*. It is submitted that the language used in sec. 4 is clear and suggests that it was not intended to interfere with rights acquired under the existing law. It is therefore submitted that the decision in *Fazal Begum* v. *Hakim Ali* is wrong and the view taken in two later Lahore cases and the Andhra Pradesh case represents the correct position.

The learned judge who decided *Rabian Bibi* v. *Gulam Ali (d)* has held that the provisions of sec. 2(ii) may be given retrospective effect *(e)*.

In a suit by a Mahomedan girl claiming to exercise her option for a declaration that her marriage with the defendant stood repudiated and dissolved, it was held that although the suit was not filed under Act III of 1939, "the Act must be taken to indicate the general principles of justice, equity and good conscience applicable" and as Mahomedan Law is administered in Sind as a matter of justice, equity and good conscience, there was no reason why the plaintiff should be required to file a fresh suit and therefore the declaration sought was granted *(f)*.

A Muslim woman cannot repudiate her marriage outside the Act of 1939. *K. C. Moyin* v. *Nafeesa* ('73) A. Ker. 176.

Arbitration.— In a suit for dissolution of marriage, the questions at issue cannot be referred to arbitration or decided under the Indian Oaths Act, for it is for the Court to decide the case on the evidence *(g)*.

Part B States.— The Dissolution of Muslim Marriages Act did not extend to Part B states with the result that the law of divorce was different in those States from that which prevailed in Part A States *(h)*.

324. Absence of husband.— The wife is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of the husband have not been known for a period of four years; but a decree passed on this ground will not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that

(c) Fazal Begum v. *Hakim Ali* ('41) A.L. 22.

(d) Rashid Bibi v. *Tufail Muhammad* ('41) A.L. 291; *Rabian Bibi* v. *Gulam Ali* ('41) A.L. 292.

(e) Manak Khan v. *Mt. Mulkhan Bano* ('41) A.L. 167.

(f) Zubeda Begum v. *Vazir Mahomed* ('40) A.S. 145 (decision of a single judge).

(g) Abdul Ghani v. *Sardar Begum* (1945) 221 I.C. 610, ('45) A.L. 183.

(h) Mohammad Kanu v. *Kasim Beevi* ('54) A. Tray.- Coch. 219.

period and satisfies the Court that he is prepared to perform his conjugal duties, the Court must set aside the decree *(i)*. In such a suit.

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit.

The paternal uncle and brother of the husband, if any, must be cited as party even if he or they are not heirs *(j)*.

325. Failure to provide maintenance.— The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has neglected or has failed to provide for her maintenance for a period of two years *(k)*.

Failure to maintain.— Failure to maintain the wife need not be wilful. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or to any other cause, the wife would be entitled to divorce. Mere inability of the husband to maintain his wife is no longer a ground for refusing a divorce *(l)* and it is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or any other cause whatsoever *(m)* unless, it is submitted, her conduct has been such as to disentitle her to maintenance under the Mahomedan Law *(n)*. In 1942 it was held by the Chief Court of Sind that the Act was not intended to abrogate the general law applicable to Mahomedans, and "the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under the general Mahomedan Law he was under an obligation to maintain her". The wife's suit for divorce was dismissed as it was found that she was neither faithful nor obedient to her husband *(o)*. So also was the wife's suit dismissed, where the wife, who lived separately, was not ready and willing to perform her part of marital duties *(p)*. Where the wife has not been paid her prompt dower she is entitled to stay away from her husband, and the husband is bound to maintain her. If he does not maintain her for a period of two years, the wife is entitled to divorce *(q)*.

The provisions of the 1939 Act must be construed in a reasonable manner, which is one of the basic rules of interpretation. A wife, who by her own act or conduct, disentitles herself for maintenance cannot yet be allowed to take advantage of her own conduct and claim dissolution. The words "failed to provide" do imply a duty to provide. If there is no such duty to provide, it cannot be said that the husband has failed to provide maintenance to his wife. Suppose a wife is of an immoral character, or she deliberately and against the wishes of her husband lives away from him without giving him her company which she is bound to, the husband cannot still be compelled to provide for her maintenance. The husband cannot be compelled to go on providing maintenance to enable the wife to lead an immoral life. It is true that if a marriage breaks down, there must be an outlet; but, it cannot equally be forgotten that the dissolution of a Muslim marriage at the instance of the wife is governed by the provisions of the Act, and the words occurring in the enactment have to be given their ordinary and reasonable meaning nor are there any compelling reasons to place a highly restrictive meaning upon the said clause. The words "without reasonable cause" must be deemed to be implicit in clause (ii), and also the absence of these words therein cannot, in my opinion, make any difference. Moreover, a reading of the several clauses in Section 2 shows that a right is given to a Muslim woman to obtain the dissolution of her marriage where her husband is guilty of one or the other things mentioned in the several clauses, viz., that, his

(i) Sec. 2(i) read with proviso (b) of the Dissolution of Muslim Marriages Act, 1939.

(j) Sec. 3, Dissolution of Muslim Marriages Act, 1939.

(k) Sec. 2(ii), Dissolution of Muslim Marriages Act, 1939.

(l) *Manak Khan* v. *Mt. Mulkhan* ('41) A.L. 167.

(m) *Satagunj* v. *Rahmat Dil* (1945) Kar. 327, 224 I.C. 6, ('46) A.S. 48.

(n) Approved in *Kunju Ismail* v. *Md. Kedeja Unuma* 1959 A. Ker. 151.

(o) *Mt. Khatijan* v. *Abdulla* (1942) Kar. 535, ('43) A.S. 65.

(p) *Mt. Imat-ul-Hafiz* v. *Talib Hussain* ('45) A.L. 56; *Jamila Khatun* v. *Kasim Ali* ('51) A.N. 375.

(q) *Najiman Nissa* v. *Serajuddin* (1946) 228 I.C. 198, ('46) A.P. 467.

whereabouts have not been known for a period of four years; that, he has been sentenced to imprisonment for a period of seven years or upwards; that; he has failed to perform his marital obligations for a period of three years without any reasonable cause, that, he was impotent at the time of the marriage and continues to be so, and so on and so forth. In this scheme it would not be appropriate to introduce a ground which entitles the wife to divorce, even though the husband's conduct is totally blameless and where the conduct of the wife herself is blame-worthy. *Ahmed Abdul Qadeer* v. *Raffat Banu* A.I.R. 1978, A.P. 417.

Under S. 488(3) 2nd proviso of the Code of Criminal Procedure, a wife refusing to live with her husband on account of his marrying again, is not deprived of her maintenance under the first sub-section of the section. The section makes no difference between parties governed by monogamy and those among whom polygamy is permissible. No question of hardship under the personal law arises. The husband can only file a suit to get the order set aside. See also: *Syed Ahmad* v. *N. P. Taj Begum* ('58) A. Mys. 128 and *Kandasami* v. *Nachmmal* ('63) A. Mad. 263.

A contrary view has been expressed in *Abdulla Khan* v. *Chandni Bi* ('56) A. Bhopal 71 and in *Munnawarbai* v. *Sabir Mohammad (r)* 1970 M.P.L.J. (Notes) 23, but is open to doubt. See the Criminal Procedure Code 1974; as the law has been amended.

In the undermentioned case *(t)* the plaintiff brought a suit for dissolution of her marriage with the defendant on the grounds mentioned in sec. 2(ii), 2(vii)(a) and (f). The facts as to the first of these grounds were that since her marriage in 1925 the plaintiff lived with the defendant for about a month and then left him on account of continued ill-treatment. A reconciliation between the husband and the wife was effected as the result of which the plaintiff went back to the defendant but had to leave him again after a few days, since when she lived with her father. In 1928 she filed a suit for maintenance in which it was held that the defendant had neglected to maintain her and a decree against him was passed but no past maintenance was allowed. In 1936 the plaintiff applied to a Magistrate for an order against the defendant for payment of a monthly allowance under sec. 488 of the Criminal Procedure Code. The Magistrate held that the defendant had neglected to maintain her for many years and she had sufficient grounds for refusing to live with him and passed an order against the defendant for payment of Rs. 10 per month by way of a monthly allowance. Thereafter payments were made by the defendant to the plaintiff, though irregularly and sometimes only after the issue of distress warrants. It was held by a single judge of the Chief Court of Sind that although it could not be said that during the two years immediately preceding the suit the defendant had not maintained the plaintiff, "in the circumstances of the case" the plaintiff was not debarred from relying on sec. 2(ii) of the Act, in respect of the earlier period of 10 years as a good ground for the dissolution of the marriage. It is submitted that the decision is not correct and it has been dissented from by a Judge of the same Court *(u)*.

Maintenance.— According to Mahomedan Law maintenance signifies all those things which are necessary to the support of life, such as food, clothes and lodging. *Hedaya,* 392. The maintenance contemplated is proviso of food, raiment and lodging adequate for the wife taking into consideration the husband's station in life. Half-hearted and illusory attempts to provide maintenance is not maintenance contemplated by the Act *(v)*.

Failure to maintain rich wife.— The Judicial Commissioner's Court of Peshawar *(w)* has held that the Act makes no distinction between a poor and a rich wife. If, therefore, a husband has failed to maintain his wife, for a period of two years, even though she has independent means, she is entitled to dissolution of marriage.

326. Imprisonment of husband.— The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has been sentenced to imprisonment for a period of seven years or upwards, but no decree can be passed on this ground until the sentence has become final *(x)*.

(r) Mohamed Hanifa v. *Mariam Bi* ('69) A. Mad. 414. See also *Rabia Khatoon* v. *Mukhtar Ahmed* ('66) A.A. 548.

(t) Asambai v. *Umer* ('41) A.S. 23.

(u) Satgunj v. *Rahmat Dil* (1945) Kar. 327, 224 IC. 6, ('46) A.S. 48. Jamiluddin P.L.D. 1960. (W.P.) Karachi 663.

(v) Satgunj v. *Rahmat Dil* (1945) Kar. 327, 224 I.C. 6, ('46) A.S. 48.

(w) Said Ahmad v. *Sultan Bibi* ('43) A. Pesh. 73.

(x) Sec. 2(iii) read with proviso (a) Dissolution of Muslim Marriages Act, 1939.

327. Failure to perform marital obligations.— The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has failed to perform without reasonable cause his marital obligations for a period of three years *(y)*.

328. Impotence of husband.— The wife is entitled to obtain a decree for the dissolution of her marriage if the husband was impotent at the time of the marriage and continues to be so; but before passing a decree on this ground the Court is bound, on application by the husband, to make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree can be passed on the ground of his impotence *(z)*.

Alteration in the law.— The Act has altered the law and procedure applicable to suits for dissolution of marriage on the ground of the husband's impotence in the following respects: (1) It is no longer necessary for the wife to prove that she did not know of her husband's impotence at the time of the marriage. (2) It is no longer necessary for the Court to adjourn the suit for one year in order to ascertain if the husband has ceased to be impotent, unless the husband applies for an order to that effect. If no such application is made by the husband after the wife has proved that the husband was impotent at the time of the marriage and continued to be so, then the Court must pass a decree for dissolution forthwith. (3) It is no longer necessary for the wife to prove after the year of probation that the husband is still impotent. Under the Act it is for the husband to prove within the period of one year that he has ceased to be impotent. The potency, of course, must be in regard to his wife *(a)*.

The earlier decisions *(b)* on these points are no longer good law.

329. Insanity of husband.— The wife may obtain a decree for the dissolution of her marriage if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease *(c)*.

330. Repudiation of marriage by wife.— See section 273.

331. Cruelty of husband.— The wife is entitled to a decree for the dissolution of her marriage if the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty or conduct even if such conduct does not amount to physical ill-treatment,

In *Shahina Praveen* v. *Mohd. Shakeel* A.I.R. 1987 Delhi 210, it was held that —

Immediately after the marriage of the parties, the plaintiff started maltreating the defendant.

... The plaintiff used to give beating and treated the defendant with cruelty during her stay with him.

... The institution of the criminal cases against her and her relations further amounts to cruelty raising a reasonable apprehension in her mind that in case she is forced to join her husband, her life will be in danger.

[Even before the Act cruelty was considered a sufficient ground for granting divorce *(d)* but incompatibility of character was not *(e)*] or

Where the wife has reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from her husband's

(y) Sec. 2(iv), Dissolution of Muslim Marriages Act, 1939; *Said Ahmad* v. *Sultan Bibi* (1943) A. Pesh. 73.

(z) Sec. (2) (v) read with proviso (c) Dissolution of Muslim Marriages Act, 1939.

(a) Muhammad Ibrahim v. *Altafan* (1925) 47 All. 243, 83 I.C. 27, ('25) A.A. 24.

(b) Muhammad Ibrahim v. *Altafan* (1925) 47 All. 245, 83 I.C. 27, ('25) A.A. 24: *A* v. *B.* (1896) 21 Bom. 77; *Vadake Vitil* v. *Odakel* (1881) 3 Mad. 347 & *Mt. Fatima* v. *Jalal Din* (1936) 163 I.C. 751, ('36) A.L. 510; *Badar Din* v. *Mt. Allah Rakhi* ('37) A.L. 383.

(c) Sec. 2(vi), Dissolution of Muslim Marriages Act, 1939.

(d) Kadir v. *Kolenan Bibi* (1935) 62 Cal. 1088, 163 I.C. 188.

(e) Mt. Mustafa v. *Mirza Khan* ('33) A.O. 15.

parents or relations such an apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband. [S. Murtaza Fazl Ali and A. P. Sen. JJ.] *Sirajmohamedkhan Janmohamadkhan* v. *Hafizunnisa Yasinkhan.* A.I.R. 1981 S.C. 1972: 1981 Cr. L.J. 1430 (S.C.)

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or,

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran *(f)*.

The opinion has been expressed by the Chief Court of Sind that only a very gross failure to render to the wife her just rights could be considered in the Court of law as a ground for dissolution *(g)*, but where a husband has gone out of India leaving two wives in India, and he provides maintenance for one and not for the other, that amounts to inequality of treatment and the case falls under this clause *(h)*.

Disposal of property — sub-cl. (d).— In a Lahore case *(i)* it was observed that this clause was not happily worded. "It is not easy to say" observed Abdul Rahman J., "whether it was only meant to convey a person who had been in the habit of selling his wife's property of his own selfish ends or also covers the single act of a person who sells or assigns his wife's property of any value, however, insignificant, and not for his own advantage, but say, for the purpose of procuring medicine for his ailing wife when he did not have the means to buy it himself out of his own money. Nor am I sure that the Legislature was not intending to provide for cases when a person gets rid of the whole or substantial portion of a wife's belongings, but also for cases where a husband happens to dispose of a ring, say of Rs. 3 in value ... I should interpret the word "property" in the sense of a substantial portion of a wife's property and its disposal in the sense of getting rid of that property not for the wife's benefit but for the selfish ends of the husband not with the object of the meeting a pressing need but more in the sense of waste and this also when done with the object of depriving the wife of her property and not with her consent or for things in and from which her consent might have been reasonably or legitimately presumed, implied or inferred." In this particular case the wife's ornament was sold by the husband with her consent and it was held that the case did not fall within sub-clause (d). It is submitted that sub-clause (d) should be read with the opening words of section 2(viii) and the disposal by the husband of the wife's property must be of such a nature as to amount to cruelty to the wife. This is a question of fact in each case.

332. Grounds of dissolution recognised by Mahomedan Law.— The wife is entitled to a decree for the dissolution of her marriage on any other ground which is recognised as valid for the dissolution of marriages under Muslim law *(j)*. Incompatibility of temperaments and hatred of the wife for her husband are not recognised by Muslim law as grounds of divorce *(k)*. Where the wife sues for dissolution on the ground of *li'an* (see sec. 333) the marriage cannot be dissolved if the husband *bona fide* retracts the charge of adultery *(l)*.

Section 2 of the Shariat Act expressly refers to *ila* (see sec. 317), *zihar* (see sec. 318), *Khula*

(f) Sec. 2 (viii), Dissolution of Muslim Marriages Act, 1939. *Mt. Resham Bibi* v. *Mohd. Shafi, supra;* (husband taking second wife not in itself sufficient cruelty to first wife). S. 2 (ix) Courts in Pakistan occupy position akin to Qazi and are competent to effect divorce on any ground under the Muslim Law. *Khurshid Bibi* v. *Mohd Amin.* (S.C.) *supra.*

(g) *Amabai* v. *Umer* ('41) A.S. 23.

(h) *Mt. Umat ul-Hafiz* v. *Talib Hussein* ('45) A.L. 56.

(i) *Zubaida Begum* v. *Sardar Shah* (1943) 210 I.C. 587; ('43) A.L. 310.

(j) Sec. 2 (ix) of the Dissolution of Muslim Marriages Act, 1939.

(k) *Umar Bibi* v. *Mohammad Din* (1944) Lah. 542, 220 I.C. 9, ('45) A.L. 51.

(l) *Tufail Ahmed* v. *Jamila Khatun* (1962) A.A. 570.

and *mubara'at* (see sec. 319). Sub-clause (ix) of sec. 2 of the Dissolution of Muslim Marriages Act is sufficiently wide to cover all grounds recognised by the Muslim law entitling a wife to divorce including the contractual right of divorce known as *talak* by *tafweez* (see sec. 314). Courts are entitled to grant divorce on grounds recognised by Shariat, regardless of the fact that those grounds were not recognised by Courts previous to the passing of the Act *(m)*.

(Inequality).— The doctrine of *kafat* requires that there should not be any marked disparity between the social status of the husband and the wife, and provides for the dissolution of ill-assorted unions, (Baillie, 62-74; Baillie, II, 32 ff.).

333. Li'an or imprecation.— (1) The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. She must file a regular suit for dissolution of her marriage as a mere application to the Court is not the proper procedure *(n)*. If the charge is proved to be false, she is entitled to a decree, but not if it is proved to be true *(o)*. No such suit will lie if the marriage was irregular [Baillie, 337].

See also: *Noorjehan Bibi* v. *Mohd. Kasim Ali* 1977, Cal. 90.

(2) *No separation until decree.*— A charge of adultery does not of itself terminate the marriage. The marriage continues until the decree is passed *(p)*.

(3) *Retraction of charge.*— The effect of the decisions, excluding what are merely *obiter dicta*, would appear to be that a retraction of the charge by the husband at or before the commencement of the hearing disentitles the wife to a decree *(q)*, but she is entitled to a decree if the retraction is made after the close of the evidence *(r)*, or of the trial *(s)*. The High Court of Bombay has expressed the opinion that retraction "has no place in the procedure in British Courts"*(t)*.

Baillie, 335-339; *Hedaya*, 123-124.

Li'an or imprecation.— Li'an is testimony confirmed by oath and accompanied with imprecation. Under the pure Mahomedan law, if a man charges his wife with adultery, he may be called upon, on the application of the wife, either to retract the charge or to confirm it by oath coupled with an imprecation in these terms: "The curse of God be upon him if he was a liar when he cast at her the charge of adultery." The wife must then be called upon either to admit the truth of the imputation, or to deny it on oath coupled with an imprecation in these terms: "The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me." If she takes the oath, the Kazi, must believe her, and pronounce a separation between the parties. The husband had to be given every opportunity to retract the charge as the offence of making a false accusation of adultery was severely punishable *(u)*. But now there is no obligation on the Courts in India to give the husband an opportunity to retract the charge. The original rules were, mere rules of evidence, and they have been superseded by the Indian Evidence Act, 1872. As to pecial oaths under the Indian Oaths Act, 1873, see secs. 8, 9 and 11 of the Act and the under

(m) Umar Bibi v. *Mohammad Din* (1944) Lah. 542, 20 I.C. 9, ('45) A.L. 51.

