CHAPTER XXVI.

MISCELLANEOUS PRINCIPLES.

THERE are numerous decisions under the Mussulman law regarding the rights of creditors against the estate of a deceased Mahommedan. By way of illustration I give here a few references. It has been held that under the Mahommedan law, a decree against one heir of a deceased debtor cannot bind the other heirs.(1) It has been further laid down that under the Mahommedan law, the estate of an intestate descends in its entirety, together with all the debts due from and owing to the deceased. The creditor of an intestate Mahommedan must, therefore, enforce his claim against the estate in a suit properly framed for the purpose. Such a suit is properly framed if all the persons in possession of that particular portion of the estate, which it is intended to charge, are made parties to it. The right of a Mahommedan heir claiming the property of his deceased ancestor, who died indebted, is a right of representation only, and except as representative he has no right to the property whatsoever.(2)

The creditor of a deceased Mahommedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of *lis pendens*.(3) The debts of a deceased Mahommedan are not a charge

---

(1) *Sita Nath Dass* v. *Roy Luchhmiput Singh*, 11 C. L. R., 268; *Assamathemnissa Bibi* v. *Roy Lutchmeepat Singh* [1878], I. L., 4 Cal., 142; s. c., 2 C. L. R., 223.

(2) *Ibid.*

(3) *Bazayet Hossein* v. *Dooli Chund* [1878]. I. L., 4 Cal., 402; s. c., L. R., 5 I. A., p. 211; *Land Mortgage Bank* v. *Roy Luchmiput Singh*, 8 C. L. R., 447.

upon the estate which gives the creditor a priority over all persons who after his death purchase or take a mortgage of his estate.(1)

The Calcutta High Court has held that when a creditor of a deceased Mahommedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.(2) This view, however, has been dissented from by the Allahabad High Court, which has held that upon the death of a Mahommedan intestate the ownership of his estate devolves immediately on his heirs, and such devolution is not contingent upon and suspended till the payment of his debts.(3) A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Mahommedan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are not in possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interest of those heirs who were not parties to the decree.(4)

According to Mahommedan law, a gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one-third of the deceased's whole property, the remaining two-thirds going to the heirs. In the absence of heirs, a will carries the whole property.(5)

It has been held that the consent given by heirs to a testator's will before his death is no assent at all; to be valid, it must

(1) See *Bazayet Hossein* v. *Dooli Chand* [1878], L. R., 5 I. A., 211; s. c., I. L., 4 Cal., 402; *Land Mortgage Bank* v. *Bidyadhari Dasi*, 7 C. L. R., 460.

(2) *See* also *Muttyjan* v. *Ahmed Ally*, I. L., 8 Cal., 370, and *Amir Dulhin* v. *Baij Nath Singh* [1894], I. L., 21 Cal., 311.

(3) *Pirthi Pal Singh* v. *Hussaini Jan* [1882], I. L., 4 All., 361; *Jafri Begum* v. *Amir Muhammad Khan* [1885], I. L., 7 All., 822.

(4) *Ibid.*

(5) *Ekin Bebee* v. *Ashruf Ali*, 1 W. R., 152. With regard to the invalidity of Wills divesting heirs of their right of inheritance or made without their consent, see the following:—*Jumeenooddeen Ahmed* v. *Hossain Ali*, 2 W. R. Mis., 49; *Qadir Ali Khan* v. *Nowsha Begum*, 2 Agra, 154: *Mahomed Mudun* v. *Khoderunnessa* alias *Khookee Bibee*, 2 W. R., 181; *Muhammad* v. *Imamuddin*, 2 Bom., 53, 2nd Ed., 50; *Abedoonnissa Khatoon* v. *Ameeroonnissa Khatoon*, 9 W. R., 257.

be given after the testator's death.(1) This must be confined, however, to persons subject to the Hanafi Law.