(n) Kabil Gazi v. *Madari Bibi* (1933) 57 Cal. L.J. 06, 145 I.C. 828, ('33) A.C. 630; *Ayesha Bibi* v. *Abdul ani* (1934) 59 Cal. L.J. 466.

(o) Zafar Husain v. *Ummat-ur-Rahman* (1919) 41 ll. 278, 49 I.C. 256; *Khatijabi* v. *Umarsaheb* (1928) 2 Bom. 295, 110 I.C. 131, ('28) A.B. 285.

(p) Jaun Beebee v. *Beparee* (1865) 3 W.R. 93; *Khatijabi* v. *Umarsaheb* (1928) 52 Bom. 295, 110 I.C. 131, ('28) A.B. 285.

(q) Musammat Fakhre Jahan v. *Muhammad* (1929) 4 Luck. 168, 114 I.C. 314, ('29) A.O. 16. See also: *Tufail Ahmad* v. *Jamila Khatun* ('62) A.A. 570 (D.B.) which doubts the correctness of the earlier decision in *Kaloo* v. *Mt. Imaman* ('49) A.A. 445.

(r) Rahima Bibi v. *Fazil* (1926) 48 All. 834, 98 I.C. 573, ('27) A.A. 56; *Shamsunnessa Khatun* v. *Mir Abdul Manaf* (1940) 1 Cal. 97, 70 C.L.J. 289, 186 I.C. 604, ('40) A.C. 95.

(s) Ahmed v. *Bai Fatma* (1931) 55 Bom. 160, 128 I.C. 909, ('31) A.B. 76 where the husband asked for an opportunity to withdraw the charge for the first time in the first appeal.

(t) (1931) 55 Bom. 160, 162, 128 I.C. 909, ('31) A.B. 76, *supra*. But see *Mahomedali M.E. Querashi* v. *Hazrabai* (1955) Bom. 464, 57 Bom. L.R. 215, ('55) A.B. 265.

(u) See Encyclopaedia of Islam, vol. iii, p. 24, article entitled *"Li'an"*.

mentioned case *(v)*.

Nature of retraction.— The retraction must be honest and straightforward. A statement in the following terms "The petitioner withdraws the charge made by him against his wife in proceedings under section 498 Indian Penal Code under section 240 of Mulla's Mahomedan Law," does not amount to an expression of the withdrawal of the accusation of adultery and to a vindication of the honour of the wife *(w)*.

Where wife has not attained majority.— A wife who has attained puberty is entitled to sue under this section without a guardian, though she may not have attained majority as defined in the Indian Majority Act, 1875 *(x)*.

As to restitution of conjugal rights where a charge of adultery has been made, see sec. 281(4).

Shia law.— Dissolution of *li'an* is not available to a minor or insane or deaf and dumb person. Baillie, II, 155.

334. Judicial divorce on other grounds.— According to old authorities the wife was not entitled to a judicial divorce on any other ground such as the conjugal infidelity of the husband or his inability to maintain her (Baillie, 443) or cruelty. But the Calcutta High Court has held that cruelty and desertion are grounds for divorce *(y)*. Incompatibility of temperament is not a ground for divorce *(z)*. Section 5 of the Shariat Act empowers the District Judge to give a divorce on the wife's petition. See sec. 6, *supra*.

"Under the Mahomedan law a wife has no absolute right to obtain divorce. She has that right only under certain specific contingencies and conditions" *(a)*. As to cruelty as an answer to the husband's suit for restitution of conjugal rights, see sec. 281(2).

Suit by Muslim before Sub-Judge for dissolution of marriage — Judgment and the decree — If open to appeal. See Civil Procedure Code (1908), S. 96. 1982 Rajdhani L.R. 666: A.I.R. 1983 Delhi 90.

335. Wife's cost in proceedings for divorce.— The rule of English law which makes the husband in divorce proceedings liable *prima facie* for the wife's cost, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans *(b)*.

The English rule is founded upon the doctrine of the Common Law according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife and there is no reason, therefore, to apply the rule of English law to proceedings for dissolution of marriage between Mahomedans.

C. — Effects of divorce

336. Rights and obligations of parties in divorce.— The following rights and obligations arise on the completion of a divorce, whatever may be the mode of divorce:—

(1) *Right to contract another marriage.*— If the marriage was consummated, the wife may marry another husband after the completion of her *iddat;* if the marriage was not consummated, she is free to marry immediately.

If the marriage was consummated, the husband had four wives at the date of divorce including the divorced wife, he may marry another wife after

(v) Khatijabi v. *Umarsaheb* (1928) 52 Bom. 295, 110 I.C. 131, ('28) A.B. 285.

(w) Banno Begum v. *Inayat Husain* (1948) 229 I.C. 220, ('48) A.A. 34.

(x) Ahmed v. *Bai Fatma* (1931) 55 Bom. 160, 128 I.C. 909, ('31) A.B. 76.

(y) Kadir v. *Koleman Bibi* (1935) 62 Cal. 1088, 39 Cal. W.N. 896, 61 Cal. L.J. 342, 163 I.C. 188.

(z) Mustafa Begum v. *Mirza Kazim Raza Khan* (1933) 8 Luck. 204, 142 I.C. 46, ('33) A.O. 15.

(a) Muhammad Ibrahim v. *Altafan* (1925) 47 All. 243, 249, 83 I.C. 27, ('25) A.A. 24, 26.

(b) A. v. *B.* (1896) 21 Bom. 77.

completion of the *iddat* of the divorced wife.

Hedaya, 128, 32; Baillie, 350-351, 34-35. As to *iddat,* see sec. 257 and notes. As to maintenance during *iddat,* see sec. 279. If the marriage was not consummated there is no *iddat* of divorce (s. 257).

(2) *Dower becomes immediately payable.*— If the marriage was consummated, the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

If the marriage was not consummated, and the amount of dower was specified in the contract, she is entitled to half that amount *(c).* If no amount was specified all that she is entitled to is a present of three articles of dress.

Hedaya, 44-45; Baillie, 96-97.

Where a marriage is dissolved upon the apostasy of the wife, she is entitled to the whole of the dower if the consummation of the marriage has taken place *(d).*

Nothing contained in the Dissolution of Muslim Marriages Act, 1939, affects any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage *(e).*

(3) *Mutual rights of inheritance ceases.*— Either party is entitled to inherit from the other until the divorce becomes irrevocable (s. 312).

Immediately the divorce becomes irrevocable, mutual rights of inheritance ceases, except where the divorce was pronounced during the husband's death-illness (sec. 135), in which case the *wife's* right to inherit continues until the expiry of her *iddat,* unless she was repudiated at her own request *(f).*

Baillie, 279, 280, 282; Hedaya, 99-100.

1. The point of time when the rights of inheritance cease is the point of time when the divorce becomes irrevocable. In a *talak* in the *ahsan* mode that point of time is the expiry of the *iddat* [s. 312(1)]. In a *talak* in the *badai* mode, it is the moment when the *talak* is pronounced [sec. 312(3)].

2. It is obvious from what has been stated above that in the case of a *talak* in the *hasan* mode, and a *talak* in the *badai* mode *(g),* the rights of inheritance cease immediately the *talak* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry of the *iddat.* To this, however, there is an exception in favour of the wife. It is this that if the repudiation was made during the husband's death-illness, and he dies before the expiry of the *iddat,* the *wife* is entitled to inherit from him, the reason giving being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance. But the husband is not entitled to inherit from his wife if she dies before the expiry of the *iddat,* for he, and not she, was responsible for "the rupture of conjugal rights." These observations do not apply to a *talak* in the *hasan* mode, for the rights of inheritance in that case continue *until* the expiry of the *iddat,* and it makes no difference whether the repudiation was made in health or in death-illness.

3. There is no right of inheritance in any case *after* the expiry of the *iddat.*

(4) *Cohabitation becomes unlawful.*— Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate [ill. (a) to sub-sec. (5)], and cannot be legitimated by acknowledgment, *(h)* [s. 342]. But the parties may remarry as

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(c) Tajbi v. *Nattar Sherif* (1940) 2 M.L.J. 345, (1940) M.W.N. 864, 191 I.C. 728, ('40) A.M. 888.

(d) A. M. Md. Ebrahim v. *Ma Ma & anr.* (1939) Rang. 383, 179 I.C. 47, ('39) A.R. 28.

(e) Sec. 5 of the Dissolution of Muslim Marriages Act, 1939.

(f) See *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537, 547-548.

(g) (1905) 30 Bom. 537, 556-557, *supra.*

(h) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.C. 762, ('32) A.P.C. 20.

stated in sub-sec. (5) below.

(5) *Remarriage of divorced couple.— (i)* Where the husband has repudiated his wife by *three* pronouncements [s. 311(2) and sec. 311(3)(i)], it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage. The presumption of marriage arising from an acknowledgment of legitimacy [s. 267] does not apply to a remarriage between divorced persons unless it is established that the bar to remarriage created by the divorce was removed by proving an intermediate marriage and a subsequent divorce after actual consummation *(i)* [ill. (a). Even if a remarriage between the divorced persons is proved, the marriage is not valid unless it is established that the bar to remarriage was removed the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of the above conditions *(j)* [ill. (b)]. A marriage without fulfilment of the above conditions is irregular, not void [Baillie, 151].

(ii) In all other cases, the divorced parties may remarry as if there had been no divorce either during the *iddat* or after its completion.

(a) A Hanafi Mahomedan repudiates his wife by three pronouncements in the same breath in these terms: "I divorce you, I divorce you, I divorce you" [s. 311(2)(i)]. The parties afterwards live together, and five children are born to them, whom the father acknowledges as legitimate. After his death the children claim their share of his estate as his heirs. It is not proved that there was a re-marriage between the parties but the Court is asked to presume it from the acknowledgment of legitimacy. An acknowledgment of legitimacy, no doubt, raises a presumption of marriage but that is only when there is no legal bar to the marriage. There is such a bar in this case created by the divorce and it can only be removed by proving that their mother had after the divorce married another man and the latter had died or divorced her after actual consummation of the marriage. If these facts are not proved, remarriage cannot be presumed, and the children cannot be held to be legitimate, and their claim must fail: *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25.

(b) A Hanafi Mahomedan repudiates his wife by three pronouncements made during successive *tuhrs* [s. 311(2)]. He then marries her again. It is not proved that there was any intermediate marriage, but the Court is asked to presume it from the fact of the remarriage. No such presumption, however can be drawn from the mere fact of remarriage, and the remarriage is irregular. As to the consequences of an irregular marriage, see sec. 206 above.

(c) A Hanafi Mahomedan divorces his wife by a *talak* in writing executed on the 25th September 1927. Such a divorce takes effect immediately on execution of the deed (s. 313). After the divorce the parties resume cohabitation but the husband again divorces his wife by oral *talak* on the 30th October 1932. There was no intermediate marriage or remarriage. The resumption of cohabitation did not restore the relationship of husband and wife. The oral divorce was meaningless formality. The wife's suit for dower instituted more than three years after 25th September 1927 was time-barred: *Hayat Khatun* v. *Abdulla Khan* ('37) A.L. 270.

Baillie, 292-293; *Hedaya*, 107-108.

A remarriage with thrice repudiated wife without fulfilling the conditions mentioned above is irregular, and not void. The reason for it is that the obstacle to the marriage can be removed "by consummation with a second husband, and expiration of her iddat": Baillie, 151.

As to "actual" consummation, see note to sec. 257. "Valid retirement" has not the same effect for this purpose.

(i) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.C. 762, ('32) A.PC. 25.

(j) Akhtaroon-nissa v. *Sharintoollah* (1867) 7 W.R. 268.

CHAPTER XVII

PARENTAGE — LEGITIMACY AND ACKNOWLEDGMENT

A. — Establishment of Parentage

337. Paternity and maternity.— Parentage is the relation of parents to their children. Paternity is the legal relation between father and child. Maternity is the legal relationship between mother and child. These legal relations give rise to certain rights and liabilities as regards inheritance, guardianship, and maintenance.

338. Maternity how established.— The maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter.

Baillie, 391.

As regards maternity, it is immaterial whether the child is an offspring of marriage or an offspring of *zina,* that is, fornication or adultery. The maternity of the child in either case is established in the woman who actually gives birth to the child. But paternity is not established unless the child was the offspring of marriage. Thus if a man commits *zina* with a woman, and a child is born, it is considered to be the child of its mother only and inherits from her and her relations (s. 85). But the man is not considered to be the *father* of the child, for paternity is established only by marriage, nor is the child *in law* the child of the man; it is *illegitimate* and not entitled to inherit from him.

339. Paternity how established.— (1) The paternity of a child can only be established by marriage between its parents. The marriage may be valid (*sahih*), or irregular (*fasid*), but it must not be void (*batil*).

Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts. It may be presumed from prolonged cohabitation combined with other circumstances (s. 267), or from an acknowledgment of legitimacy in favour of a child.

(2) When the paternity of a child is established, its legitimacy is also established.

Baillie, 391, 400-402; Shama Churun Sirkar's Tagore Lectures, 1873, s. CCCXV.

The main pivot in cases of paternity and legitimacy is marriage. It is also in the case of an acknowledgment. This appears clearly from the following passage in the judgment of the Privy Council in *Habibur Rahman* v. *Altaf Ali (a)*:—

"By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina,* that is illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but as marriage may be constituted without any ceremonial the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. *Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son.*"

Acknowledgment of prolonged cohabitation as husband and wife raises a mere presumption. So, where evidence has been led that there was no marriage at all when the children were begotten, the issue cannot possibly be legitimated by acknowledgment *(b)*.

340. Legitimacy: when conclusively presumed.— The fact that any person was born during the continuance of a valid marriage between his mother and

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(a) (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

(b) Razia Begum v. *Sahebzadi Anwar Begum* ('58) A. Andhra Pra. 195.

any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage has no access to each other at any time when he could have been begotten.

This is sec. 112 of the Indian Evidence Act, 1872. The question whether sec. 112 of the Evidence Act supersedes the rules of Mahomedan law as to legitimacy was left open in an Allahabad case *(c)*. The High Court of Allahabad has since held that the section supersedes Mahomedan law, and that it applies to Mahomedans *(d)*. The same view has been taken in Lahore *(e)*. The Chief Court of Oudh has held that even if sec. 112 applied to Mahomedans it cannot be applicable to an irregular (*fasid*) marriage, as such a marriage is not a "valid" marriage within the meaning of the section. "Valid" in the view of that Court, means "flawless" *(f)*. The marriage in the Oudh case was an irregular marriage, being a marriage with the wife's sister (s. 263). Where a married woman was driven out by the husband within a few days after the marriage, on the ground of her concealed pregnancy, and a child was born to her within about four months after her being driven out, it was held that no presumption under section 112 of the Evidence Act could be raised, as there was no valid marriage *(g)*.

Presumption of legitimacy under the Mahomedan law.— The rules of Mahomedan law may now be stated [Baillie, 392-393, 396-397]. They are as follows:—

1. A child born within less than 6 months after marriage is illegitimate.

2. A child born after 6 months from the date of marriage is presumed to be legitimate, unless putative father disclaims the child by *li'an* (s. 333).

The fact of premature birth does not *per se* lead to the inference that the infant is illegitimate. In this connection see also the comments of Denial Latifi in Annual Survey of Indian Law (ILI New Delhi) for 1987 at page 313.

Smt. Dukhtar Jahan v. *Mohd. Farooq* 1987 (1) SCC 624.

3. A child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *li'an* (s. 33). This is the rule of Hanafi law. According to the Shafei and Maliki law, the period is 4 years. According to the Shia law, it is 10 months.

Points of difference between the two systems.—

(1) *In the contrast with rule* 1.— Under sec. 112 a child born even a day after marriage is legitimate, unless the parents had no access to each other at any time at which it could have been begotten.

(2) A child born after 6 months from the date of marriage, but within 280 days of the termination of the marriage is legitimate under either system, subject to *li'an* in the one case, and proof of non-access in the other.

(3) A child born between 280 days and 2 years after the termination of the marriage is legitimate by the Hanafi law, subject to *li'an*. Under the Evidence Act, however, the case will be governed by sec. 114 which provides that "the Court may presume the existence of any fact which it thinks likely to have happened, *regard being had to the common course of natural events.*" In a Calcutta case *(h)* before the passing of the Evidence Act, the Court declined to follow this part of the rule of Mahomedan law in the case of a child born 19 months after the date of divorce, on the ground that to hold that such a child was legitimate "would be contrary to the course of nature and impossible."

341. Legitimacy presumed from presumptive marriage.— The legitimacy of a child may be presumed for circumstances from which a marriage itself between its parents may be presumed (s. 268).

(c) Muhammad Allahdad v. *Muhammad Ismail* (1880) 10 All. 289, 339.

(d) Sibt Muhammad v. *Muhammad* (1926) 48 All. 625, 96 I.C. 582, ('26) A.A. 589; See *Ismail Ahmed Peepadi* v. *Momin Bibi* (1941) 193 I.C. 209, ('41) A.PC. 11.

(e) Mt. Rahim Bibi v. *Chiragh Din* ('30) A.L. 97, 120 I.C. 495; *Ghulam Mohy-ud-Din* v. *Khizar* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A.L. 6.

(f) Musammat Kaniza v. *Hasan* (1926) 1 Luck, 71, 92 I.C. 82, ('26) A.O. 231.

(g) Abdul Rahemankutty v. *Aisha Beevi* ('60) A. Ker. 101.

(h) Ashraf Ali v. *Ashad Ali* (1871) 16 W.R. 260.

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. But if there is no impediment for a lawful marriage, such presumption will be raised by the aforesaid circumstances. *Syed Amanullah Hussain* v. *Rajamma* (1977) 1. Ann. W.R., 123; (1976) 2 A.P. L.J. 323.

A child born in wedlock cannot be bastardised except on clear proof of non-access. *Mohd. Haneefa* v. *Pathummal Beevi* 1972 K.L.T. 512.

In *Mahomed Baiker* v. *Shurfoon Nissa (i)* the Privy Council said: "The legitimacy or legitimation of a child of Muhammedan parents may properly be presumed or inferred from circumstances without proof or at least with any direct proof, either of a marriage between the parents, or of any formal act of legitimation." See to the same effect, Ameer Ali, 5th ed., Vol. ii, 213 *seq.* A statement by a deceased father that he was married to the mother is evidence of marriage from which the legitimacy of the child may be presumed *(j)*.

B. — Acknowledgment of Paternity

342. Acknowledgment of legitimacy.— (1) "Where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognizes 'acknowledgment' as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance."

"The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved.* The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from *disproved.* In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child" *(k)*. In short, the doctrine applies only to cases where either the fact or the exact time of the alleged marriage is a matter of uncertainty, that is, neither *proved* nor *disproved (l)*. Stated in another form, the doctrine is "limited to cases of

(i) (1860) 8 M.I.A. 136, 159; *Ma Khatoon* v. *Ma Mya* (1936) 165 I.C. 232, ('36) A.R. 448.

(j) Zamin Ali v. *Aziz-un-nissa* (1933) 55 All. 139, 144 I.C. 433, ('33) A.A. 329.

(k) Muhammad Allahdad v. *Muhammad Ismail* (1888) 10 All. 289, 330, 334-335; *Musst. Bibee Fazilatunnessa* v. *Musst. Bibee Kamarunnessa* (1905) 9 C.W.N. 352; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159 [marriage disproved]; *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 38 All. 627, 36 I.C. 104; *Ihsan* v. *Panna Lal* (1928) 7 Pat. 6, 103 I.C. 430, ('28) A.P. 19; *Muhammad Shafiqullah* v. *Nuhullah* (1926) 48 All. 58, 88 I.C. 954, ('26) A.A. 48; *Agha Muhammad* v. *Zohra Begam* (1928) 3 Luck. 199, 105 I.C. 490, ('28) A.O. 562; *Firoz Din* v. *Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 224 [marriage disproved] *Ibrahim* v. *Mubarak* (1920) 1 Lah. 229, 56 I.C. 923; *Usmanmiya* v. *Valli Mahomed* (1916) 40 Bom. 28, 30 I.C. 904; *Mohabbat Ali* v. *Mahomed Ibrahim* (1929) 56 I.A. 201, 10 Lah. 725, 117 I.C. 17, ('29) A.PC. 135; *Mahabub Nissa* v. *Mahomed Yusuff* ('50) A. Hyd. 41.

(l) Muhammad Allahdad v. *Mahommad Ismail* (1888) 10 All. 289, 334; *Roshanbai* v. *Suleman* (1944) 46 Bom. L.R. 328 ('44) A.B. 213; *Tyebhoy Essofalli Thinga* v. *Collector of Ahmedabad* (1943) 45 Bom. L.R. 1055, 212 I.C. 372, ('44) A.B. 91; *Rafiqa Begam* v. *Aisha Begam* (1944) 221 I.C. 598, ('44) A.A. 598.

uncertainty of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment" *(m)*.

The plaintiff was the son of *'K'* through his wife *'B'*. The defendants were the sons of *'K'* through another wife *'H'*. As per Exhibit A-1 the marriage between *'K'* and *'H'* was on 3rd January, 1921 and as per the birth extracts. Exhibits A-2 and A-3, the defendants were born along prior to the marriage between *'K'* and *'H'*. The plaintiff had filed a suit for a declaration that the defendants were not the legitimate sons of his father and to restrain them from interfering with the plaintiff's management and administration of Saint Veli-yullah Thaikkal. The trial Court held that the defendants were legitimate sons as there was a valid acknowledgment. However, on appeal, the lower appellate Court held that there was no marriage between *'K'* and *'H'* at the time of the birth of the defendants and therefore they could not be made legitimate by acknowledgment of their legitimacy by the father. The 1st defendant preferred a second appeal.

Held: As there was no marriage between the plaintiff's father the defendant's mother prior to their birth as evidence by Exhibits A-2 and A-3, they could not be held to be the legitimate sons of the plaintiff father by relying on the doctrine of acknowledgment. A child born of "zina" could not be made legitimate by acknowledgment. Similarly the defendants who were born before the date of their mother's marriage with the plaintiff's could not be held to be legitimate sons of the plaintiff's father by relying on the doctrine of acknowledgment.

The Mahomedan law of acknowledgment of paternity could be invoked only when the factum of marriage or the exact time of marriage had not been proved. The doctrine of acknowledgment is based on the assumption of a lawful union between the patients of the acknowledged child. The doctrine, however, is not applicable where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or an adulterous connection. The doctrine is also, not applicable where the marriage necessary to render a child legitimate is disproved. [P. Venugopal, J.] *Mohammed Khan Sahib* v. *Ali Khan Sahib* (1981) 1 M.L.J. 402.

Where paternity of a child cannot be proved by establishing a marriage between the parents, Mahomedan Law recognises "acknowledgment" as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance. This doctrine does not apply to a case where illegitimacy of the child is proved and established either because the lawful union between the parents of the child is impossible or the marriage itself being disproved. The doctrine applies only to a case where the fact of marriage is not proved, as distinguished from disproved. In other words it applies to cases of uncertainty. The acknowledgment may be express or implied. It may be presumed from the fact that the person was habitually and openly treating another as his legitimate child. The acknowledgment must be made in such a way the acknowledger meant to accept the other not only as his child but as his legitimate child. The ages of the parties must be such as to admit of the acknowledger being father of the person acknowledged. The person acknowledged must not be the offspring of *Zina*, that is adultery, incest or fornication. The person acknowledged must not be known to be the child of another man. The acknowledgment must not have been repudiated by the person acknowledged. If these conditions are satisfied, the acknowledgment raises a presumption of marriage also. In other words, the marriage also would be held to be proved and the legitimacy established. [*Alladi Kuppuswamy*, J.] *Syed Amanullah Hussain* v. *Rajamma* (1977) 1 An. W.R. 123: (1976) 2 A.P. L.J. 323.

Child proved born prior to marriage.— Principle held not applicable. [Venugopal, J.] *Mohamed Khan Sahib* v. *Ali Khan Sahib*, (1981) 94 Mad. L.W. 97: (1981) 1 M.L.J. 402: A.I.R. 1981 Mad. 209.

(2) The acknowledged child may be a son or a daughter *(n)*.

Baillie, 406; *Hedaya*, 439. The doctrine of acknowledgment is not a mere rule of evidence, but is part of the substantive law of inheritance. Hence the conditions under which it will take effect must be determined with reference to Mahomedan Jurisprudence *(o)*.

The leading case on the subject is *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All.

(m) (1888) 10 All. 289, 337, *supra*.

(n) See *Dhan Bibi* v. *Lalon Bibi* (1900) 27 Cal. 801.

(o) (1888) 10 All. 289, *supra*.

289, a case which has been followed by Courts throughout India and approved by the Privy Council. The passages cited in this section are from the judgment of Mahmood, J. The law was thus stated by the Privy Council in *Sadik Husain* v. *Hashim Ali (p)*. "No statement made by one man that *another (proved to be illegitimate)* is his son can make the other legitimate, but *where no proof of that kind has been given*, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible" (s. 345).

343. Acknowledgment may be express or implied.— An acknowledgment need not be express. It may be presumed from the fact that one person has habitually and openly treated another as his child, that is, as a *legitimate* child *(q)*.

In *Muhammad Azmat* v. *Lalli Begum (r)* their Lordships of the Privy Council said: "It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such."

In a case in which the question was whether a boy was born naturally or was a '*parvarda*' (i.e. brought up in the family) the following observations were made:

"Where there is a valid acknowledgment of legitimacy in favour of a claimant, then the marriage will be held to have been proved and his legitimacy established unless the marriage between the parents is in dispute. Until the claimant establishes his acknowledgment the onus is on him to prove the marriage. But once he establishes his acknowledgment, the onus shifts on those who deny the marriage to negative it. *Mohammad Yusuf* v. *Mahboobunnissa Begum* (1971) 1 A.W.R. 97.

344. Conditions of valid acknowledgment.— In order to render an acknowledgment valid and effective the following conditions must be fulfilled:—

(1) "the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that an acknowledger meant to accept the other not only as his son, but as his *legitimate son" (s)* [see note 2 below];

(2) the ages of the parties must be such as to admit of the acknowledger being the father of the person acknowledged *(t)* [see note 3 below];

(3) the person acknowledged must not be the offspring of *zina*, that is, adultery, incest or fornication *(u)*, as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the

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(p) (1916) 43 I.A. 212, 234, 38 All. 627, 661, 361 I.C. 104.

(q) Muhammad Azmat v. *Lalli Begum* (1831) 9 I.A. 8, 18, 8 Cal. 422; *Khajah Hidayat* v. *Rai Jan Khanun* (1844) 3 M.I.A. 295, 323 [consecutive course of treatment]; *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M.I.A. 136, 158-159; *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M.I.A. 94, 116; *Sadekat Hosein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31; *Abdool Razak* v. *Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Masit-un-nissa* v. *Pathani* (1904) 26 All. 295; *Musst. Bibee Fazilatunnessa* v. *Musst. Bibee Kamarunnessa* (1905) 9 C.W.N. 352.

(r) (1881) 9 I.A. 8, 18, 8 Cal. 422.

(s) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159; *Abdool Razak* v. *Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31; *Jiandkhan* v. *Province of Sind* ('48) A.S. 130.

(t) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

(u) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159; *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 234, 38 All. 627, 661; 36 I.C. 104; *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54, All. 46, 135 I.C. 762, ('32) A.PT. 25; *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 334-337; *Mardansaheb* v. *Rajaksaheb* (1909) 34 Bom. 111, 4 I.C. 254; *Mohammad Hanif* v. *Badarannessa* (1938) 42 C.W.N. 272.

mother was at that time the wife of another man *(v)* or had been divorced by the acknowledger and the legal bar to remarriage had not been removed *(w)* or was within prohibited degrees of the acknowledger *(x)*. If the marriage is *disproved*, the issue would be the issue of fornication *(y)* [see note 4 below].

(4) the person acknowledged must not be known to be the child of another man *(z)*.

(5) the acknowledgment must not have been repudiated by the person acknowledged *(a)* [see note 5 below].

The above conditions apply whether the acknowledged child is a son or a daughter [see s. 342(2)].

Hedaya, 439; Baillie, 408. A synopsis of the above conditions will be found in the Privy Council case of *Habibur Rahman* v. *Altaf Ali (b)*. Difference between legitimacy and legitimatisation pointed out. *Mohammad Yusuf* v. *Mahboobunnissa Begum* (1971) 1 A.W.R. 97; following *Habibur Rahaman Chaudhary* v. *Syed Altaf Ali* 48 I.A. 144.

1. *Acknowledgment and burden of proof.*— As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of *legitimate* sonship. Further, it must not be impossible upon the fact of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgment has more than a mere evidentiary value. "It raises a *presumption of marriage*— a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position : the marriage will be held proved and his legitimacy established unless the marriage is *disproved*. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment the onus is on those who deny a marriage to negative it in fact" *(c)*. See *Mohammad Yusuf* v. *Mabboobunnissa (supra)*.

Acknowledgment is sufficient to establish a valid marriage unless the contrary appears. Provided that no obstacle should exist as for example the woman is the wife of another. If marriage be in dispute, it has to be established first before acknowledgment of paternity of the child is possible. If marriage was not possible at all there can be no acknowledgment. *Fathima Bi Ammal* v. *A.A. Md. Mohiuddin* (1971) 2 M.L.J. 451; *Fatma Bibi* v. *Ad. Gen. Zanzibar* ('49) A.P.C. 254.

2. *Clause* (1): *intention to confer status of legitimacy.*— The acknowledgment must be not merely of sonship, but of *legitimate* sonship. It must not, however, be supposed that an acknowledgment merely of sonship has no evidentiary value. Acknowledgment as a son *prima facie* means acknowledgment as a legitimate son *(d)*.

(v) Liaqat Ali v. *Karim-un-nissa* (1893) 15 All. 396; *Mardansaheb* v. *Rajaksaheb* (1909) 34 Bom. 111, 41. I.C. 254; *Agha Muhammad* v. *Zohra Begum* (1928) 3 Luck. 199, 105 I.C. 490, ('28) A.O. 562; *Muhammad Shafiqullah* v. *Nuh-ullah* (1926) 48 All. 58, 88 I.C. 954, ('26) A.A. 48; *Naiz Mahommad* v. *Yusuf Khan* ('34) A.L. 462, 154 I.C. 733.

(w) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.P.C. 25.

(x) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

(y) Dhan Bibi v. *Lalon Bibi* (1900) 27 Cal. 801; *Firoz Din* v. *Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 432; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 119, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

(z) Usmanmiya v. *Valli Mahomed* (1916) 40 Bom. 28, 30 I.C. 904.

(a) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

(b) (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

(c) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('32) A.P.C. 159; *Mahommad Sadiq* v. *Mohammad Hassan* (1943) 209 I.C. 601, ('43) A.L. 225.

(d) Fuzzelun Bebee v. *Omdah Bebee* (1868) 10 W.R. 469, cited with approval in *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 232, 38 All. 627, 659, 36 I.C. 104; *Usmanmiya* v. *Valli Mahomed* (1916) 40 Bom.

A *mere casual* acknowledgment of paternity, not intended to confer the status of legitimacy, will not have the effect of conferring the status. There must be an intention to confer that status *(e)*.

3. *Clause* (2): *age.*— The acknowledger must be at least twelve and a half years older than the person acknowledged: Baillie, 411.

4. *Clause* (3): *Offspring of fornication.*— The issue of adultery, incest or fornication, cannot be legitimated by acknowledgment. If the marriage *is disproved,* the issue would be the issue of fornication. Similarly, the issue of a re-marriage between divorced persons, where the wife was repudiated by a triple divorce and no intermediate marriage is proved, would also be the issue of fornication on the footing that such re-marriage is void *(f)*. [But see sec. 336 (5) and the notes thereto].

No presumption of marriage arises from long cohabitation if the woman was a prostitute when she was brought to the home of the man whose wife she claims to be *(g)*. But if the man acknowledges his children as her as his legitimate children, marriage with her will be presumed, for marriage with a prostitute is not prohibited, and she could have been his lawful wife, when the children were begotten *(h)*. But if it is definitely proved that there was no marriage at all between the parties when the children were begotten, in other words, if marriage is *disproved,* the issue would be the issue of fornication, and they could not possibly be legitimated by acknowledgment as laid down in the case cited in foot-note *(i)*.

5. *Clause* (5): *repudiation.*— The person acknowledged is entitled to repudiate the acknowledgment, if he has attained the age when he can understand the transaction.

345. Right of inheritance.— If an acknowledgment is of legitimate sonship, and that relationship is possible in fact and in law [s. 344], it raises a presumption of marriage between the acknowledger and the mother of the person acknowledged, and unless rebutted, gives such person the right of inheritance to the acknowledger as his legitimate child *(j)*, and a similar right also to the mother as the lawful wife of the acknowledger *(k)*.

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother *(l)*.

346. Acknowledgment of legitimacy irrevocable.— An acknowledgment once made cannot be revoked *(m)*.

347. Adoption not recognized.— The Mahomedan law does not recognize adoption as a mode of filiation *(n)*.

Where custom is given priority by legislation over general Mahomedan law as in the Punjab, Oudh and some other places (secs. 11, 12, 13 and 15 above), a special family or tribal custom of adoption will, if proved, prevail over that law.

28, 33, 30 I.C. 904.

(e) Abdool Razack v. *Aga Mahomed Jaffer* (1893) 21 I.A. 56, 70, 21 Cal. 666, 679.

(f) Rashid Ahmad v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25.

(g) Ghazanfar v. *Kaniz Fatima* (1910) 37 I.A. 105, 32, All. 345, 6 I.C. 674.

(h) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513.

(i) Habibur Rahman v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159; *Mahommad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422, 9 I.A. 8, *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31.

(j) Khajah Hidayut v. *Rai Jan Khanum* (1844) 3 M.I.A. 295, 318; *Wise* v. *Sunduloonissa* (1867) 11 M.I.A. 178, 193; *Newab Mulka Jehan* v. *Mahomed* (1873) Sup. Vol. I.A. 192; *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 199, 3 I.A. 291; *Mahatala* v. *Heleemoozooman* (1881) 10 C.L.R. 293; *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 82, 45 Cal. 878, 890, 47 I.C. 513; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

(k) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 81-82, 56 Cal. 878, 889, 890, 47 I.C. 513.

(l) Ashrufood Dowlah v. *Hyder Hossein* (1866) 11 M.I.A. 94; *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 317.

(m) Muhammad Allahdad v. *Muhammad Ismail* (1888) 10 All. 289, 340; *Muhammad Umar* v. *Muhammad Niaz-ud- Din* (1912) 39 Cal. 418, 39 I.A. 19, 13, I.C. 344; *Mir Zaman* v. *Nur Alam* (1936) 162 I.C. 314, ('36) A. Pesh. 108.

(n) See A.I.R. 1977 J. & K. 44.

The Oudh Estates Act, 1869, sec. 29, permits a Mahomedan talukdar to adopt a son to him *(o)*.

The retention by Hindu converts to Mahomedanism of Hindu usages of inheritance and succession does not carry with it the Hindu custom of adoption. The burden of proving that the custom of adoption has also been retained lies on those who asserts it *(p)*. Although a Mahomedan may be entitled under the law prevailing in a Native State to adopt a son, such a son cannot succeed to the property of his adoptive father in India in the absence of evidence establishing a custom to that effect in India *(q)*.

The above notes to this section are to be read subject to the Shariat Act, 1937.

Madras Shariat [Amendment Act (XVIII of 1949)] S. 3(1)—Adoption—Custom or usage to the contrary when shall stand abrogated. [S. Nainar Sundaram, J.] *Moulvi Mohammed* v. *S. Mahaboob Begum* (1983) 2 M.L.J. 357.

(o) See *Abdul Halim Khan* v. *Saadat Ali Khan* (1932) 59 I.A. 202, 7 Luck. 194, 136 I.C. 745, ('32) A.PC. 137.

(p) Bai Machhbai v. *Bai Hirbai* (1911) 35 Bom. 264, 10 I.C. 816.

(q) Ayubshah v. *Babalaal* (1938) Bom. 150, 3[illegible] Bom. L.R. 1324, 173 I.C. 801, ('38) A.B. 111.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

A. – Appointment of Guardians

348. Age of majority.— In this Chapter, "minor" means a person who has not completed the age of eighteen years.

See the Indian Majority Act IX of 1875, sec. 3, and the Guardian and Wards Act VIII of 1890, sec. 4 cl. (1).

Age of majority under the Mahomedan law.— According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shias, puberty is presumed on the completion of the fifteenth year. Under the Indian Majority Act (s. 3), minority ceases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years.

Under the Mahomedan law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, and the only matters in which a Mahomedan is not entitled to act on attaining the age of fifteen years are (1) marriage, (2) dower and (3) divorce. In all other matters his majority continues until the completion at least of eighteen years. Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act. See notes to sec. 115 above.

349. Application for appointment of guardian.— All applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890.

Any person who is entitled to be a guardian by the Mahomedan law may act as such without any previous order of the Court. But there is nothing to prevent him from applying to the Court under the Guardians and Wards Act, that he may be appointed or declared a guardian under the Act. He is not bound to wait until his legal title or fitness to act as guardian is disputed by another person. The application for the appointment may be made not only by a person desirous of being *(a)* or claiming to be, the guardian of the minor, but also by any relative or friend of the minor, and in some cases by the Collector (s. 8 of the Act). It should be in the form prescribed by sec. 10 of the Act, and no order should be made unless notice of the application is given to persons interested in the minor (s. 11 of the Act).

350. Power of Court to make order as to guardianship.— When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing a guardian of his person or property, or both, or (2) declaring a person to be such guardian, the Court may make an order accordingly.

Guardians and Wards Act, 1890 sec. 7.

351. Matters to be considered by Court in appointing guardian.— (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject,* appears in the circumstances to be for the *welfare* of the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if

(a) In re Lovejoy Patell (1943) 2 Cal. 554 ('44) A.C. 433.

any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

It is true that the father is not proved to have lost the right of being appointed as the guardian of the minor. He has no defect and he being the natural guardian of the minor could be appointed provided it was in the interests of the minor. Minor cannot be forced to live with the father because that may cause psychological deterioration to the minor and may eventually affect his health also because at this age he needs love and affection. He being of the age of seven cannot show his preference as to with whom he wants to live. If he is given affection and love which he needs at this age by the respondent or the appellant No. 1, then he should be permitted to have the affection and love of any one of them. For that purpose it is necessary to ascertain the wishes of the minor.

If the minor is capable of making the preference, he should be brought to the Court and thereafter order of appointment of guardian should be made.

Mst. Aisha & Another v. *Bashir Ahmed Haji* (1987) J & K. 68.