A Mahommedan testator, who died in 1861, by his will left his property in equal four shares to his second and third sons, V and E, to the lawful son (if any) of his eldest son M and to his (the testator's) brother A. His eldest son M he disinherited. He directed that the property was not to be divided until V and E had attained the age of twenty, and as to the share of the lawful son of M it was to be held in trust until such son should reach the age of twenty. At the time of the testator's death no son of M was living. Shortly after his death, a son was born to M, but he lived only a few months. The testator's brother A was appointed executor of the will. In 1878, V and E sued the executor A and his son S for an account and division of the property, and by a consent decree passed in 1881 three-fifths of the property were given to V and E, and the remaining two-fifths to A and S. The estate was duly divided in accordance with the decree, and the parties got possession of their respective shares. In February 1884, another son was born to M, and in May 1884 the infant brought this suit by his father and next friend, claiming to be entitled, on his attaining the age of twenty, to one-third of the property received by V and E, under the consent-decree. It was held that the plaintiff could not recover, not having been in existence at the date of the testator's death.(2) It is submitted that the principle is laid down here much too broadly, for under the Mahommedan Law if the devise is first to a person in existence and then to a person *not* in existence it is valid.

A Mahommedan testator directed by his will that his immovable estate should not be divided or alienated by any of his heirs, and that his executor should appropriate the net income, according to a schedule annexed to his will, among certain specific persons divided into two classes, *viz.*, those who took and those who did not take by inheritance. It was held that the intention of the testator was to endeavour to prevent any partition of the estate

---

(1) *Nusrut Ali* v. *Zeinunnissa*, 15 W. R., 146; *Cherachom Villal Ayisha Kutti Umah* v. *Vaiia Pudiakel Biathu Umah*, 2 Mad., 350.

(2) *Abdul Cadur Haji Mahomed* v. *Turner* (*Official Assignee*) [1884], I. L., 9 Bom., 158.

and not to convert his heirs-at-law into mere annuitants taking grants from him. The executor held the estate in trust to pay the profits in certain defined shares to the heirs, and his representatives could not plead adverse possession against them so as to bar their claims by lapse of time.(1).

(1) *Khajoorunnissa* v. *Rohemunnissa*, 17 W. R., 190.

CHAPTER XXVII.

THE LAW OF WILLS (SHAFEI DOCTRINES).

Section

General Observations.

The power of devising by will.

The power to will is vested in everybody, Moslem or non-Moslem, without distinction of sex, who is *sui juris*, possessing reason, who is free, and, "according to the Shâfei doctrines," not labouring under the inhibition of imbecility.

The power is not given to an alien, to a person in an unconscious state, or to a minor, though a jurist has maintained that this prohibition should not extend to a minor, who has attained the age of discretion. According to some jurists, the will of a bondsman is not valid unless he had been liberated after he had made his will, and had died without having revoked the same.

Testamentary dispositions in favour of the public must have a lawful object; thus a will cannot be made for the support of a Christian church or a synagogue. A legacy in favour of one or more individuals is lawful if the person or persons designated are capable of exercising the right of proprietorship. Thus, a legacy in favour of a child *en ventre sa mère* only takes effect on the two-fold condition, that such child should be born alive, and that the conception should have taken place before the disposition, that is to say, that the birth should take place before six months should have elapsed from the date of the will. If the birth takes place beyond the period of six months, the child is supposed not to have been conceived previous to the testamentary disposition, at least if the parents have not ceased to cohabit with each other. In the opposite case, conception is admissible for a maximum term of four years.(1) A will in favour of a

(1) This doctrine is, however, not in force now; see Mahommedan Law, Vol. II, p. 193.

bondsman reverts to the master, unless he has been enfranchised before the testator's decease. As for subsequent liberation, followed by an acceptance on the part of the slave, the result depends upon the question, whether the possession of the legacy has been acquired or not before the death of the testator. Testamentary dispositions in favour of animals are absolutely void, whether the intention was expressed to constitute the animal as proprietor, or whether nothing to that effect had been mentioned; but if a declaration has been made that the animals should never want for necessary food, traditional doctrine admits the validity.