Welfare of the minor.— The above section is a reproduction in terms of sec. 17 cls. (1), (2) and (3), of the Guardian and Wards Act. It imposes a duty upon the Court in appointing a guardian to make the appointment *consistently with the law to which the minor is subject.* The central idea is the *welfare* of the minor, and the Allahabad and Jammu & Kashmir High Courts have said that though the rules of Mahomedan law have to be taken into consideration the main question to be considered is what would be conducive to the child's welfare *(b)*. In a Rangoon case the mother has lost her right under Mahomedan law as she has been divorced and had remarried a Buddhist. She was nevertheless appointed guardian, as the Court considered that the interests of the minor would be best promoted by leaving her with the mother *(c)*. The mother would be the proper guardian for children of tender years, even though she lived separate from her husband owing to disputes over property, provided that she had not been guilty of misconduct *(d)*.

Under the Muslim Personal Law the mother is entitled to the custody (*Hizanat*) of her male child until he has completed the age of seven years and of the female child until she has attained puberty. Puberty is attained at the age of 14 or 15 years.

Another principle of law which is too well established is that in a proceeding for appointment of guardian, it is not that guardianship of the minor which is of importance, but the welfare of the minor has to be taken into consideration. If there is a conflict between the personal law to which the minor is subject and the consideration of the minor's welfare, the latter must prevail.

In appointing the respondent grandmother as guardian of the minor children, the Court below was not guided by what in the circumstances was conducive to the welfare of the minors and his order, therefore, cannot be upheld. The mother's application has to be allowed and the mother appointed. Neither the mother not the grandmother can be the guardian of the property of the minors. [Medini Prasad Singh, J.] *Mostt. Bibi Saira Khatoon* v. *Mostt. Bibi Shahidan Khatoon* (1978) B.L.J.R. 420.

Conflict between the Guardian and Wards Act, 1890, and the personal law: Where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act, the latter will prevail over the former. Where the father of a Mahomedan minor girl was living and there was nothing to show that he was unfit to be guardian of the minor, he was entitled to retain the custody of the minor as against the preferential right under Mahomedan Law of the maternal aunt of the minor's mother. In other words, the provisions of s. 19 of the Act would prevail over the provisions of s. 17: *Rafiq* v. *Smt. Bashiran* ('63) A. Raj. 239.

B. — Guardians of the Person of a Minor

(b) Mt. Haidri v. *Jawad Ali* (1934) All. L.J. 399, 150 I.C. 149, ('34) A.A. 722; *Sakina Begum* v. *Malka Ara Begum* ('48) A.A. 198; *Hasan Bhat* v. *G. M. Bhat* ('61) A.J. & K. 5; *Mohd. Amin* v. *Ateeka Banu,* ('63) A.J. & K. 32.

(c) Ma Juli v. *Moola Ebrahim* (1933) 145 I.C. 843, ('33) A.R. 210.

(d) Zynab Bibi v. *Muhammad Ghouse* ('52) A.M. 284.

352. Right of mother to custody of infant children.— The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child *(e)*, unless she marries a second husband in which case the custody belongs to the father *(f)*.

The principles propounded in these sections cannot, however be read in isolation and divorced from the provisions of the Guardians and Wards Act which vests in the court a discretion to direct the return to the custody of a guardian a ward who leaves or is removed from his custody in appropriate cases where the Court thinks that such a direction is necessary for the well being of the ward. . .

Where the dictates of personal law indicate one course of action and considerations of the welfare of the minor indicate another, the former must be sub-ordinated to the latter. The words that furnish a key to the correct legal position are to be found in Sec. 17 of the Guardians and Wards Act. Principles of personal law must be applied "subject to the provisions of this section". In other words, if there is a conflict between the personal law to which the minor is subject and considerations of his or her welfare, the latter must prevail. *Mohd. Yunus* v. *Shamshad Bano* 217 A.I.R. 1985 All.

See Also:— *Mostt. Bibi Saira Khatoon* v. *Mostt. Bibi Shahidan Khatoon* (1978) B.L.J.R. 420.

In *Akhtar Begum* v. *Jamshed Munir* I.L.R. 1979 II Del. 249, A.I.R. 1979 Delhi 67.

. . . The petitioner (mother) moved a petition firstly under S. 25 of the Act for custody of her minor daughter and then filed an application under S. 12 of the Act for temporary custody by invoking personal law of the parties. The petitioner and the respondent (her husband) were Sunni Muslims governed by the Hanafi Law of Sunni Muslims. The S. 12 application was dismissed by the trial Court which was influenced by the general principles of law of guardianship and lost sight of the personal law of the parties.

. . . The personal law of the parties enjoining custody of a minor girl being given to the mother till the minor attains the age of puberty is a vital factor in determining even the question of temporary custody. The Court below has not kept this aspect in view. That would bring the impugned order within the mischief of exercising jurisdiction illegally, "that is, in breach of some provision of law" as held by the Supreme Court in M.L. Sethi's case (A.I.R. 1972 S.C. 2379).

Hedaya, 138; Baillie, 435.

Under the Hanafi law, the mother is the guardian of a minor girl till she attains puberty and of a male child till he attains the age of seven years. The difference between custody and guardianship explained *Khatija Begum* v. *Ghulam Dastgir* (1975) 2 All. W.R. 194 D.B. *Kumaraswami* v. *Rajammal* ('57) A. Mad. 563.

The mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child's father. If there exist circumstances to show that it was difficult for her to reside with her husband or that she had not forsaken voluntarily her husband's company, she should not be penalised. That apart, importance must be attached to the main rider, namely, she rides "at a distance from the father's place of residence." Indeed the court must be read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of 7 years, the father must not be denied access to the child. *Mumtaz Begum* v. *Mubarak Hussain,* A.I.R. 1986 M.P. 221.

Nature and extent of right of hizanat (custody).— In *Imambandi* v. *Mussaddi (g)*, their Lordships of the Privy Council said: "It is perfectly clear that under the Mahomedan law *the mother*

(e) Baillie, 435; *Zarabibi* v. *Abdul Rezzak* (1910) 12 Bom. L.R. 891. 8 I.C. 618; *Emperor* v. *Ayshabai* (1904) 6 Bom. L.R. 536; *Allan Rakhi* v. *Karam Illahi* (1933) 14 Lah. 770, 147 I.C. 123, ('33) A.L. 969; *Mt. Haidri* v. *Jawad Ali* (1934) All. L.J. 399, 150 I.C. 149, ('34) A.A. 722.

(f) Ulfat Bibi v. *Bafati* (1927) 49 All. 773, 102 I.C. 103, ('27) A.A. 581.

(g) (1918) 45 I.A. 73, 83-84, 45 Cal. 878, 47 I.C. 513; *Ulfat Bibi* v. *Bafati* (1927) 49 All. 773, 102 I.C. 103, ('27) A.A. 581; *Mt. Siddiq-un-nissa* v. *Nizam- uddin* (1932) 54 All. 128, 137 I.C. 219, ('32) A.A. 215; *Mt. Ghuran* v. *Riaz Ahmad* (1935) 11 Luck. 553, 158 I.C. 581, ('35) A.O. 492; *Fasima Bibi* v. *Pentu Saheb* (1941) 2 M.L.J. 548, (1941) M.W.N. (1049), ('41) A.M. 944.

is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian."

It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in sec. 353 below is *subject to the supervision of the father* which he is entitled to exercise by virtue of his guardianship. If so, the right of *hizanat* does not carry with it all the powers which a guardian of the person of a minor has under the Guardian and Wards Act, 1890. See note to sec. 357, "Father as guardian of his minor children."

If the minor's mother remarries, the real father can file an application under S. 25 and claim custody on the ground of the remarriage. He is not required to wait till the minor attains the age of 7 years. [M.P. Mehrotra. J.] *Smt. Ainunnisa* v. *Mukhtar Ahmad,* A.I.R. 1975 All. 67.

S. 25—*Scope—Custody of minor—Welfare of minor—If sole criterion—Right of legal guardian.*

Where the minor aged 10-11 years is in the custody of his mother and he has intelligently exercised his preference to continue to stay with her, his custody cannot be disturbed and given to his father though he is the legal guardian of the minor under the personal law (*viz.,* Mahomedan Law). A mere claim to legal guardianship in such a situation will not stand on a higher footing than the claim of the real mother to continue to have the custody of the minor who has remained in her custody or in the custody of her mother since the birth of the child. (Case-law discussed). [M. P. Mehrotra, J.] *Smt. Ainunnisa* v. *Mukhtar Ahmad.* A.I.R. 1975 All. 67.

Even during the marriage the custody of the minor children in case of a boy until he attains the age of 7 years, and in the case of a female until she attains puberty is with the wife. The right of the father to the custody of the child is deferred, and the primary right is in the mother, and in the absence of the mother, in mother female heirs. As long as the right to custody is with the mother, the mother is deemed to be also having the custody and care of the minor. If that is so, it is obvious that the mother during the period laid down by the Mahomedan Law has both the custody and the care of the minor as long as she is not disqualified from retaining the custody of the minor. [Tulpule, J.] *Mohammed Shafi* v. *Shamin Banoo.* A.I.R. 1979 Bom. 156.

Where under the personal law the mother is entitled to the custody of the minor child, she should normally get the custody of the minor but she may be deprived of the custody if the evidence on record shows that it would not be in the interest of the minor to give the minor the custody of the mother. Thus the provisions of the personal law are to be applied consistently with the provisions of the Guardians and Wards Act. The welfare of the minor can be determined only on the basis of evidence for which opportunity will have to be afforded to the party seeking it. *Salamat Ali* v. *Majjo Begum* (1985) A.I.R. All. 29 & 31.

The mother is not a *de jure* guardian of her children under Mahomedan Law, and therefore, has no right to sell the interest of her minor children in immovable property. Such transaction is not merely voidable but totally void.

The mother, a Mahomedan widow, acting as guardian for her two children executed a sale deed. The amount borrowed was admittedly utilised in the payment of the deceased father's debts. The minor sought to set aside the sale. The defendants filed a counter-claiming claim proportionate share of minors in the father's debts. The trial Court declared the suit but the lower appellate Court held that the plaintiff was liable for the proportionate share of the debts.

On appeal *Held:* S. 41 of the Specific Relief Act 1877 (now S. 33 of the Specific Relief Act, 1963) clearly provides that when the Court adjudged cancellation of an instrument on the ground that it was void or voidable, it had the power to call upon the plaintiffs at whose instance the instrument was adjudged void or voidable, to restore so far as may be any benefit which they might have received from the other party and to make any compensation to him which justice may require. On the ground that their mother was not competent to act as their guardian and dispose of the property when the plaintiffs sought to recover their share of the property, certainly they should pay their share of the liability because admittedly the sale proceeds were applied for the discharge of the debts of the estate. [M. M. Ismail, J.] *Fatima Bivi* v. *Sadhakaialla* (1977) 1 M.L.J. 473: 90 L.W. 41: A.I.R. 1977 Mad. 215.

The mother has no right to be the legal guardian of minor's property and cannot enter into any agreement to alienate it. A.I.R. 1963 S.C. 1405, referred to [C.P. Sen and B. C. Verma, JJ.]. *Gurubux Singh Corowara* v. *Smt. Begum Rafiya Khurshid.* A.I.R. 1979 M.P. 66.

See: *Enamul Haque* v. *Bibi Taimunissa* ('67) A.P. 344. (The mother is entitled to the custody of he female child until she has attained puberty).

Shia law.— Under the Shia law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the abovementioned age, the custody belongs to the father *(h)*. If the mother dies before the child has attained that age, the father is entitled to the custody *(i)*. On the death of both the parents, the custody belongs to the father's father. It is doubtful to whom the custody belongs in the absence of the father's father: Baillie, II, 95.

Shafei law.— It has been observed that under Shafei Law the mother is entitled to the custody of her daughter even after she has attained puberty and until she is married *(j)*.

353. Right to female relations in default of mother.— Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:—

(1) mother's mother, how highsoever;
(2) father's mother, how highsoever;
(3) full sister;
(4) uterine sister;
(5) [consanguine sister];
(6) full sister's daughter;
(7) uterine sister's daughter;
(8) [consanguine sister's daughter];
(9) maternal aunt, in like order as sisters; and
(10) paternal aunt, also in like order as sisters.

Hedaya, 138; Baillie, 435-436. Neither the *consanguine* sister (No. 5) nor her daughter (No. 8) is expressly mentioned either in the *Hedaya* or the *Fatawa Alamgiri;* it almost seems as if the omission is accidental, for *paternal aunts* are expressly mentioned.

If the minor's mother has lost her right by remarriage, the mother's mother has a right of guardianship preferential to the father's mother *(k)*. A maternal aunt has a preferential right to the custody of a minor over the step-mother of the father of the minor *(l)*. It has been held that the rights of the female relations of the mother cannot be taken away by the father appointing by his will other persons as the guardians of his minor children *(m)*.

354. Females when disqualified for custody.— A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody—

(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), *e.g.,* a stranger *(n)*, but the right

(h) Ladli v. *Mahomed* (1887) 14 Cal. 615.

(i) Salim-un-nissa v. *Saadat* (1914) 36 All. 466, 24 I.C. 632.

(j) Muhaidin Tharaganar v. *Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.L.J. 503, (1941) M.W.N. 308, ('41) A.M. 582.

(k) Nur Begum v. *Mt. Begum* (1934) 149 I.C. 972, ('34) A.L. 274.

(l) Tumina Khatun v. *Goharjan Bibi* (1941) 1 Cal. 419. 45 C.W.N. 515, ('42) A.C. 281.

(m) In re Isso (1942) Kar. 215 ('42) A.S. 113.

(n) Nur Begum v. *Mt. Begum* (1934) 149 I.C. 972. ('34) A.L. 274; *Kundan* v. *Aisha Begum* (1938) A.L.J. 982, 173 I.C. 1003, ('39) A.A. 15; *Mir Mahomed* v. *Mujeebunnissa* ('52) A.M. 280. *Mst. Zadha Begum* v. *Mohd. Nazir Khan,* 1966 P.L.D. Azad J. & K. 1 (divorced mother on marrying stranger not related to minor daughter within prohibited degrees loses

revives on the dissolution of marriage by death or divorce *(o)*; or,

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute *(p)*; or

(4) if she neglects to take proper care of the child.

Hedaya, 138-139; Baillie, 435-436.

The reason of the rule in cl. (1) is that if a woman marries a man not closely related to the child, the child may not be treated kindly. It is otherwise, however, where the mother, for instance, marries her child's paternal uncle or the maternal grandmother marries the paternal grandfather because these man, begin as parents, it is to be expected that they will treat the child kindly: *Hedaya,* 138. Where, however, there are no relations willing and able to look after the minor child, the mother who has become disqualified by marrying a stranger may be appointed by the Court as the guardian of her minor child *(q)*. But it is open to the Court to appoint the mother as the guardian even if she has married a stranger, if the Court considers it to be in the interest of the minor. Thus such a mother was preferred to a paternal aunt, who had married and was not in a better financial position that the mother *(r)* and similarly in a Pakistani case, where the father gave up all claims to the custody of the child when the child was of tender age, and the mother, upon divorce, married a stranger and the minor was well looked-after by the mother and where the minor being of the age of discretion refused to go to the father, the Court allowed the mother to retain custody of the child and rejected the father's application, the welfare of the minor being the prime consideration *(s)*.

This principle spelled out in the Mahomedan law is based on practical experience based on considerations which are conducive to the proper growth of the child. It cannot be disputed that a child of that tender age would feel psychologically most secure in the company of the mother rather than the father. No one can compete with the mother in that respect ordinarily. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father. It is necessary to dilate on the subject as, in my opinion, the law has been very ably summed up by the Division Bench decision of this Court in the case of Hafizur Rahaman (1983 All. WC 572) (*supra*). I however, cannot resist the temptation of citing a very apposite passage from 'Hedaya' Hamilton (Vol. 1) page 385:—

"If a separation takes place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother because it is recorded that the woman once applied to the prophet, saying 'O prophet of God; this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own 'care' to which the prophet replied 'thou hast a right in the child prior to that of thy husband. So long as thou does not marry with "a stranger" '. Moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child..." *Khurshid Gauhar* v. *Siddiqunnissa* (1986) - All. 314, A.I.R.

Apostasy.— Apostasy is stated in *Fatawa Alamgiri* to be a ground of disqualification. The reason given is that a woman who relinquishes the Moslem faith has to be kept in prison till she returns to the Mahomedan faith: Baillie, 435. But this reason cannot apply in India: hence apostasy would not be disqualification in India: Baillie, 435, f.n. (3). See also Act XXI of 1850, and notes on sec. 271 above.

355. Right of male paternal relations in default of female relations.— In

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right to custody).

(o) Fussehun v. *Kajo* (1884) 10 Cal. 15; *Bhoocha* v. *Elahi Bux* (1885) 11 Cal. 574; *Ansar Ahmad* v. *Samidan* ('28) A.O. 220, 106 I.C. 882.

(p) Abasi v. *Dunne* (1878) 1 All. 598.

(q) In re Ghulam Mahomed (1942) Kar. 363, ('42) A.S. 154.

(r) Haliman Khatoon v. *Ahmadi Begum* (1949) All. L.J. 223, ('49) A.L. 627.

(s) Amar Ilahi v. *Rashida Akhtar* (1955) Lah. 501 ('55) P. Lah. 412.

default of the mother and the female relations mentioned in sec. 353, the custody belongs to the following persons in the order given below:—

(1) the father;
(2) nearest paternal grandfather;
(3) full brother;
(4) consanguine brother;
(5) full brother's son;
(6) consanguine brother's son;
(7) full brother of the father;
(8) consanguine brother of the father;
(9) son of father's full brother;
(10) son of father's consanguine brother;

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 260-261).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor.

Hedaya, 138-139; Baillie, 437.

It is clear from the proviso to the section that though a *boy* may be put in the custody of his paternal uncle's son, a *girl* should not be entrusted to him, for he is not within the prohibited degrees: Baillie, 437.

Under Muslim law, after the age of 7 years, it is the father who is entitled to the custody of the child, unless the Court holds on evidence, the father is not a fit person or that it is not conducive to the health whether physical or mental of the child, ordinarily, the child to be with the father. On the evidence, since nothing is brought out against the father to show, he is unfit he is entitled to the custody of the child. [Raghuvir and Rama Rao, JJ.] *Mohammed Jameel Ahmed Ansari* v. *Ishrath Sajeeda* (1983) 1 An. W.R. 49.

Guardian of property of person of unsound mind.— Brother cannot act as guardian A.I.R. 1918 P.C. 11: 16 All. L.J. 800 (P.C). Applied. [K. C. Agarwal, J.] *Anwar Ali* v. *Abdul Hamil* (1981) 7 All. L.R. 110.

356. Custody of child wife.— The mother of a girl who is married, but has not attained puberty, is entitled to the custody of the girl as against the husband of the girl *(t)*.

See Guardian and Wards Act, 1890, sec. 19.

Husband as guardian.— The court has no power under the Guardian and Wards Act [s. 19(1)] to appoint a guardian of the person of a minor, where the minor is a married woman, and her husband is not in the opinion of the Court *unfit* to be the guardian of her person. If it be a rule of the Mahomedan law that a husband is not entitled to the custody of his wife until she has attained puberty, it must be taken to rest on the hypothesis that he is unfit by that law for that custody. If so, the Court may hold under sec. 19 of the Guardian and Wards Act that a Mahomedan husband is "unfit" within the meaning of that section to be the guardian of the person of his wife until she has attained puberty, and may, consistently with the provisions of that section, appoint her mother as her guardian until she attains puberty.