A legacy for the support of a mosque is legal, and even a will "in favour of a mosque," without adding anything else. However, in this case, the disposition is supposed to have been made, not only for the support, but also for the embellishment of the edifice. Moreover, a will may be made in favour of a non-Moslem, either subject to a Mahommedan sovereign or not, of an apostate, and of one's own murderer. A legacy in favour of an heir can only take effect with the unanimous consent of the co-heirs, pronounced after the succession has passed. This consent is necessary even if the co-heirs renounce the succession, *and it cannot be given before the death of the testator*, as the disposition is only rendered invalid by the existence of co-heirs at the time of the decease, and this cannot be declared previously. A testamentary disposition, the effect of which is to leave each heir his legitimate inheritance, is null and void; but there is no impediment against giving any one heir, by testament, any particular thing being the value of the portion due to him by law. Only the act must be approved of by the co-heirs. Wills in favour of *Zimmis*.

A person may lawfully devise the following objects:—

1. The usufruct of things that do not suffer in the course of time.

2. The future fruit of a tree, the future young of an animal, &c.

3. One of two objects, the legatee to take his choice.

4. An impure thing, provided its use is not prohibited by law, for example a trained dog, the juice of grapes not meant for fermentation, &c.

A legacy worded as "one of my dogs," must be carried out by the heir giving any dog belonging to the defunct, and the disposition is null and void if the testator possessed none. A person, who possesses many dogs among his property, may give away all or some of them by will, even if the dogs constitute the major portion of the heritage. If a person possess two drums, the one a musical instrument for amusement, the other an instrument to be used legitimately—for example, a war-drum, or a drum used by pilgrims, the bequest of "a drum" without further particulars would refer to the latter. Furthermore, a special legacy of a drum for amusement is null and void, unless it can, at the same time, be used for warlike purposes and pilgrimages.

Section II.

Rules as to the Third.

Testamentary dispositions should not exceed the third of the property of the testator; and such as have been made contrary to the precepts of the law will be reduced to the allotted portion, upon demand of the heir or heirs. When, on the other hand, the heir declares his approval of the disposition, it takes effect, whatever the amount may be; but, according to one jurist, it is then considered as a pure donation by the heir.

The reduction is determined by collecting all the property existing on the day of the decease, or, according to others, on the day the disposition is made. By the dispositions to which effect should be given out of the third are understood to be the following:—

(1) Gratuitous emancipation which is to be effected upon the death of the testator.

(2) Voluntary dispositions, such as *wakfs* and *hibas*, constituted during the last illness.

(3) Payment of lawful debts.

In case all these should exceed the disposable third, the following rules must be observed in the reduction:—

1st. When the testamentary disposition consists simply of a direction to enfranchise slaves, lots must be drawn in order to

decide which of them should be deprived of his liberty in consequence of the reduction.

2nd. When the testamentary dispositions consist of bounties of different kinds, all are subject to a proportionate reduction.

3rd. When the dispositions include the liberation of bondsman as well as other bounties, the portions available must first be divided in proportion to the two categories of the legacy, and then the same rule as we have mentioned in the 1st and 2nd clauses must have effect.

A person, who is suffering from an illness from which there is an apprehension of death, cannot make a valid disposition of more than one-third of his available assets; but if he recovers against all hope, his dispositions cannot be impugned. If a person be suffering from a slight illness involving no danger to his life, he can dispose of his property unrestrictedly; and even if he dies unexpectedly during this illness his dispositions take their full legitimate effect. This would not be the case if the death was the natural result of the illness from which he was suffering, though it be not considered of a dangerous nature, for under such circumstances it proves itself to have been mortal. In case of uncertainty about the character of the disease, it must be referred to two doctors, free and irreproachable. The following are considered by the law to be dangerous diseases:—colic, pleurisy, incessant bleeding from the nose, chronic diarrhœa, hectic fever, the commencement of (even partial) paralysis, the vomiting of food without its having undergone any change in the stomach, and even vomiting in general if it is very bad and accompanied by pains and effusion of blood, continual or intermittent fever, but not ague. "The following circumstances are assimilated by 'our' doctrines to mortal diseases:—having been made prisoner of war by infidels who give no quarter; being in a routed army corps, assailed by the conqueror; having been condemned to death in retaliation, or to be stoned to death; being in a vessel during a storm, or in a rough sea; a woman undergoing great labour-pains, be it before or after confinement, as long as the fœtus has not severed the membrane." Marz-ul-mout.

Testamentary dispositions are formulated thus:—"I leave to him such or such thing," "Remit it to him," "Give it to him after my death," "I make it his," "It shall be his after my

death," but in saying only, "It is his," not a legacy but an avowal is pronounced. On the contrary, if it be said—"It is his in my succession," it is a valid testamentary disposition. "Testamentary dispositions can be formulated in another manner, which, though not so explicit, equally indicates the last will, for example, a written statement containing the will given to the witnesses."

Legacy in favour of a class.

A legacy in favour of a class of people, as for example, "the poor" need not be accepted expressly, but the decease of the testator renders it irrevocable; while, on the contrary, a legacy in favour of one or two specific people must be formally accepted by them. This acceptance, like the repudiation of a legacy, cannot take place during the testator's lifetime, and it is, even, not customary that the legatee should declare his wish immediately upon the testator's decease. A legacy becomes null by the pre-decease of the legatee; if he dies after the testator but before having accepted the legacy, the right of acceptance devolves upon his heirs. As regards the question,—when does the property become the legatee's, some jurists consider he becomes entitled to possession immediately upon the death of the testator, provided he accepts the legacy; others maintain that he only becomes the proprietor upon accepting it; others, again, hold that previous to the acceptance the legacy is suspended, but that the legatee is the actual possessor from the time of the testator's death if he accepts, otherwise the heirs are presumed not to have lost possession thereof. The three different doctrines we have enunciated on the subject of legacy between decease and acceptance, also exist with regard to fruit and to earnings realised by a bequeathed bondsman as well as with regard to other expenses, such as the support of a bondsman and the money to be paid to him for observing a fast. According to the authors, who admit that a legacy remains suspended until the legatee has accepted or rejected the same, he must, nevertheless, provide for the temporary support of the bondsman or of the animal bequeathed.

Section III.

The Legatees.

If a person were to bequeath "a sheep from my flock," the disposition will be void if the testator possessed no flock of sheep; but if he had said "a sheep from my inheritance," in case the

testator should leave no sheep, one must be bought and given to the legatee.

Constitution of a legacy.

A legacy in favour of "the child of which a certain woman is *enceinte*," devolves upon the two children if she gives birth to twins; and upon the child born alive, if she gives birth to twins of which one is still-born. If, on the contrary, the testator added, "if it be a boy," or "if it be a girl," the birth of twins, if one be a boy and the other a girl, renders the disposition null and void. The legacy can only be claimed by the boy exclusive of the girl, should the testator have added, "if she bears a boy." Finally, a legacy worded thus is also valid, "in case the woman in question should give birth to two twin boys;" and the heir can, under these circumstances, give the bequeathed object to one of the children according to his own choice.

A legacy in favour of a person's "neighbours" extends to forty houses in four different quarters; a legacy in favour of "learned men" includes all those who study law, that is, the Koran, the traditions of the Prophet and jurisprudence. But it does not extend to simple readers of the Koran, to men of letters, interpreters of dreams and doctors, nor, according to most jurists, to theologians, properly speaking. This archaic rule, however, has been considerably modified in recent times.

Legacy in favour of the poor.

A legacy in favour of the poor also implies the indigent and *vice versâ*; in both cases, the legacy must be divided into two equal portions—one for each class, provided it consists of at least three persons. The testator may, also, bequeath to one of the persons of the category in question, more than to the others who have the right; while, according to "our" doctrines, a legacy "to such a person and to the poor," results in the person designated not receiving more than one separate portion, however little that portion may be, so long as there is some value. Only the person mentioned must not be entirely excluded.