357. Right of father and paternal male relations to custody of boy over seven and of girl who has attained puberty.— The father is entitled to the custody of a boy over seven years of age *(u)* and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal

(t) Nur Kadir v. *Zuleikha Bibi* (1885) 11 Cal. 649; *(u) Idu* v. *Amiran* (1886) 8 All. 322. *Korban* v. *Emperor* (1904) 32 Cal. 444.

relations in the order given in sec. 355 above, and subject to the proviso to that section. (See paragraph 355 and the case noted there.)

If there be none of these, it is for the Court to appoint a guardian of the person of the minor.

Hedaya, 129; Baillie, 438.

Father as guardian of his minor children.— The Court has no power under the Guardian and Wards Act [(s. 19(2)] to appoint a guardian of the person of a minor whose father is living, and is not in the opinion of the Court *unfit* to be guardian of the minor *(v)*. A father is under the Mahomedan law entitled to the custody of his son after he has completed the age of seven years, and of his daughter after she has attained the age of puberty, but there is no rule of Mahomedan law that he is entitled to that custody even if he is unfit for it. The Court, therefore, has power to appoint the mother or any other person whom it thinks proper, guardian of the person of the minor, if the father is, in its opinion, unfit to be such guardian. The Court is not bound, if the father is unfit, to appoint the person entitled next after him, namely, the father's father, guardian of the person of the minor, for the father's father has no legal right to the guardianship during the lifetime of the father. The paramount consideration in such a case should be the *welfare* of the minor. The fact that the father has married again does not render him unfit for the guardianship of his child *(w)*.

A second marriage by the father does not make him unfit to be guardian. *Khatija Begum* v. *Ghulam Dastgir* (1975) 2 An. W.R. 194; *Andiappa* v. *Nallendrani* 39 Mad. 473.

A father is entitled to the custody of a minor in preference to the maternal grandmother: *Shakra Begum* v. *Ahmed Hasan*: 1972 An. W.R. 310. The father is the natural guardian of a minor Mahomedan girl and no other person can be appointed by the Court under S. 19 of the Guardians and Wards Act, 1890, unless the father is unfit. However giving the maternal grandmother the custody of the minor does not offend section 19 in the absence of the mother and when the minor is below the specified age. *Khatija Begum* v. *Ghulam Dastgir* (1975) 2 An. W.R. 194.

Testamentary guardian of person.— The father may, it seems, entrust the custody of his minor children to the executor appointed by his will: Baillie, 676.

It has been held by the Chief Court of Sind that where the father at the time of his death was not entitled to the custody of the children, he was not entitled to appoint by will a guardian of the person of his children in derogation of the rights of the persons entitled to act as such guardians under the Mahomedan law. As the mother had predeceased the father, the female relations of the mother were held entitled to the guardianship of the minor daughters although the father had appointed by will a great-paternal uncle of the minor daughters as their guardian *(x)*.

Guardians and Wards Act (8 of 1890), Ss. 7, 17.— Custody of minor Muslim child above seven years of age — Father not shown to be unfit to have custody.

Even since the birth, the child was in the custody of the mother. She, in her turn, entrusted the custody to her parents or, perhaps, after she was married or when she left for Saudi Arabia in 1976.

The child is above seven years. The trial court in the instant case has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father. *Mohammed Jameel Ahmed Ansari* v. *Ishrath Sajeeda*, A.I.R. 1983 A.P. 106.

358. Custody of illegitimate children.— The custody of illegitimate children belongs to the mother and her relations [Macnaghten, 298].

The right can be enforced by a writ of *habeas corpus (y)*.

C. – Guardian of the Property of a Minor

359. Legal guardians of property.— The following persons are entitled in

(v) Besant v. *Narayaniah* (1914) 41 I.A. 314, 324, 38 Mad. 807, 822, 24 I.C. 290.

(w) Siddiq-un-nissa v. *Nizam-uddin* (1932) 54 All. 128, 137 I.C. 219; ('32) A.A. 215.

(x) In re Isso (1942) Kar. 215, ('42) A.S. 113.

(y) Gohar Begum v. *Suggi* ('60) A.S.C. 93.

the order mentioned below to be guardians of the property of a minor *(z)*:—

(1) the father;
(2) the executor appointed by the father's will;
(3) the father's father;
(4) the executor appointed by the will of the father's father.

Baillie, 689: Macnaghten, 62, 304.

Mother, brother, uncle, etc., not legal guardians.— The four guardians mentioned in this section are hereinafter called *legal guardians.* The only *relations* who are *legal guardians of the property* of a minor are (1) the father, and (2) the father's father. No other *relation* is entitled to the guardianship of the property of a minor *as of right,* not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become *legal guardians* and have all the powers of a *legal guardian* as defined in secs. 362 and 366. The Court also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian appointed by the Court, as stated in secs. 363 and 367. See note 1 to sec. 364 below.

Minor possessing more than one property.— Income not sufficient to maintain him — the legal guardian is competent to alienate any of the properties. See A.I.R. 1982 All. 9. *Kaiser Parvez* v. *Abdul Majid.*

A widowed mother is not the legal guardian of the property of her minor children and cannot bind the children by any act in relation of the property. Therefore she cannot sell or mortgage the property. Even if she be a co-heir with them, it does not give her any more rights, except to manage the estate till partition among the share holders. *Patel Parshottamdas Narasinbhai* v. *Bai Dhabu* ('73) A. Guj. 88.

"A brother is not a lawful (sic) guardian under Mahomedan law ... Neither the mother nor the brother is a law (sic) guardian though the father or the paternal grandfather of the minor may appoint the mother, brother or any other person as executor or executrix." *Syed Shah Gulam Ghouse Mohiuddin* v. *Syed Shah Ahmad Mohiuddin Kamisul Qadir* ('71) A.S.C. 2184. *Mohammad Amin* v. *Vakil Ahmed* ('25) A.S.C. 358. *Imambandi* v. *Mutsaddi* 43 I.A. 73.

The only person who are entitled to appoint a guardian of the property of a minor *by will* are his father and father's father. Even the mother has no power to appoint by will a guardian of the property of her minor children. A mother's executor is *not a legal guardian,* nor is a brother's executor, nor an uncle's executor. In fact, no executor, except the father's executor or the father's father's executor, can be a *legal guardian* of the property of the minor: Macnaghten, 304. As to the powers of a *legal guardian,*. see secs. 362 and 366.

Testamentary guardian of property.— Any person appointed executor by the will of the father or paternal grandfather of the minor becomes by virtue of his office legal guardian of the property of the minor. But can the father or paternal grandfather appoint one person his executor and another person guardian of the property of the minor? It would appear that he can *(a):* Baillie, 682.

In *Md. Jameel Ahmed Ansari* v. *Ishrath Sajeeda,* A.I.R. (1983) A.P. 106.

It was held that [A] even since the birth, the child was in the custody of mother. She, in her turn, entrusted the custody to her parents or, perhaps, after she was married or when she left for Saudi Arabia in 1976.

It was further observed that [B] the child is above seven years. The trial court in the instant case has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father.

Therefore [C] there is thus nothing to hold the father is not a fit person or it is not conducive to the safety and health of the child to entrust the child.

(z) Imambandi v. *Mutsaddi* (1918) 45, I.A. 73, 83-84, 45 Cal. 878, 892, 893, 47 I.C. 513; *Ara Begam* v. *Deputy Commissioner of Gonda* (1941) O.W.N. 906, 196 I.C. 787, ('41) A.O. 529. *Md. Zafir* v. *Amiruddin* 1963 A.P. 108.

(a) Mata Din v. *Ahmad Ali* (1912) 39 I.A. 49, 55, 34 All. 213, 13 I.C. 976.

360. Guardian of property appointed by Court.— In default of the legal guardians mentioned in sec. 359, the duty of appointing a guardian for the protection and preservation of the minor's property falls on the judge as representing the State *(b)*.

Appointment of guardian by Court.— If there is no legal guardian (s. 359), the Court may appoint any other person guardian of the property of a minor. In so doing, the Court should be guided by what appears in the circumstances to be for the *welfare* of the minor [s. 351(1) and (2)]. Thus, the Court may appoint the mother guardian of the property of her minor son in preference to his paternal uncle *(c)*. The fact that the mother is a pardanashin lady is no objection to her appointment *(d)*.

The Court is not bound to appoint paternal relations guardians of property in preference to maternal relations. If the *welfare* of the minor requires it, the Court may appoint a maternal relation. The Court must also have regard to the *wishes of the minor's father*. Both these grounds concurred in a case in which a brother of the father's first wife was appointed guardian of the property of the minor in preference to a step-brother of the father *(e)*.

The power of a legal guardian to alienate property of a minor is subject to restrictions under Mahomedan Law and a donor cannot impose further restrictions in addition thereto. *Md. Nazimuddin* v. *Govindrajulu Appah* ('71) A. Mad. 44.

361. De facto guardian.— A person may neither be a legal guardian (s. 359) nor a guardian appointed by the Court (s. 360), but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor *(f)*.

The expression "de facto guardian" is used in contradistinction to "de jure guardian." Legal guardians (s. 359) and guardians appointed by the Court (s. 360) are *de jure* guardians. The mother, brother, uncle, and all relations other than the father and father's father are *de facto* guardians, unless they are appointed executor by the will of the father or father's father (s. 359), or are appointed guardians by the Court (s. 360).

A mother and her minor son executed a mortgage-deed. Later the son, as plaintiff, wanted to redeem the mortgage: It was held in the case that a *de facto* guardian has no power to transfer any right or interest in the immovable property of the minor and that such a transfer is not merely voidable but void. It is void also *qua* those who are *sui juris*. *Ali Mohammad* v. *Ramniwas* ('67) A. Raj. 258.

362. Alienation of immovable property by legal guardian.— A *legal* guardian of the property of a minor [s. 359] has no power to sell the *immovable* property of the minor except in the following cases, namely, (1) where he can obtain double its value; (2) where the minor has no other property and the sale is necessary for his maintenance; (3) where there are debts of the deceased, and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution *(g)*.

(b) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 84, 45 Cal. 878, 893, 47 I.C. 513.

(c) Alim-ullah v. *Abadi* (1906) 29 All. 90.

(d) Jaivanti v. *Gajadhar* (1911) 38 Cal. 783, 785, 10 I.C. 334.

(e) Mahomed Sayeed v. *Ismail* ('31) A.R. 66, 131 I.C. 497.

(f) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 84, 45 Cal. 878, 894-895. 47 I.C. 513; *Mohammad Ejaz* v. *Mohammad Iftikhar* (1932) 59 I.A. 92, 101, 7 Luck. 1, 136 I.C. 97, ('32) A.PC. 78; *Muhammad Maizuddin Mia* v. *Nalini Bala Devi* (1937) 2 Cal. 137, ('37) A.C. 284; *Anto* v. *Reoti Kuar* (1937) All. 195, 166 IC. 61, ('36) A.A. 837; *Abdul Karim* v. *Mt. Maniran* ('54) A. Pat. 6.

(g) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 91, 45 Cal. 878, 47 I.C. 513; *Hurbai* v. *Hiraji* (1896) 20 Bom. 116, 121; *Kali Dutt* v. *Abdul Ali* (1888) 16 Cal.

A legal guardian has no power to sell a minor's property unless the property is in a bad state and must be disposed of to avoid loss. If the minor has more than one property there must be justification to sell a particular property. *Mrs. Eishu Chugani* v. *Ranglal Agarwala* ('73) A. Cal. 64.

The legal guardian of the property of a Mahomedan minor has no power to sell the immovable properties of the minor except in the following cases, namely: (1) where he can obtain double its value; (2) where the minor has no other property and the sale is necessary for his maintenance; (3) where there are debts to be discharged and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution. A *de facto* guardian has no power to effect a transfer. Such transaction is not merely voidable but void. [Lakshamaiah, J.] *Mohd. Raheemuddin* v. *Aayesha Begum* (1978) 2 An. W.R. 84.

Baillie, 687-688; Macnaghten, p. 64, sec. 14, pp. 305, 306.

Mortgage.— The same rule apply to a mortgage and unless it is a case of absolute necessity the mortgage is invalid *(h)*.

Lease.— The father or other lawful guardian may grant a lease, if it be for the benefit of the minor *(i)*.

Where minor's title to property is in dispute.— The prohibition against alienation referred to in this section applies to immovable property to which the minor has an undisputed title. It does not apply where the minor's title to the property is disputed. Thus, where the father of a minor sold part of the immovable property inherited by the minor from his mother, *the title to which was in dispute*, and the sale was made pursuant to a compromise which *put an end to pending litigation*, the sale was held to be binding on the minor as being one *for the minor's benefit (j)*. As to the power of a legal guardian to dispose of *movable* property belonging to his ward, see sec. 366 below.

The mother as *de facto* guardian has no power to alienate a minor's immovable property, but a joint sale together with major executants is good in law to the extent of the latter's shares: *Maimunnissa Bibi* v. *Abdul Jabbar* ('66) A.M. 468. See also: *Jaina Beevi* v. *Govindaswami* ('67) A.M. 369 (holding that a lease executed by the minor's father but in his capacity as power of attorney agent of the minor's mother was void); and *Ali Mohammad* v. *Ramniwas* ('67) A. Raj. 258.

363. Alienation of immovable property by guardian appointed by Court.— A guardian of property appointed by the Court under the Guardian and Wards Act, 1890 [s. 360] has no power *without the previous permission of the Court*, to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, and part of the *immovable property* to this ward, or to lease any part of *that property* for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. A disposal of *immovable property* by a guardian in contravention of the foregoing provisions is *voidable* at the instance of the minor or any other person affected thereby *(k)*. Permission to the guardian to do any of the acts mentioned above must not be granted by the Court except in case of necessity or for any evident advantage to the ward [Guardian and Wards Act, 1890, ss. 29, 30, 31].

A minor on attaining majority made an application for accounts against his former guardian but it was held that this proper remedy was to file a suit for accounts. *Shujauddin* v. *Shamsuddin* (1983) 3 A.L.R. 157.

627, 16 I.A. 96; *Thottolj* v. *Kunhammed* (1910) 34 Mad. 527, 8 I.C. 1093; *Mohammad Abdur Rahman Khan* v. *Mohammad Abdul Ghazi Khan* ('37) A.O. 56, 165 I.C. 597; *Basha* v. *Muthan* 70 Mad. L.W. 706.

(h) Yeajuddin Pramanick v. *Rup Manjari* ('36) A.C. 326; *S. K. Nasirul Haque* v. *Zohra Khatoon* 1974 A. Cal. 248.

(i) Zeebunnissa Begum v. *Mrs. Donagher* (1936) 59 Mad. 942, 163 I.C. 384, ('36) A.M. 564.

(j) Kali Dutt v. *Abdul Ali* (1888) 16 Cal. 627, 16 I.A. 96.

(k) Solema Bibi v. *Hafeez Mahomed* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 636.

Reference to arbitration by guardian appointed by the Court.— There are dicta of the High Court of Allahabad to the effect that a guardian appointed by the Court may refer to arbitration *without* the permission of the Court disputes as to the distribution of *immovable* properties of the minor's father, but that it is an irregularity if the guardian makes a reference without the "opinion, advice or direction" of the Court under sec. 33 of the Act. There is no indication in the judgment as to the consequences of such an irregularity *(l)*.

As to the disposal of movable property by a guardian appointed by the Court, see sec. 367 below.

Guardian ad litem.— The guardian *ad litem* or next friend has full power of alienation of a minor's property in effecting a compromise on behalf of a minor. Mahomedan law does not apply in such a case. O. XXXII, r. 7, C.P.C., applies *(m)*.

Guardian joining state service but continuing to be guardian of minor.— Appointment of Counsel by guardian on his behalf to protect interests of minor — Is competent in absence of proof that such lawyer acted against interests of minors. *Nijma Naquishband* v. *Chief Secretary* A.I.R. (1986) J & K. 63.

364. Alienation of immovable property by de facto guardian.— A *de facto* guardian [s. 361] has no power to transfer any right or interest in the *immovable* property of the minor. Such a transfer is not merely voidable, but void *(n)*.

1. *Mother, brother, uncle, etc., as de facto guardians.*— The mother, as has already been stated, is not the legal guardian of the property of her minor children (see note to sec. 357). She is merely a *de facto* guardian — a bare custodian of their property, and has no power to sell, mortgage, or otherwise deal with immovable property belonging to them. As stated by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi (o)*, which is the leading case on the subject, "the mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant." A sale, mortgage, or any other transfer by the mother is wholly void *(p)*. The same remarks apply to a brother, uncle, and other relations. An alienation by a brother *(q)*, uncle *(r)*, or any other relation of the minor's immovable property is wholly void. If the alienee is let into possession of the property, his possession, so far as regards the minor's share, is no better than that of a *trespasser (s)*. The Sind Chief Court has held that the lessee under the lease granted by a *de facto* guardian of a minor is liable to pay compensation to the minor for use and occupation of the land.

The next question to consider is whether a sale or mortgage made by a *de facto* guardian is binding on the minor, if it was made to satisfy a mortgage or other debts of his father or other person from whom he acquires the property. In *Mata Din* v. *Ahmad Ali (t)*, a Mahomedan executed a mortgage of his immovable property. He then died leaving a will by which he bequeathed the

(l) Said-un-nissa v. *Raqaiya Bibi* (1931) 53 All. 428, 130 I.C. 201, ('31) A.A. 307.

(m) Babu Gyanu v. *Mohamad Sardar* ('55) A.N. 193.

(n) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 45 Cal. 878, 47 I.C. 513; *Mata Din* v. *Ahmad Ali* (1912) 39 I.A. 49, 34 All. 213, 13 I.C. 976; *Kannusami Chetti* v. *Rahimat Ammal* (1933) 65 Mad. L.J. 548, 147 I.C. 83, ('33) A.M. 806, 813; *Ramachandrayya* v. *Abdul Kadar* ('48) A.M. 37; *Relumal Kewalmal* v. *Huzur Baksh* ('47) A.S. 179; *Abdul Karim* v. *Mt. Maniran* ('54) A. Pat. 6; *Kharag Narain* v. *Hamida Khatoon* (1955) Pat. 709, ('55) A.P. 475; *Ardhanari Mudaliar* v. *Abdul Rahiman* (1956) 1 M.L.J. 243.

(o) (1918) 45 I.A. 73, 83, 45 Cal. 878, 894, 47 I.C. 513.

(p) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 45 Cal. 878, 47 I.C. 513; *Muhammad Shafi* v. *Mst. Kalsum Bibi* (1923) 4 Lah. 467, 79 I.C. 260, ('24) A.L. 200; *Ghulam Hussein* v. *Mir Jakirali* (1940) Nag. 553, (1938) N.L.J. 409; *Sombhu Gosain* v. *Piyam Mian* (1941) 193 I.C. 253, 7 B.R. 520, ('41) A.P. 351; *Bhikaji Ramchandra* v. *Ajagarally Sarafally* (1945) Bom. 658, 47 Bom. L.R. 803, 224 I.C. 388, ('46) A.B. 57; *Venkama* v. *S. V. Chisty* (1950) 2 Mad. L.J. 587, ('51) A.M. 399. *Md. Zafir* v. *Amiruddin* 1963 A.P.C. 108.

(q) Mata Din v. *Ahmad Ali supra; Fateh Din* v. *Gurumukh Singh* (1929) 10 Lah. 385, 113, I.C. 227, ('29) A.L. 810.

(r) Nizam-ud-din v. *Anandi* (1896) 18 All. 373.

(s) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 92-93, 45 Cal. 878, 903-904, 47 I.C. 513.