One may also bequeath not only to a certain category of people without indicating the number of individuals of which it is composed, for example "to the Alides" (the descendants of the Caliph Ali), but also to a fixed number, for example, "to three persons" of a certain category, and "to the relations" of a certain person. Regarding this latter form of legacy, it must be remarked that it implies all the relations even the most distant,

excepting relations in the direct line, be it ascendant or descendant. However, the relatives on the mother's side are not understood in the testamentary dispositions made by the Arabs in favour of "relations" unless specially mentioned. In order to find out the "relatives" of the person favoured by the testator—you must take the nearest ascendant, and this person's descendants remaining in the tribe, are those the testator must be considered to have had in view. If, on the other hand, the testator used the expression, "the nearest relatives" the distinction applies also to the direct line, always providing that the son takes precedence over the father, and the brother over the paternal grandfather, but beyond these exceptions the law gives no preference under these circumstances to either sex. The father and mother, sister and brother are all equal participators in the legacy, and even the son of the daughter takes precedence over the agnatic great-grandson. A legacy in favour of a person's own relatives (*akriba*), does not include the rightful heirs.

What may be bequeathed.

One can bequeath the usufruct of a house, as well as the lease of a shop. The sale of a thing, the usufruct of which to the extent of one-third has been bequeathed for a limited period of time, has the same consequences as the sale of any other object; but a perpetual usufruct may not be sold unless to the legatee.

A person may legitimately direct his heir to make, or to cause to be made, a voluntary pilgrimage which he himself intended to undertake. In this case, the heir must pay the journey to Mecca, from the station fixed by the law, unless the deceased mentioned any special town whence the pilgrimage should start. As regards the obligatory pilgrimage neglected by the deceased, this act of devotion falls to the charge of the bulk of the property; though, if the testator has enjoined the heir to bear the costs either from the bulk or from the disposable third, his last will must be regarded. If the deceased expressed no wish on this point, the charge imposed upon the heir to accomplish the neglected compulsory pilgrimage, falls upon the bulk, although some hold that it must come out only of the disposable third; but in every case this charge relates to the journey commencing from the station fixed by the law. Any person, though he be not one of the family, can make the necessary pilgrimage on behalf of the deceased, without any express mandate from him

The heir must also take upon himself the discharge of pecuniary liabilities for expiations fixed by the deceased, the fulfilment of which had been neglected. With regard to other expiations, the heir may, according to his own choice, give food or clothing to the poor, if necessary, and even enfranchise a bondsman. In any case, and whatever be the nature of the expiations, the heir can fulfil it at his own cost if the inheritance be not adequate, and it counts equally as an act of the deceased. If the expiation is made by a person other than a member of the family, the conditions are the same as regards the distribution of food and clothing, but not if the expiation consists in enfranchising a bondsman. The soul of the deceased is benefited by alms and pious invocations made on his behalf, whether they be offered by his heirs or any other persons.

A testamentary disposition is wholly or partially revocable. It may be revoked :— Revocation.

1. Verbally, for example, by pronouncing the words "I cancel the will," "I annul it," "I revoke it," "I renounce it," or "the thing which I have bequeathed, shall nevertheless be my heirs."

2. By the fact of having disposed of the bequeathed object, by sale, enfranchisement, marriage, gift, or by pledging it, even if, in the two latter cases, the seisin by the donee or the creditor has not taken place.

3. By a charge imposed in a later will upon the heir to dispose of the object bequeathed in any manner mentioned in para. 2.

4. By the order to sell the thing bequeathed, by putting it up for sale, even if unsuccessfully, or by the fact of mixing other objects with the thing which has been bequeathed. If a particular kind of wheat is bequeathed and it is mixed with some other wheat, that very fact is sufficient to constitute an ademption even though the wheat added to the heap is of a superior quality. But if it be of equal, or inferior quality, the fact of having mixed it with the first wheat, does not constitute a revocation of the bequest. Revocation also results from the following facts :—from having ground the bequeathed wheat, having sown one's field with it, having made the bequeathed flour into bread, having spun the cotton bequeathed, having woven the threads bequeathed,

having made a bequeathed piece of stuff into a shirt, having built or planted upon bequeathed ground.