(t) (1912) 30 I.A. 49, 34 All. 213, 13 I.C. 976. The decision in *Haji Abdulla* v. *Daud Mahomedan* ('53) A. Saur. 84, it is submitted, is erroneous. It has been decided by the Supreme Court that benefit derived by the minor from the transaction is irrelevant: *Mohamed Amin* v. *Vakil Ahmad* ('52) A.SC. 358.

property to his four grandsons, one of whom was a minor, in equal shares subject to equal obligations in respect of his debts. After his death the three elder grandsons sold the mortgaged property including the minor's share to the mortgagee to satisfy the mortgage debt and other debts of the deceased. It was held by the Privy Council that the sale, though made to satisfy the debts of the deceased, was not binding on the minor, and that he was entitled to redeem his one-fourth share of the mortgaged property. In a Lahore case *(u)*, a Mahomedan executed a mortgage of his immovable property in favour of *A*. He then died leaving a widow and minor children. The widow borrowed Rs. 3,000 from *B*, out of which she paid Rs. 2,500 which was the amount due to *A* under his mortgage, and mortgaged the same property to *B*. The balance of Rs. 500 was applied by her towards the maintenance of the children. The mortgage was for a term of 60 years, and *B* was let into possession. *B* spent Rs. 400 in improving the property. The children afterwards brought a suit against *B* to recover possession of their share of the property. It was held that the mortgage of the children's share was void, but the mortgage was set aside conditionally upon the children paying to *B* the amount by which they had benefited, namely, Rs. 2,500 + Rs. 500 + Rs. 400 = Rs. 3,400. In a Madras case *(v)* the major sons of a deceased Mahomedan undertook to pay off their father's debts, and as guardian of the minor son, the mother alienated some property. It was held, setting aside the mortgage by the mother, that the Court has a discretion to direct the minor to refund the amount by which his estate had benefited. These decisions probably go too far, and may require reconsideration.

Family settlement.— The Supreme Court has held that a *de facto* guardian has no authority to enter into a family settlement in respect of a minor's property, even though the settlement might be for his benefit *(w)*.

But see: In appeal before Supreme Court parties arriving at settlement that father shall deposit in Bank within 4 months a sum of Rs. 16,000 in the name of the child under the guardianship of the child's mother and she would be entitled to receive interest every month on that amount for the maintenance of the child till he attains majority. It was held that on the facts and circumstances of the case the settlement was reasonable and in the interest of the child. [H. R. Khanna and V. R. Krishna Iyer, JJ] *Boomi* v. *Leela Rajan* A.I.R. 1977 S.C. 700.

Note: This case concerns Hindus but the principle will be applicable to Muslims.

See also: *Sunita* v. *Shyam Kali* A.I.R. (1982) All. 1.

An alienation of property be a *de facto* guardian may be ratified by a minor on attaining majority. *Lakshmi Amma* v. *Saidutty* I.L.R. (1967) 1 Ker. 631.

Transaction of exchange.— A single Judge of the High Court of Allahabad has held that a *de facto* guardian may enter into a transaction of exchange in respect of a minor's property, if it has the effect of conserving it *(x)*.

2. *Limitation for suit to set aside transfer of property by a de facto guardian,*— Art. 44 of Sch. I of the Limitation Act, 1908, prescribed a period of three years within which a ward who has attained majority may sue to set aside a transfer of his property made by his guardian, the time running from the date of the ward's majority. This article applies to a transfer by a lawful guardian, and not one by a *de facto* or unauthorized guardian. The article that applies to a transfer by a *de facto* guardian is art. 144 read with sec. 8 of the Act. Art. 144 deals with immovable property, and prescribes a period of twelve years from the time when the possession of the defendant becomes adverse to the plaintiff *(y)*. See however, the Limitation Act 1963.

3. *Reference to arbitration by de facto guardian.*— The principle of the Privy Council decision in *Imambandi* v. *Mutsaddi* referred to in note 1 above has been applied to a reference to arbitration by a *de facto* guardian. Such a guardian has no power to refer to arbitration disputes as to the distribution of immovable properties of the minor's father, and the minor is not bound by an award made on such a reference. Nor does the subsequent appointment of the *de facto* guardian as guardian of the minor under sec. 10 of the Guardian and Wards Act, 1890, make the award binding

(u) Rang Illahi v. *Mahbub Ilahi* (1926) 7 Lah. 35, 94 I.C. 25, ('26) A.L. 170.

(v) Kadir Meeral v. *Muhammad Koya* ('56) A.M. 368, (1956) 1 M.L.J. 307.

(w) Mohamed Amin v. *Vakil Ahmad* ('52) A.SC. 358.

(x) Abdul Hakim v. *Jan Mahomed* ('51) A.SC. 247.

(y) Mata Din v. *Ahmad Ali* (1912) 39 I.A. 49, 34 All. 213, 13 I.C. 976.

upon the minor in the absence of evidence that the Court approved of the reference *(z)*.

4. *Continuance of partnership business.*— It has been held, following the principle of the ruling in the Privy Council case of *Imambandi* v. *Mutsaddi* referred to in note 1 above, that where the father of a minor was a member of a firm which owned a rice mill and carried on rice milling business, the mother had no power to enter into an agreement with the surviving partners on behalf of the minor to continue the partnership business. Such an agreement is void *(a)*. Whether under the Mahomedan Law or on general principles defining the relations between a ward and a guardian, a guardian as such has no power to carry on business on behalf of his ward, especially if the business is such as may invoke the minor's estate in speculation or loss, and it is immaterial whether the business was that of the father of the minor or that was a break in it *(b)*.

5. *Bequest to an heir.*— On the same principle a mother cannot validate a bequest to an heir by consenting on behalf of her minor children who are co-heirs *(c)*.

6. *Ratification.*— As a sale by a *de facto* guardian of the minor's immovable property is not merely voidable but is void, it cannot be ratified by the minor on attaining majority *(d)*. A contrary decision of the Peshawar Court is, it is submitted, incorrect *(e)*.

7. *Agra Tenancy Act.*— Settlement of agricultural land forming part of a zamindari property, inherited by a Mahomedan widow and her minor son, with a tenant for agricultural purposes does not amount to an alienation of the minor's interests in the immoveable property *(f)*.

As to the powers of a *de facto* guardian to deal with the moveable property of the minor, see sec. 368 below.

8. *Partition.*— A deed of partition to which a minor is a party represented by his mother as a *de facto* guardian is void and not binding on him *(g)*.

365. Agreement by guardian for purchase of immovable property for his ward.— Neither the guardian of a minor nor the manager of his estate is competent to bind the minor or his estate by an agreement for the *purchase* of immovable property. Such an agreement is void *(h)*.

[*A*, the manager of the estate of a minor, *B*, agrees to purchase from *C* immovable property on behalf of *B*. The agreement is void, and neither *B* nor *C* can sue for specific performance of the contract.]

336. Power of legal guardian to dispose of movable property.— A legal guardian of the property of a minor (S. 359) has power to sell or pledge the goods and chattels of the minor *(i)*.

367. Power of guardian appointed by Court to dispose of movable property.— A guardian of the property of a minor *appointed by the Court* [s. 360] is bound to deal with *movable property* belonging to the minor as carefully as a man of ordinary prudence would deal with it if it were his own [Guardian and Wards Act, 1890, s. 27].

368. Power of de facto guardian to dispose of movable property.— A *de*

(z) Mohammad Ejaz v. *Mohammad Iftikar* (1932) 59 I.A. 92, 7 Luck. 1, 136 I.C. 97, ('32) A.PC. 78; *Mohsiuddin* v. *K. Ahmed* (1920) 47 Cal. 713, 57 I.C. 945; *Abdul Karim* v. *Mt. Maniran* ('54) A.P. 6 (immovable and movables inseparable); *Johura Bibi* v. *Mohammad* (1951) 2 Mad. L.J. 56, ('51) A.M. 997.

(a) Khorasany v. *Acha* (1928) 6 Rang. 198, 110 I.C. 349, ('28) A.R. 160.

(b) Ahmed Ibrahim Saheb v. *Moyyappa Chettiar* (1940) Mad. 285, (1939) M.W.N. 976, ('40) A.M. 285.

(c) Bibi Kulsoom v, *Mt. Mariam* (1933) 143 I.C. 108, ('33) A.O. 97.

(d) Anto v. *Reoti Kuar* (1937) All. 195, 166 I.C. 61, ('36) A.A. 837.

(e) Jawahir Singh v. *Kohat Municipality* ('37) A. Pesh. 74, 170 I.C. 63.

(f) Tahad Ali v. *Israr-Ullah* (1939) All. 89, (1938) A.L.J. 1110, 180 I.C. 504, ('39) A.A. 121.

(g) Assiz v. *Chithamma* ('54) A. Tra. Coch. 370.

(h) Mir Sarwarjan v. *Fakhruddin* (1912) 39 I.A. 1, 39 Cal. 232, 13 I.C. 331.

(i) Fatawai Alamgiri (p. 222: Amir Ali's Translation)— "If the father has pledged his minor child's property for such debts as he has incurred either for himself or for his minor child, then it is lawful (for him)." See *Zaitoon Begum* v. *Central Bank Ltd. P.L.D.* 1961 (W.P.) Lah. 888.

facto guardian [s. 361] has the power to sell and pledge the goods and chattels, of the minor in his charge for the minor's imperative necessities, such as food, clothing, or nursing *(j)*.

A mother has no power as *de facto* guardian to enter into any contract whereby a minor would be saddled with any pecuniary liability *(k)*. Nor has a brother *(l)*. It has been held in Madras that she has power to renew a promissory note executed by the minor's father and so stave off an execution against the minor's property *(m)*., *sed quaere*.

(j) Imambandi v. *Mutsaddi* (1918) 45 I.A. 73, 86-87, 45 Cal. 878, 895-896, 47 I.C. 513.

(k) Ghulam Ali v. *Inayat Ali* (1933) 144 I.C. 68, ('33) A.L. 95; *Kunhibi* v. *Kaliani Amma* (1939) 2 M.L.J. 463, ('39) A.M. 881.

(l) Naziruddin v. *Kharagnarain* (1939) 177 I.C. 802, ('39) A.P. 29.

(m) Venkatarayudu v. *Khasim Saheb* (1935) 160 I.C. 268, ('35) A.M. 1041; Dissented from in *Kunhibi* v. *Kaliani Amma* (1939) 2 M.L.J. 463, ('39) A.M. 881, and in *Ramchandrayya* v. *Abdul Kadar* (1948) Mad. 270, ('48) A.M. 37.

CHAPTER XIX

MAINTENANCE OF RELATIVES

369. Maintenance defined.— "Maintenance" in this Chapter includes food, raiment and lodging.

This definition of 'maintenance' is not exhaustive. The word includes other necessary expenses for mental and physical well-being of a minor, according to his status in society. Educational expenses were included in the definition *Alunadellah* v. *Mafizuddin Ahmed* ('73) A. Gau. 56.

Cases under S. 488 Cr. P.C. were held applicable to define the term.

Tekchand Partabrai Bhavani v. *Kalavant Bai Tekchand* ('41) A. Sind 214.

Sm. Purnasashi Devi v. *Nagendra Nath* ('50) A. Cal 465.

Cf. Baillies, 441.

370. Maintenance of children and grandchildren.— (1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his *adult* sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (s. 352) does not relieve the father from the obligation of maintaining them *(a)*. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Section 125 — Maintenance — Children living with mother — Right of children — Not dependent on guardianship.

The plea of the father that while he is entitled to guardianship of his children, in fact they are living with their mother will not disentitle them from claiming maintenance. As regards guardianship the forum is not that of the Magistrate's Court but is with the Court exercising powers under Guardians and Wards Act. [M. Wahajuddin, J.] *Siddiq Ahmad Sanji* v. *Smt. Parveen.* 1984 Cri. L.J. 341 : 1984 A.C.C. 65 : 1984 A.W.C. 66.

Hedaya, 148; Baillie, 459-462. A daughter when married passes into her husband's family, and there is no obligation on the members of her natural family to maintain her, not even if she is divorced *(b)*.

Right to maintenance : how long it continues.— The effect of the Indian Majority Act, 1875, so far as Mahomedans are concerned, is to extend the minority of a person until he has completed the age of eighteen years, except in matters of marriage, dower and divorce. In respect of these matters a Mahomedan is entitled to act when he attains the age of majority under the Mahomedan law. That age is reached when he attains puberty, that is, when he completes the age of fifteen years. Sir Ronald Wilson considers that since maintenance is not one of the excepted subjects, the age of minority for the purpose of maintenance must be deemed to have been extended until the age of eighteen years [Anglo-Muhammadan Law, ss. 140, 142]. This view, it is submitted, is not

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(a) Emperor v. *Ayshabai* (1904) 6 Bom. L.R. 536; *Mahomed Jusub* v. *Haji Adam* (1913) 37 Bom. 71, 15 I.C. 520 [a Cutchi Memon case]. *Allah Rakhi* v. *Karam Illahi* (1933) 14 Lah. 770, 147 I.C. 123, ('33) A.L. 969, *Mt. Sarfraz Begum* v. *Miran Bakhsh* (1928) 9 Lah. 313, 112 I.C. 476, ('28) A.L. 543; *Muhaiddin Tharaganar* v. *Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.L.J. 503, (1941) M.W.N. 308, ('41) A.M. 582; *Mohammad Shamsuddin* v. *Noor Jehan Begum* ('55) A. Hyd. 144 (1955) Hyd. 418.

(b) Pakrichi v. *Kunhacha* (1913) 36 Mad. 385, 13 I.C. 236.

correct. The effect of the Indian Majority Act is to extend the period of *incapacity* to act in matters other than the three months above, *e.g.*, contracts, wills, gifts, wakfs, etc. It is not to enlarge the duration of a *right* or of the corresponding duty. The children, therefore, of a Mahomedan have no right to maintenance after they have attained the age of puberty nor is there any obligation on the parents to maintain them after that age, except, as stated above, in the case of a son who is disabled by infirmity or disease. A child is entitled to past maintenance *(c)*.

Maintenance where daughter stays away from father.— Where the father is entitled to the custody of the daughter and offers to keep her in the house and maintain her, the daughter has no right to separate maintenance unless there are circumstances which justify the daughter in staying away from the father's house *(d)*. In this case the facts were that the daughter's mother had been divorced and the father had married again. The father did not offer to keep her in the house and later on became a lunatic. These circumstances were held to be sufficient to entitle the daughter to separate maintenance.

Where the father, having divorced the child's mother, obtained a decree for guardianship of the child (a daughter, aged, nine years) but did not execute the decree, so that the child remained with its mother, the Court held that the child was entitled to maintenance *(e)*. In another case, where the father had married again and not divorced his first wife, and was willing to maintain his two children by the first wife who had attained the age of seven, it was held that he was not bound to pay maintenance allowance to the mother if the two children were deliberately not sent to him *(f)*. But a single Judge of the Madras High Court has expressed the view that the father's liability to maintain his children is absolute and if the father has any right of custody of his children he is entitled to enforce that right, but the fact that he has not done so or that his children are residing elsewhere did not deprive them of their right to claim maintenance from their father *(g)*. This view has been dissented from by the Bombay High Court *(h)* where it was held that the father was entitled to decline to maintain his children, if they refused to live with him without reasonable cause, although he was entitled to their custody as their guardian. The father, however, is bound to pay separate maintenance allowance until he expresses his willingness to keep and maintain his child in his own house. Minor child living with the divorced mother is entitled to maintenance: *Mohammad Yusuf Khan* v. *Mst. Zarina;* 1975 Cr. L.J. 1988.

Maintenance of illegitimate Children.— Mahomedan Law imposes no obligation upon the natural father to maintain his illegitimate children. It has been held by the Kerala High Court that apart from any rights conferred by any statute or the personal law, an illegitimate daughter of a Mahomedan male and a Hindu female was not entitled to claim maintenance from the putative father or from the assets left by him on general principles that a person having begotten the child, is bound to provide for its maintenance. *Pavitri* v. *Katheesumma* ('59) A. Ker. 319.

371. Maintenance of parents.— (1) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(2) A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(3) A son, who, though poor, is earning something, is bound to support his poor father who earns nothing.

Hedaya, 148; Baillie, 465, 466.

372. Maintenance of grandparents.— A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor but not

(c) Moosa Seethy v. *Mariakutty* (1954) Trav.-Co. 690.

(d) Bayabai v. *Esmail Ahmed* (1941) Bom. 643, 43 Bom. L.R. 823, 197 I.C. ('41) A.B. 369 (Decision of a single Judge). *Dinsab Kasimsab* v. *Mahamad Hussein* (1945) 47 Bom. L.R. 345, ('45) A.B. 390.

(e) Mohammad Shamsuddin v. *Noor Jehan Begum* (1955) Hyd. 418, ('55) A. Hyd. 144.

(f) Dinsab Kasimsab v. *Mahamad Hussein* (1945) 47 Bom. L.R. 345, ('45) A.B. 390.

(g) Muhaiddin Tharaganar v. *Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.L.J. 503, ('41) A.M. 582.

(h) Dinsab Kasimsab v. *Mahomed Hussain* (1945) 47 Bom. L.R. 345 ('45) A.B. 390.

otherwise, to the same extent as he is bound to maintain his poor father.

Baillie, 466.

373. Maintenance of other relations.— Persons who are not themselves poor are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death. A father is not bound to maintain his son's widow *(i)*.

Baillie, 467.

374. Statutory obligation of father to maintain his children.— If a father, who has sufficient means, neglects or refuses to maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, 1898, to make a monthly allowance, not exceeding five hundred rupees, for their maintenance *(j)*.

The obligation of the Mahomedan father to maintain his minor children may be described as a personal obligation and may be correctly so described. But that does not mean that the context of that obligation falls within the literal meaning of the expression 'personal'. saying that an obligation is personal does not mean that the only sanction which the law imposes for the performance of the obligation is to proceed against the obligee's person whenever he fails to discharge that obligation. In the context of the relationship between a father and his minor children, all that the idea of personal obligation imports is that he is under a duty to maintain them even on the mere aspect of his being their parent.

The text books on Mahomedan Law might for aught be variations of the same theme. But both show that the Prophet as the supreme law giver had to be on the subject of maintenance of wives and children and the liability of the husband's or father's property as the case may be to such maintenance. Reducing the Prophet's words in modern legal terminology it can be said that a Muslim father's obligation to maintain his children attaches to his property and runs with it.

In the absence of any leading authority, the Courts in this land must administer the personal law for Muslims on this difficult question only on the basis of the ancient textual authorities, whose validity as sources of law can hardly be questioned. Having regard to the tradition handed down from the Prophet himself there seems to be every judicial compulsion to follow the injunction which the Prophet administered to his followers as the only rule of law bearing on the subject of maintenance. *Ibrahim Fathima* v. *Mohammed Saleem* (minor) (1979) 2 M.L.J. 199: 92 L.W. 390.

See the Code of Criminal Procedure, 1898, sec. 488 as amended by sec. 131 of the Code of Criminal Procedure (Amendment) Act, 1955 (XXVI of 1955). If the children are illegitimate, the refusal of the mother to surrender them to the father is not a ground for refusing an order of maintenance *(k)*. See sec. 358 above. See also Code of Criminal Procedure, 1974.

375. Maintenance of wives.— See secs. 277 to 279 above.

(i) Mahomed Abdul v. *Khairunnissa* (1950) 52 Bom. L.R. 133, (50) A.B. 245.

(j) Although Mahomedan Law imposes no duty on the father to maintain his illegitimate children, an agreement to maintain an illegitimate child is not void. See *Sukha* v. *Ninni* ('66) A. Raj. 163.