Executor.

The Prophet has introduced the custom of appointing testamentary executors, to take charge of the payment of the testator's debts, of the execution of his last will, and the guardianship of his infant children. An executor must be a Moslem, *sui juris*, possessed of full reason, free, irreproachable and capable of the charge entrusted to him. A non-Moslem subject of a Mussulman prince may be appointed executor by a co-religionist; nor is blindness any cause for incapacity.

Mother can be appointed guardian of her children.

The law does not exact that the executor should be of the male sex; the mother of the infant children ought to be considered more capable of bringing them up than any other person.

An executor must be deposed for notorious bad conduct; this principle applies also to a Judge, but not to the Head of the State.

This right of appointing an executor to undertake the payment of debts and the execution of the last will of the testator is accorded to all Mussulmans of age, possessed of understanding and free; but the right of vesting the executor with the guardianship of young children, belongs exclusively to the person who is their legitimate guardian. An executor cannot in his turn appoint by will a person to replace him after his own death, unless such power had been given him by the primary testator. Nothing prevents the nomination of two executors to succeed one another: this can be done by the words, "I make you my testamentary executor until the majority of my son," or "until the arrival of Zaid and then my son," "or Zaid will take charge of this will." On the other hand, a testamentary executor cannot be appointed to the guardianship of the children, during the lifetime of their paternal grandfather, their natural guardian, if he is capable of undertaking the guardianship.

Derivative executorship.

It is prohibited to give the executor the power of making a contract of marriage for the son of the deceased during minority or to represent the daughter of the deceased in a similar contract.

The words by which an executor may be appointed are:—"I nominate you my testamentary executor," "I entrust my affairs to you," etc.; but there is no impediment against adding a suspensive condition. Besides this, the duty with which the executor

is being charged must be clearly defined, for if nothing more is said than, "I nominate you my executor," the disposition is void. The nomination of an executor has no effect before the duty has been accepted, and this acceptance must take place during the testator's lifetime.

If the testator has appointed two executors, neither of them can act without the assistance of the other, unless the power has been formally given to him. The testator can revoke the nomination at any time, and the executor can renounce it even after acceptance if he think fit. Upon an infant attaining majority, an executor charged with the guardianship must give an account of his administration, and in case of difference the law presumes in favour of the executor's words, if the question concern the minor's maintenance. On the other hand, the law presumes in favour of the latter if the dispute relates to any sum which the executor maintains he gave to his ward after he attained majority.

CHAPTER XXVIII.

THE LAW OF PRE-EMPTION (*SHUFA'A.*)

SECTION I.

GENERAL OBSERVATIONS.

Meaning of the word *Shufâ'a.*

The right of pre-emption or *Shufâ'a* means the right possessed by one person to acquire a property sold to another in preference to that other by paying a price equal to that settled, or paid by the latter ; and in the Mahommedan system owes its origin to motives of expediency and a desire to prevent the introduction of a stranger among co-sharers and neighbours likely to cause inconvenience or vexation.

The Sunni Hanafi Law of Pre-emption was introduced in India with the Mahommedan Government, and in certain places it has become a part of the *lex loci ;* for example in Behar, (1) parts of the Punjab and the United Provinces, both Hindus and Mahommedans are entitled to claim the right of pre-emption. And so well-established is that right, that it is almost invariably recorded in greater or less detail in the village-administration-papers called the *Wajib-ul-Arz.*

In other places the right depends on custom. Generally speaking in Lower Bengal the right is confined to Mahommedans, but in some places Hindus and Christians have exercised the right of pre-emption.

Hanafi Law.