(k) Kariyadan v. *Kayat Beeran* (1895) 19 Mad. 461.

APPENDIX I

THE DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939

(Act No. 8 of 1939)

(PASSED BY THE INDIAN LEGISLATURE)

Received the assent of the Governor-General on the 17th March, 1939

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. It is hereby enacted as follows: –

Short title and extent

1. (1) This Act may be called THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

(2) It extends to the whole of India except Part B States.

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds namely: –

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause his marital obligations for a period of three years;

(v) that the husband was impotent at the time of marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years;

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty that is to say, –

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill- treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of

marriages under Muslim law:

Provided that –

(a) no decree shall be passed on ground *(iii)* until the sentence has become final;

(b) a decree passed on ground *(i)* shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground *(v)* the Court shall on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

DISSOLUTION OF MUSLIM MARRIAGES ACT S. 2(ii) and (iii) compared

A husband's failure to provide for the maintenance of the wife for the period of 2 years mentioned in Cl.(ii) of S. 2 entitles the wife to a decree for dissolution of marriage whether or not the husband has reasonable cause for withholding such maintenance.

Cl. (ii) of S. 2 should be read in contradistinction with Cl. (iv) as per with which the wife is entitled to a decree for dissolution of her marriage on the ground that the husband has failed to perform "without reasonable cause" his marital obligations for a period of three years. The words, "without reasonable cause" are significantly absent in Cl. (ii). The duty to provide maintenance to the wife is only self-imposed to keep the relationship intact and it is not a duty corresponding to the right of the wife to claim maintenance against the husband. As against the arbitrary power of the husband to liquidate the marriage, the wife gets a right for dissolution of marriage on the husband's neglect or failure to provide for her maintenance for a period of 2 years. This construction of Cl. (ii) of S. 2 is in consonance with the Islamic law on the subject. There is, therefore, no justification in introducing the words "without reasonable cause" into Cl. (ii). The Legislature in its wisdom, by providing those words in Cl. (iv) has not thought it necessary to provide this restriction in Cl. (ii). A.I.R. 1978 Andh. Pra. 417 and A.I.R. 1971 Cal. 218, Dissented from A.I.R. 1971 Ker. 261, Foll. *Ittoochalil Meethal Moossa* v. *Pachiparambath Meethal Fathima,* A.I.R. 1983 Kerala 283.

In a suit brought by a wife for dissolution of marriage on the ground that her husband was impotent at the time of the marriage and continued to be so that facts were as follows. Marriage was celebrated on June 12, 1960 and the suit was brought on Oct. 3, 1960. The husband asked for and was granted one year to prove that he had ceased to be impotent. On the expiry of the period the Court granted a decree on the application of the wife.

The requirement of Sec. 2(v)(c) is that the husband is not only impotent at the time of the marriage but that he continues to be impotent when the suit is filed. The evidence in the case was held to establish impotence at both the points of time.

On the question raised that during the period of grace, the husband was denied the company of his wife in his own house, the Court held that after the Act, the rule of Mahomedan Law about the duty of the wife did not apply. The Act requires an opportunity to satisfy the Court about the cessation of the condition and that opportunity is available only on application to Court. The provisions of the Act abrogated the rule of Mahomedan Law. It is not the rule that the acquisition of virility can be proved only by sexual act with the wife. Such a procedure is likely to subject the wife to queer predicaments and some peril.

Abdul Azeem v. *Fahimunnisa Begum* ('69) A. Mys. 226.

In this case the wife sued the husband for dissolution of her marriage for failure to maintain her for two years. She was married in 1952. In 1955 she went away to her parents. The husband then performed a second marriage. The suit failed. It was held that under the Mahomedan Law polygamy was allowed and could not be a ground for living apart and claiming maintenance in the absence of other grounds which would justify the wife to follow this course. The amendment to Sec. 488 Cr. P.C. was not considered as an application lay to a different forum.

Munnawarbai v. *Sabir Mohammad* 1970 M.P.L.J. Notes 23.

The wife left the marital house and stayed away without any justifiable cause and then asked for the dissolution of marriage on the ground that the husband was not maintaining her; it was held that the wife was not entitled to relief under S. 2(ii) of the Dissolution of Muslim Marriages Act, 1939.

Mst. Mabiya Khatun Bibi v. *Shaikh Anwar Ali* ('71) A. Cal. 218.

Syed Abbas Ali v. *Nazerunnessa Begum* (1939) 43 C.W.N. 1059.

Mst Noor Bibi v. *Pir Bux* ('50) A. Sind 8.

See also: A.I.R. 1983 Ker. 283. *Ittoachalil Meethal Moosa* v. *Pachiparambath Meethal Fathima & Pathumma.*

3. In a suit to which clause *(i)* of section 2 applies—

Notice to be served on heirs of the husband when the husband's whereabouts are not known.

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

Effect of conversion to other faith.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage.

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam for some other faith who re-embraces her former faith.

Right of dower not to be affected.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Repeal of section 5 of Act XXVI of 1937.

[6. Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937, is hereby repealed (*Repealed by Act XXV of 1942.*)]

APPENDIX II

THE MUSSALMAN WAKF ACT, 1923

(Act No. 42 of 1923)[1]

An Act to make provision for the better management of the wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties

[15th *August*, 1923]

Whereas it is expedient to make provision for the better management of *wakf* property and for ensuring the keeping and publication of proper accounts in respect of such properties; it is hereby enacted as follows:

Preliminary

1. Short title, extent and commencement.— (1) This Act may be called the Mussalman Wakfs Act, 1923.

[2][(2) It extends to the whole of India except[3][the territories which, immediately before, the 1st November, 1956, were comprised in Part B States].

(3) This section shall come into force at once; and

(4) The State Government may, by notification in the Official Gazette, direct[4] that the remaining provisions of this Act or any of them which it may specify, shall come into force in the State, or any specified part thereof, on such date[4] as it may appoint in this behalf.

2. Definitions.— In this Act, unless there is anything repugnant in the subject or context,—

(a) "benefit" does not include any benefit which a *mutawalli* is entitled to claim solely by reason of his being such *mutawalli;*

(b) "Court" means the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the State Government may, by notification in the Official Gazette, designate in this behalf;

(c) "*mutawalli*" means any person appointed either verbally or under any deed or instrument by which a *wakf* has been created or by a court of competent jurisdiction to be the *mutawalli* of a *wakf,* and includes a *naib- mutawalli* or other person appointed by a *mutawalli* to perform the duties of the *mutawalli,* and, save as otherwise provided in this Act, any person who is for the time being administering any *wakf* property;

(d) "prescribed" means prescribed by rules made under this Act; and

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1. This Act has been rep. in its application to Bengal Wakf Act, 1934 (Ben. 13 of 1934), Sec. 82; and rep. in part in the United Provinces by the United Provinces Muslim Wakf Act, 1936 (U.P. 13 of 1936); and amended in its application to —

Bihar and Orissa by the Bihar and Orissa Mussalman Wakf (Amendment) Act, 1926 (B. & O. 1 of 1926); and Bombay by the Mussalman Wakf (Bombay Amendment) Act, 1935 (Bom. 18 of 1935); the Mussalman Wakf, Bombay Public Trusts Registration and Parsi Public Trusts Registration (Amendment) Act, 1944 (Bom. 10 of 1944) and the Mussalman Wakf (Bombay Amendment) Act, 1945 (Bom. 15 of 1945).

This Act shall not apply to any *wakf* to which the Wakf Act, 1954 (29 of 1954) applies.

2. Subs. by the A.O. 1950 for the former sub-section.

3. Subs. by the Adaptation of Laws (No. 3) Order, 1956 for "Part B States".

4. Sections 2 to 5 and 7 to 13 were brought into force in the Punjab with effect from 14th May, 1924, *see* Punjab Gazette, 1924, Pt. I, p. 418.

Secs. 2 to 13 were brought into force in the Presidency of Bombay from the 1st June, 1925, see Bombay Government Gazette, 1925, Pt. I, p. 1414.

All provisions of the Act were brought into force in Bihar and Orissa B. & O. from the 3rd September, 1925, *see* Gazette, 1925, Pt. II, p. 1192.

Sections 2 to 13 were brought into force in the Presidency of Bengal with certain modifications from the 1st June, 1927 *see* Calcutta Gazette, Pt. I, p. 1008.

Sections 2 to 13 were brought into force in Ajmer Merwara from the 1st February, 1928, *see* Gazette of India, Pt. II-A, p. 20.

(e) "*wakf*" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any *wakf*, such as, is described in Sec. 3 of the Mussalman Wakf Validating Act, 1913 (6 of 1913) under which any benefit is for the time being claimable for himself by the person by whom the *wakf* was created or by any of his family or descendants.

Comment

Section 129 of the Transfer of Property Act saves Mahommedan gifts from the application of the provisions of Chapter VII of the Transfer of Property Act. The result is that the oral gift made by Mahommedan in favour of his wife in lieu of her dower is valid.[5]

Statements of Particulars

3. Obligation to furnish particulars relating to wakf.— (1) Within six months from the commencement of this Act every *mutawalli* shall furnish to the Court within the local limits of whose jurisdiction the property of the *wakf* of which he is the *mutawalli* is situated or to any one of two more such Courts, a statement containing the following particulars, namely:

(a) a description of the *wakf* property sufficient for the identification thereof;

(b) the gross annual income from such property;

(c) the gross amount of such income which has been collected during the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the *wakf*, whichever period is shorter;

(d) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the *wakf* property;

(e) an estimate of the expenses annually incurred in the realisation of the income of the *wakf* property, based on such details as are available of any such expenses incurred within the period to which the particulars under Cl. *(c)* relate;

(f) the amount set apart under *wakf* for—

(i) the salary of the *mutawalli* and allowances to individuals,

(ii) purely religious purposes,

(iii) charitable purposes,

(iv) any other purposes and;

(g) any other particulars which may be prescribed.

(2) Every such statement shall be accompanied by a copy of the deed of instrument creating the *wakf* or, if no such deed or instrument has been executed or a copy thereof cannot be obtained shall contain full particulars, as far as they are known to the *mutawalli*, of the origin, nature and objects of the *wakf*.

(3) Where—

(a) a *wakf* is created after the commencement of this Act, or

(b) in the case of a *wakf* such as is described in Sec. 3 of the Wakf Validity Act, 1913 (6 of 1913) the person creating the *wakf* or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder.

the statement referred to in sub-section (1) shall be furnished, in the case referred to in Cl. *(a)*, within six months of the date on which the *wakf* is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in Cl. *(b)*, within six months the date of the death of the person entitled to such benefit as aforesaid or of last survivor of any such persons, as the case may be.

Comment

Mutawalli means a person who either under a deed or *wakf* or by appointment under order of a competent court manages the *wakf* property.[6]

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5. *Amini Bi* v. *Khamurunnissa*, A.I.R. 1974 Mad. 54 at p. 56.

6. *Vide* Bindra's *Conveyancing*, 5th Ed., 1971. p. 174; *P. S. Abdul Kadir* v. *Mahlarathul Kadirya Sabha*

4. Publication of particulars and requisition of further particulars.— (1) When any statement has been furnished under Sec. 3, the Court shall cause notice of the furnishing thereof to be affixed in some conspicuous place in the Court-house and to be published in such other manner, if any, as may be prescribed, and thereafter any person may apply to the Court by a petition in writing, accompanied by the prescribed fee, for the issue of an order requiring the *mutawalli* to furnish further particulars or documents.

(2) On such application being made, the court may, after making such inquiry, if any, as it thinks fit, if it is of opinion that any further particulars or documents are necessary in order that full information may be obtained regarding the origin, nature or objects of the *wakf* or the condition or management of the *wakf* property, cause to be served on the *mutawalli* an order requiring him to furnish such particulars or documents within such time as the Court may direct in the order.

Comment

The Court shall cause notice of the furnishing statement to be affixed in some conspicuous place in the Court-house and to be published in such other manner as may be prescribed. Any person can apply for the issue of any order requiring the *mutawalli* to furnish further documents. But such petition must be in writing and it should be accompanied by the prescribed fee. The Court may direct to furnish any particular if it thinks necessary to do after making due enquiry.

Statement of Accounts and Audit

5. Statement of accounts.— Within three months after the thirty-first day of March next following the date on which the statement referred to in Sec. 3 has been furnished, and thereafter within three months of the thirty-first day of March in every year, every *mutawalli* shall prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, in such form and containing such particulars as may be prescribed, of all moneys received or expended by him on behalf of the *wakf* of which he is the *mutawalli* during the period of twelve months ending on such 31st day of March or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the *wakf*:

Provided that the Court may, if it is satisfied that there is sufficient cause for so doing, extend the time allowed for the furnishing of any statements of accounts under this section.

6. Audit of account.— Every statement of accounts, shall, before it is furnished to the court under Sec. 5, audited—

(a) in the case of a *wakf* the gross income of which during the year in question, after deduction of the land-revenue and cesses, if any, payable to the Government, exceeds two thousand rupees, by a person who is the holder of a certificate granted by the [7][Central Government] under Sec. 144 of the [8][Indian Companies Act, 1913 (7 of 1913)] or is a member of any institution or association the members of which have been declared under that section to be entitled to act as auditors of companies throughout the [9][territories to which the Act applies]; or

(b) the case of any other *wakf*, by any person authorised in this behalf by general or special order of the said Court.[10]

General Provisions

7. Mutawalli entitled to pay cost of audit, etc. from wakf funds.— Notwithstanding anything contained in the deed or instrument creating any *wakf*, every *mutawalli* may pay for the income of the *wakf* property and expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under Sec. 3 or Sec. 4 or in respect of the preparation of audit of the annual accounts for the purposes of this Act.

8. Verification.— Every statement of particulars furnished under Sec. 3 or Sec. 4, and every statement of accounts furnished under Sec. 5, shall be written in the language of the Court to which

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Kayalpatnam, 1952 M.W.N. 941 at p. 944: A.I.R. 1953 Mad. 143.

7. Subs. by the A.O. 1937, for "L.G."

8. The relevant provisions of the Companies Act, 1956 (1 of 1956) may not be referred to.

9. Subs. by the A.O. 1959, for "Provinces".

10. In the application of the Act to Bombay, new Secs. 6-A to 6-Q have been ins. by the Mussalman Wakf (Bombay Amendment) Act, 1935 (18 of 1935), Sec. 5.

it is furnished, and shall be verified in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908).

9. Inspection and copies.— Any person shall, with the permission of the court and on payment of the prescribed fee at any time at which the Court is open, be entitled to inspect in the prescribed manner, or to obtain a copy of, any statement of particulars or any document furnished to the Court under Sec. 3 of Sec. 4, or any statement of accounts furnished to it under Sec 5, or any audit report made on an audit under Sec. 6.[11]

Penalty

10. Penalties.— Any person who is required by or under Sec. 3 or Sec. 4 to furnish a statement of particulars or any document relating to a *wakf*, or who is required by Sec. 5 to furnish a statement of accounts, shall, if he, without reasonable cause the burden of proving which shall lie upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by Sec. 6, by punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees.[12]

Comment

Five hundred rupees has been provided as a punishment if anybody fails to furnish statement or document in due time or files a false and misleading statement of accounts. If the offence is repeated again the fine can be extended upto two thousand rupees.

Rules

11. Power to make rules.— (1) The State Government may, after previous publication, by notification in the Official Gazette, make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all the following matters, namely:

(a) the additional particulars to be furnished by *mutawallis* under Cl. (g) of sub-section (1) of Sec. 3;

(b) the fees to be charged upon applications made to a court under sub-section (1) of Sec. 4;

(c) the form in which the statement of accounts referred to in Sec. 5 shall be furnished, and the particulars which shall be contained therein;

(d) the powers which may be exercised by auditors for the purpose of any audit referred to in Sec. 6, and the particulars to be contained in the reports of such auditors;

(e) the fees respectively chargeable on account of the allowing of inspections and of the supply of copies under Sec. 9;

(f) the safe custody of statement, audit reports and copies of deeds or instruments furnished to courts under this Act; and

(g) any other matter which is to be or may be prescribed.

12. Savings.— Nothing in this Act shall—

(a) affect any other enactment for the time being in force in the [13][territories to which this Act applies] providing for the control or supervision of religious or charitable endowments; or

(b) apply in the case of any *wakf* the property of which—

(i) is being administered by the Treasurer of Charitable Endowments; the Administrator-General, or the Official Trustee; or

(ii) is being administered either by a receiver appointed by any Court of competent

11. In the application of the Act to Bombay, a new Sec. 9-A has been ins. by Sec. 11, *ibid.*

12. In the application of the Act of Bombay new Secs. 10-A to 10- D. have been ins. by the Mussalman Wakf (Bom. Amendment) Act, 1935 (Bom. 18 of 1935), Sec. 13.

13. Subs. by the A.O. 1950, for "Provinces".

jurisdiction, or under a scheme for the administration of the *wakf* which has been settled or approved by any Court of competent jurisdiction or by any other authority acting under the provisions of any enactment.

13. Exemption.— The State Government may, by notification in the Official Gazette, exempt from the operation of this Act or of any specified provision thereof any *wakf* or *wakfs* created or administered for the benefit of any specified section of the Mussalman community.

APPENDIX III

THE MUSSALMAN WAKF VALIDATING ACT, 1913

(Act No. 6 of 1913)[1]

An Act to declare the rights of Mussalman to make settlements of property by way of "wakf" in favour of their families, children and descendants

[7th *March*, 1913]

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:

1. Short title and extent.— (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of India except [2][the territories which, immediately before the 1st November, 1956, were comprised in Part B State].

2. Definitions.— 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.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

3. Power of Mussalmans to create certain wakfs.— It 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, 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:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as religious, pious or charitable purpose of a permanent character.

Comment

Wakf can be created by any Mussalman for the maintenance of his family, children or descendants. Hanafi Mussalman can create *wakf* for his own maintenance also or for the payment of debts out of the rents and profits of the property dedicated to such *wakf*. But it is necessary that the ultimate benefit should be to poor, pious or charitable purpose of a permanent nature.

4. Wakf not to be invalid by reason of remoteness of benefit to poor etc.— No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable furnish purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*.

Comment

The general result of the authorities seems to be that the *wakf* may lawfully change the *wakf*

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1. This Act has been declared to be in force in the Santhal Parganas by Notification under Sec. 3 of the Santhal Parganas Settlement Regulation (3 of 1872). It has been applied to *wakfs* created before its commencement, *see* the Mussalman Wakf Validating Act, 1930 (32 of 1930). Sec. 2.

2. Subs. by the Adaptation of Laws. (No. 2) Order, 1956. for "Part B States".

property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the *kazi* or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the *wakf*.[3]

5. Saving of local and sectarian custom.— Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

3. *P. S. Abdul Qadir* v. *Mahlarathul Kadirya Sabha, Kayalpatnam*, 1952 M.W.N. 911 at p. 944: A.I.R. 1953 Mad 143; *see* also *Mofizuddin Howalder* v. *Abdul Rashid*, (1983) 35 Dhaka Law Reporter (A.D.) 36 and *Jangli Bibi Mosque* v. *Latifa Chowdhurani*, 1984 Bangladesh Legal Decisions 240.