It applies only to immovable property, whether held jointly or separately, and whether capable of partition or not, and comes into operation when the property in respect of which the right is claimed is transferred for a *consideration.*

To entitle a person to claim the right of pre-emption, the *milkiat* or proprietary interest in the property on which he bases his right must be in him, but it is not necessary that he should

(1) See *Fakir Rawot* v. *Emam Bukhsh,* B. L. R. Supp. Vol., p. 35.

be in actual possession of it.(1) Thus a tenant(2) or a mortgagee or a mere *benamidar* is not entitled to pre-emption on any of the grounds recognised by law.

A Hindu widow, however, holding a life-estate and not in possession of land merely in lieu of maintenance, represents the full estate, and her possession carries with it the right to pre-empt.(3)

It is not a right of "re-purchase" either from the vendor or from the vendee involving any new contract of sale; but it is simply a right of *substitution* entitling the pre-emptor by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title.(4)

Property in respect of which it is enforceable.

It does not, therefore, take effect with regard to property which has devolved by right of inheritance, or which has been received in gift without any consideration or as a legacy.(5) Nor does it arise in respect of property bailed to another or given in lieu of services rendered or to be rendered, or by way of a reward, or as a compensation for *khulâ*, or as a dower to a wife. In other words, when a woman conveys a property to her husband in consideration of his granting a divorce, or which a man conveys to a wife in consideration of marriage, no right of pre-emption arises thereto. Similarly, if a man were to marry without settling on the wife any dower and after the marriage were to settle on or convey to her a property in lieu of dower, there would be no right of pre-emption. When a property is conveyed to a wife in discharge of the dower-debt, there is also no right of pre-emption. But when a house is sold to a third person in order to enable the husband to satisfy with the proceeds thereof the dower of his wife, the right of pre-emption comes into operation.(6) The reason of these rules is self-evident. The wife conveying to the husband

---

(1) *Sakina Bibi* v. *Amiran* [1888], I. L., 10 All., 472; Comp. *Bani Shankar Snelhat* v. *Mahpal Bahadur Singh* [1887], I. L., 9 All., 480.

(2) *Gooman Singh* v. *Tripolo Singh* [1867], 8 W. R., 437.

(3) *Muhammad Yusuf Ali Khan* v. *Dal Kuar* [1897], I. L., 20 All., 148.

(4) *Gobind Dayal* v. *Inayatullah* [1885], I. L., 7 All., 775, *per* Mahmood, J.

(5) Comp. *Amir Ally* v. *Pearun*, W. R., 1864, 239; *Har Narain Pande* v. *Ram Prasad Misr* [1891], I. L., 14 All., 333.

(6) The decision in *Fida Ali* v. *Mozuffer Ali* [1882], I. L., 5 All., 65, appears to proceed on a wrong interpretation of the law.

and *vice versâ* do not thereby introduce a stranger among co-sharers or neighbours.

Nor does the right of pre-emption apply to leases in perpetuity, however small the rent reserved may be.(1) Nor where there has been no real and *bonâ fide* sale according to Mahommedan Law.(2)

Circumstances under which the right of pre-emption arises.

The right of pre-emption takes effect with regard to property conveyed to another by virtue of a compromise of a claim. For example, if a defendant were to compromise a suit by resigning or making over a house to the plaintiff after having denied his claim, or were to acknowledge it after having refused to accede to it; the right of pre-emption would take effect in respect thereof.

It takes effect also in respect of property conveyed by a *hiba-ba-shart-ul-ewaz*, when the settled consideration has been paid by the transferee, for a *hiba-ba-shart-ul-ewaz* is a sale in its effect. But so long as the *ewaz* has not passed there is no right of pre-emption.

When the right of pre-emption arises.

The right of pre-emption arises only when the contract transferring the right of property from the vendor to the vendee has become complete.(3)

A mere executory contract does not give rise to a right of pre-emption. "Accordingly when a property is sold with a condition of option no right of pre-emption arises, for the power reserved by the seller forms an impediment to the extinction of the seller's right of property and the right of *shufâ'a* is founded and rests upon the extinction of the seller's right of property as has been already explained."(4)

Nor does the right take effect in respect of a transfer made under an invalid sale, for the transferor under such a sale maintains all his rights intact and, so long as he has not delivered the property to the purchaser, can himself exercise his right of pre-emption over the transfer of an adjacent property.