APPENDIX IV

THE MUSSALMAN WAKF VALIDATING ACT, 1930

(Act No. 32 of 1930)[1]

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913

[25th *July*, 1930]

Whereas the Mussalman Wakf Validating Act, 1913 (6 of 1913), does not apply to *wakfs* created before its enactment;

And whereas it is expedient to validate such *wakfs* without infringing any rights contrary thereto which may have already accrued or been acquired;

It is hereby enacted as follows:

1. Short title.— This Act may be called the Mussalman Wakf Validating Act, 1930.

2. Act 6 of 1913 to apply retrospectively.— The Mussalman Wakf Validating Act, 1913 (6 of 1913), shall be deemed to apply to *wakfs* created before its commencement:

Provided that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

Comment

The Mussalman Wakf Validating Act, 1913 shall have a retrospective effect. The Act shall apply to *wakfs* which have been created before its commencement. But the retrospectivity has no effect to any right or liability accrued before the commencement of the Act.

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1. This Act has been declared to be in the Santhal Parganas by Notification under Sec. 3(3) *(a)* of the Santhal Parganas Settlement Regulation (3 of 1872).

APPENDIX V

THE PUBLIC WAKFS (EXTENSION) OF LIMITATION ACT, 1959

(Act No. 29 of 1959)[1]

An Act to extend the period of limitation in certain cases for suits to recover possession of immovable property forming part of public wakfs

[1st *September*, 1959]

Be it enacted by Parliament in the Tenth Year of the Republic of India as follows:

1. Short title and extent.— (1) This Act may be called the Public Wakfs (Extension of Limitation) Act, 1959.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definition.— In this Act, "public *wakf* means the permanent dedication by a person professing Islam of any immovable property for any purpose recognised by Muslim Law as a public purpose of a pious, religious or charitable nature.

Comment

The "public *wakf*" has been defined as a permanent dedication by a Mussalman of any immoveable property for the purpose recognised by Muslim law as a public purpose of a pious nature.

3. Extension of period of limitation in certain cases for suit to recover possession of immovable property forming part of public wakfs.— Where a person is entitled to institute a suit of the description referred to in Art. 142 or Art. 144 of the First Schedule to the Indian Limitation Act, 1908 (9 of 1908), for possession of any immovable property forming part of a public *wakf* or any interest therein has been dispossessed, has discontinued the possession, at any time after the 14th day of August, 1947, and before the 7th day of May, 1954, or, as the case may be, the possession of the defendant in such a suit has become adverse to such person at any time during the said period then, notwithstanding anything contained in the said Act, the period of limitation in respect of such a suit shall extend up to the [2][31st day of December, 1970.]

STATE AMENDMENTS

The extended period of limitation under Sec. 3 of the Public Wakfs (Extension of Limitation) Act, 1959 in its application to the different States is as under:

Sl. No.	*States*	*Extended period of limitation*
1.	Bihar	31st December, 1985, *vide* Bihar Act No. 65 of 1982, Sec. 2 (with retrospective effect)
2.	Union Territory of Delhi	31st December, 1985, *vide* Act No. 39 of 1982, Sec. 2 (w.e.f. 1st January, 1981)
3.	Haryana	31st December, 1975, *vide* Haryana Act 4 of 1975, Sec. 3.
4.	Himachal Pradesh	31st December, 1978, *vide* H.P. Act No. 13 of 1978, Sec. 2 (w.e.f. 1st January, 1975)
5.	Madhya Pradesh	31st December, 1983, *vide* M.P. Act No. 22 of 1982, Sec. 2 (w.e.f. 31st of December, 1982)
6.	Orissa	31st December, 1981, *vide* Orissa Act No. 12 of 1982, Sec. 2 (w.e.f. 1st January, 1982)
7.	Rajasthan	31st December, 1980 *vide* Rajasthan Act No. 21 of 1978. Sec. 2 (w.e.f. 1st January, 1975)
8.	West Bengal	31st December, 1976, *vide* West Bengal Act No. 33 of 1972. Sec. 3 (w.e.f. 1st January 1971).

1. *See* now the Limitation Act, 1963.

2. Subs. by Act 9 of 1969, Sec. 2.

4. Repeal and Saving.— (1) The Public Wakfs (Extension of Limitation) Ordinance, 1959 (2 of 1959), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 20th day of July, 1959.

APPENDIX VI

STATEMENT OF OBJECTS AND REASONS OF WAKF (AMENDMENT) ACT, 1984

The Wakf Act, 1954, (29 of 1954) provides for the better administration and supervision of *wakfs*, the working of the Wakf Boards establishes under the Wakf Act is, however, not satisfactory and in most cases these Boards have failed to achieve the very purpose for which they have been established. Further, the financial position of most of these Boards is also not happy. The question of toning up the administration of *wakfs* so as to protect and properly manage *wakf* properties by taking necessary measures, including legislation, have been engaging the attention of the Central Government. A committee known as the Wakf Inquiry Committee was accordingly constituted by the Central Government for the purpose of evaluating the working of the Wakf Act and for making an inquiry into the administration of *wakfs* at all levels in respect of States to which the provisions of the Wakf Act are applicable.

2. The Wakf Inquiry Committee made a large number of recommendations which envisage a thorough re-structuring of *wakf* administration designed to improve the financial position of the *wakf* institutions and to plug the loopholes noticed in the working of the Wakf Act. The Report of the Wakf Inquiry Committee was examined by the Central Government in consultation with the State Governments, the Central Wakf Council, Chairman of the Wakf Boards, Muslim MPs. and the Minorities Commission. Various views and different shades of opinion on the subject were expressed at different forums. The Bill, which is mainly based on the recommendations of the Wakf Inquiry Committee, takes into consideration the various views expressed in this behalf.

3. The Bill seeks to make, *inter alia,* amendments to the Wakf Act, 1954, in relation to the following matters, namely:

(i) to ensure uniformity of the *wakf* legislation throughout India and in particular, in the State of part of the State in which the Act is not in force;

i) the Wakf board shall consist of eleven members, of which two shall be members of Parliament to be elected from amongst themselves by the Muslim members elected to Parliament from the State, two shall be elected by the Muslim members of the State Legislature from amongst themselves, the Wakf Commissioner, who shall be the *ex officio* Member-Secretary, and six other Muslim members to be nominated by the State Government from amongst the different categories of persons specified in Sec. 10. The Chairman of the Wakf Board shall be elected by the members thereof from amongst themselves. The Wakf Commissioner shall not, however, be elected as the Chairman;

(iii) to provide for the appointment of Wakf Commissioners in the States from amongst persons professing Islam who are holding any post in the Government of the concerned State in the senior scale of the Judicial Service of the State or any post in the senior scale of any Administrative Service in the State;

(iv) to enlarge the powers of the State Government with regard to the control and supervision of *wakfs;*

(v) to strengthen the provisions of accounting and audit of the accounts of the *mutawallis* and to make it obligatory for the Wakf Commissioner to carry out at least once in two years a detained inspection of the *wakfs* in the State having an annual income of not less than twelve thousand rupees;

(vi) to impose restrictions with regard to the alienation of *wakf* property;

(vii) to provide for the appointment of Tribunals for the speedy determination of the disputes, question or other matters relating to *wakfs;* every such Tribunal is to consist of one person who shall be member of the State Judicial Service holding a rank not below than that a District Judge or a Civil Judge, First Class;

(viii) to bring all *wakf-alal-aulad* within the purview of the Act and to provide that a *wakf* by user shall not cease to be a *wakf* by reason of non-user for any length of time;

(ix) imposing restriction on the powers of *mutawalli* to grant leases of immovable properties of *wakfs*. It has been provided that no lease of any immovable property

for any period exceeding three years shall be made and that lease or sub-lease exceeding a period of one year but not exceeding a period of three years shall be void unless it is made with the previous sanction of the Board;

(x) Wakf Commissioner shall be empowered to frame schemes for the proper administration of *wakfs* and to take over, in certain cases, the direct management of *wakfs;*

(xi) the Central Government is also being empowered—

(a) to lay down general principles and policies of *wakf* administration in so far as they relate to the secular activities of the *wakfs;*

(b) to co-ordinate the functions of the Central Wakf Council, the Wakf Commissioners and the Boards, in so far as they relate to their secular functions of the *wakf;*

(c) to review administration of the secular activities of the *wakfs* generally and to suggest improvements, if any.

The other amendments proposed in the bill are of a minor, incidental and consequential nature.

Comment

The Wakf Inquiry Committee made a large number of recommendations. The Report of the Inquiry Committee was examined by the Central Government. The Bill is mainly based on the recommendations of the Wakf Inquiry Committee. The Bill wants to make amendments to the Wakf Act, 1954, in relation to ensure uniformity of the *wakf* Legislation. The Bill wants to provide for the appointment of Wakf Commissioner in the States from among Mussalmans. Power of the State Government and Central Government will be enlarged with regard to control and supervision of *wakf.* There shall be Tribunals for deciding the disputes. The Bill seeks to impose restrictions in relation to alienation of *wakf* property. Instead of the above proposed amendments there are many other amendments which are of a minor nature.

The Wakf (Amendment) Act, 1984 (Act No. 69 of 1984) not included here.

APPENDIX VII

THE KAZIS ACT, 1880

(Act No. 12 of 1880)

An Act for the appointment of persons of the Office of Kazi

[9th *July* 1880.]

WHEREAS by the preamble to Act No. XI of 1864[1] (*An Act to repeal the law relating to the offices of Hindus and Mahommedan Law officers and to the offices of Kazi-ul-kuzaat, and of kazi, and to abolish the former offices,* it was (among other things) declared that it was inexpedient that the appointment of the *kazi-ul-kuzaat,* or of City, Town or Pargana *kazis* should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed; and whereas by the usage of the Mahommedan community in some parts of [2][India] the presence of *kazis* appointed by the Government is required at the celebration of marriages and the performance of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of *kazi;* It is hereby enacted as follows:

Comment

Preamble.— The extracts from the Statement of Objects and Reasons and the preamble to the Kazis Act, clearly show that a *kazi* holds a position of considerable importance in Mahommedan community and that his presence at the celebration of marriages and at the performance of certain other rites and ceremonies is considered essential by Mahommedans. Therefore the contention that a *kazi* performs not only secular duties but also certain religious duties, has to be upheld.[3]

1. Short title.— This Act may be called the Kazis Act, 1880;

[4][* * * * * * *]

Local extent.— It extends, in the first instance, only to the territories administered by the Governor of Fort Saint George in Council. [5][But the Government of any other State] may, from time to time, by notification in the Official Gazette, extend it to the whole or any part of the territories under its administration.[6]

2. Power to appoint Kazis for any local area.— Wherever it appears to the State Government that any considerable number of the Mahommedans resident in any local area desire that one or more *kazis* should be appointed for such local area, the State Government may, if it thinks fit, after consulting the principal Mahommedan residents of such local area, select one or more fit persons and appoint him or them to the *kazis* for such local area.

If any question arises whether any person has been rightly appointed *kazi* under this section, the decision thereof by the State Government shall be conclusive.

The State Government may, if it thinks fit, suspend or remove any *kazi* appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the State Government unfit, or personally incapable, to discharge the duties of the office.

Comment

Appointment of Kazi—Power of the State Government.— Under Sec. 2 of the Kazis Act,

1. Rep. by Act 8 of 1868.
2. Subs. by the A.O. 1950, for "the Provinces".
3. *Khazi Mohd. Abbas Ali* v. *Andhra Pradesh Wakf Board,* A.I.R. 1979 A.P. 116 at p. 120.
4. The words "and it shall come into force at once" rep. by Act 10 of 1914, Sec. 3 and Sch. II.
5. Subs. by Act 3 of 1951, Sec. 3 and Schedule for "But the Government of any other Part A State or the Government of a Part C State".
6. The Act has been extended to certain places in the Bombay Presidency, West Bengal, U.P., Punjab, C.P. and Assam.

1880, it is the State Government that has to appoint a *kazi* after consulting the principal Mahommedan residents of such local areas.[7]

3. Naib Kazis.— Any *kazi* appointed under this Act may appoint one or more persons as his *naib* or *naibs* to act in his place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any *naib* so appointed.

When any *kazi* is suspended or removed under Sec. 2, his *naib* or *naibs* (if any) shall be deemed to be suspended or removed, as the case may be.

4. Nothing in Act to confer judicial or administrative powers; or to render the presence of kazi necessary; or to prevent any one acting as kazi.— Nothing herein contained, and no appointment made hereunder, shall be deemed—

(a) to confer any judicial or administrative power on any *kazi* or *naib kazi* appointed hereunder; or

(b) to render the presence of a *kazi* or *naib kazi* unnecessary at the celebration of any marriage or the performance of any rite or ceremony; or

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

7. *Khazi Mohd. Abbas Ali* v. *Andhra Pradesh Wakf Board*, A.I.R. 1979 A.P. 116 at p. 120.

APPENDIX VIII

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

(Act No. 25 of 1986)

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty seventh year of the Republic of India as follows: –

1. Short title and extent.— (1) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions.— In this Act, unless the context otherwise requires.—

(a) "divorced woman" means a Muslim woman who was married according to Muslim law and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law;

(b) "iddat period" means in the case of a divorced woman.—

(i) three menstrual courses after the date of divorce, if she is subject to menstruation; and

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;

(c) "Magistrate" means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure 1973 in the area where the divorced woman resides.

(d) "prescribed" means prescribed by rules made under this Act.

3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.— (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her.

make an order, within one month of the date of the filing of the application directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard

of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub- section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973, and may sentence such persons, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.— (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportion in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board established under Section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5. Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974.— If on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973; and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.— For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

6. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purpose of his Act.

(2) In particular and without prejudice to the foregoing power, such rules may provide for—

(a) the form of the affidavit or other declaration in writing to be filed under Section 5;

(b) the procedure to be followed by the Magistrate is disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters;

(c) any other matter which is required to be or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session of the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Transitional provisions.— Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973 pending before a Magistrate or the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

APPENDIX IX

THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937

(Act No. 26 of 1937)

An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims[1] * * * *

[7th *October*, 1937]

Whereas it is expedient to make provision for the application of the Muslim Personal Law *(Shariat)* to Muslims[1] * * *; It is hereby enacted as follows:

1. Short title and extent.— (1) This Act may be called the Muslim Personal Law *(Shariat)* Application Act, 1937.

(2) It extends to the whole of India except [2][the territories which, immediately before the 1st November, 1956, were comprised in Part B States][3] * * *

2. Application of Personal Law to Muslims.— Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila zihar, lian, khula* and *mubaraat,* maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law *(Shariat)*.

Comment

Question of legitimacy.— A close reading of Sec. 2 of the Central Act 26 of 1937 and Sec. 16 of the Madras Civil Courts Act, 1873, indicates that they do not deal with the law relating to legitimacy. It is true, they refer to the law of succession and wherever the parties are Muslims, the Court has to decide their rights with reference to the Muslim law of succession. But the law relating to legitimacy cannot be taken to be a part of the law of inheritance or succession.[4]

3. Power to make a declaration.— (1) Any person who satisfies the prescribed authority—

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of Sec. 11 of the Indian Contract Act, Act 1872, (9 of 1872), and

(c) that he is a resident of [5][the territories to which this Act extends],

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [6][the provisions of this section] and thereafter the provisions of Sec. 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Comment

Section 112 of the Evidence Act, is very general in its terms and it applies to all persons including Mahommedans who may have a personal law of their own relating to legitimacy as there

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1. The words "in the Provinces of India" omitted by the A.O. 1950.

2. Subs. by the Adaptation of Laws (No. 3) Order, 1936, for "Part B States".

3. The words "excluding the North-West Frontier Province" omitted by the A.O. 1948.

4. *A. G. Ramachandran* v. *Shamsunnissa Bivi,* A.I.R. 1977 Mad. 182 at p. 185.

5. Subs. by the Adaptation of Laws (No. 3) Order, 1956, for "a Part A State or a Part C State".

6. Subs. by Act 16 of 1942, Sec. 4, for "this Act".

is no provision exempting them from the application of Sec. 112.[7]

4. Rule-making power.— (1) The State Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(b) for prescribing the fees to be paid for the filing of declaration and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

5. *Dissolution of marriages by Court [in certain circumstances.]— Rep. by the Dissolution of Muslim Marriages Act, 1939 (8 of 1939), sec. 6.*

6. Repeals.—[8][The undermentioned provisions] of the Acts and Regulation mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:

(1) Sec. 26 of the Bombay Regulation IV of 1827;

(2) Sec. 16 of the Madras Civil Courts Act, 1873 (3 of 1873);

[9][* * * * *]

(4) Sec. 3 of the Oudh Laws Act, 1876 (18 of 1876);

(5) Sec. 5 of the Punjab Laws Act, 1872 (5 of 1872);

(6) Sec. 6 of the Central Provinces Laws Act, 1875 (20 of 1875); and

(7) Sec. 4 of the Ajmer Laws Regulation, 1877 (Reg. 3 of 1877).

Comment

Questions of legitimacy whether come under Sec. 16 of the Madras Civil Courts Act read with Sec. 2 of the Muslim Personal Law (Shariat) Application Act, 1937.— Legitimacy may be a matter relevant for deciding the claims relating to succession but it cannot be said that it is part of the law of succession. The question whether a particular is legitimate or not can arise not only with reference to succession but also with reference to various other matters. It is not correct to say that questions of legitimacy will come under Sec. 16 of the Madras Civil Courts Act, read with Sec 2 of Act 26 of 1937, so as to say that the Court is bound to apply the presumption under the Mahomedan law on question of legitimacy and not the presumption contained in Sec. 112. Therefore, the presumption under Sec. 112 of the Evidence Act should be taken to have superseded the Mahomedan law relating to legitimacy to the extent of any inconsistency between the two of the Evidence Act.[10]

THE PUBLIC WAKFS (EXTENSION OF LIMITATION) (DELHI AMENDMENT) ACT, 1982

(Act No. 39 of 1982)*

[19*th August,* 1982]

An Act further to amend the Public Wakfs (Extension of Limitation) Act, 1959, as in force in the Union territory of Delhi.

Be it enacted by Parliament in the Thirty-third Year of the Republic of India as

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7. *A. G. Ramchandran* v. *Shamsunnissa Bivi*, A.I.R. 1977 Mad. 182 at p. 184.

8. Subs. by Act 16 of 1942, Act 16 of Sec. 3, for "Provisions".

9. The words, figures and brackets "(3) Sec. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887" "omitted by *ibid.*"

10. *A. G. Ramchandran* v. *Shamsunnissa Bivi*, A.I.R. 1977 Mad. 182 at p. 185.

follows:—

1. Short title, extent and commencement.— (1) This Act may be called THE PUBLIC WAKFS (EXTENSION OF LIMITATION) (DELHI AMENDMENT) ACT, 1982.

(2) It extends to the whole of the Union territory of Delhi.

(3) It shall be deemed to have effect from the 1st day of January, 1981.

2. Amendment of section 3 of Act 29 of 1959.— In section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, as in force in the Union territory of Delhi, for the words, figures and letters "the 31st day of December, 1980," the words, figures and letters "the 31st day of December, 1985" shall be substituted.

APPENDIX X

THE WAKF ACT, 1954

(29 of 1954)

LIST OF AMENDING ACTS

69. 1. The Wakf (Amendment) Act, 1959 (30 of 1959).
2. The Wakf (Amendment) Act, 1964 (34 of 1964).
3. The Wakf (Amendment) Act, 1969 (38 of 1969).

The following enactments, namely:—

(1) The Mussalman Wakf Act, 1923;

shall not apply to any wakf to which this Act applies.

(2) If, immediately before the commencement of this Act in any State, there is in force in that State any law which corresponds to this Act [other than an enactment referred to in sub-section (1)] that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action was taken.

[1][70. If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the purposes of this Act, as appear to it to be necessary or expedient for removing the difficulty.

1. Ins. by s. 24, *ibid.*

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