---

(1) *Ram Golam Sing* v. *Nursing Sahoy* [1875], 25 W. R., 43; *Dewanutulla* v. *Kazem Molla* [1887], I. L., 15 Cal., 184.

(2) *Mohno Bibee v. Juggurnath Chowdhry*, 2 W. R., 78.

(3) *Soonder Koer* v. *Lalla Rughoobur Dyal*, 10 W. R., 246; *Bukhsha Ali* v. *Tofas Ali*, 20 W. R., 218.

(4) When the buyer or seller repudiates the sale, the Calcutta High Court has held that there can be no right of pre-emption; *Ojheoonnissa* v. *Rastam Ali*, W. R., 1864, 219.

Accordingly, the right of pre-emption does not arise in respect of a property transferred under an invalid sale either before or after the vendee has obtained possession thereof, "because before possession the house belongs to the vendor and his right of property is not extinguished, and after possession there is still a probability that the bargain may be dissolved since the law admits the dissolution of a sale in case of invalidity."

But when once the vendor's right in the property transferred under an invalid sale has been extinguished and the title has vested in the vendee, he is entitled to exercise the right of pre-emption.

The right of pre-emption again accrues only when a complete transfer of the right title and interest of the transferor has taken place and not where there is a mere agreement to sell or transfer, or where the transfer is only fictitious or, as already stated, the sale is invalid. The question whether the transaction amounts to a complete transfer will be determined on the basis of the Mahommedan Law and not of the Transfer of Property Act.(1)

As a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity(2) or mortgaged even though by a conditional sale until foreclosure of the equity of redemption.(3)

When the right of pre-emption accrues.

Where one co-sharer mortgages his share in a certain property none of the other sharers have any right of pre-emption until the equity of redemption is foreclosed.(4)

And where the transferor has delivered possession of the property and paid the consideration, although no sale-deed has been executed, it has been held that in a suit for pre-emption the Mahommedan Law would apply.(5)

linquish-
nt of the
ht of pre-
ption.

The right of pre-emption is lost by the acquiescence of the claimant in the sale. For example, when he has agreed to pur-

(1) *Najm-un-Nissa* v. *Ajaib Ali Khan* [1900], I. L., 22 All., 343; *Begam* v. *Muhammad Yakub* [1894], I. L., 16 All., 344.

(2) *Baboo Ram Golam Singh* v. *Nursing Sahai* [1875], 25 W. R., 43; *Dewanatullah* v. *Kajemmolla* [1887], I. L., 15 Cal., 184.

(3) *Begam* v. *Muhammad Yakub*, supra; *Gurdial Munder* v. *Teknarayen Singh* [1865], B. L. R., Supp. Vol., 166; s.c., 2 W. R., 215.

(4) *Begam* v. *Mohammed Yakub*, supra.

(5) *Gurdial Munder* v. *Teknarain Singh*, B. L. R., Supp. Vol. 166, s. c., 2 W. R., 215; see also 11 W. R., 282, and 6 B. L. R., App., 114.

chase(1) or to a take a lease of the property from the vendee it amounts to abandonment. In other words the person claiming a right of pre-emption can expressly or impliedly relinquish or waive his right, and once relinquished it cannot be asserted again.(2)

Acquiescence with a knowledge of the sale would amount to waiver. And, accordingly, where it was found that the plaintiff in a suit to enforce the right of pre-emption, whilst alleging that the true consideration for the sale was less than the amount stated in the sale-deed, made no communication to the vendor after he became aware that a sale was being negotiated, nor made it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee, it was held that he had waived his right. The plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the sale-price within a reasonable time, that not having done so he must be taken to have countenanced the completion of the bargain with the vendee.(3) What constitutes acquiescence is a question of fact. Mere offer to take the property from the vendor paying him the sale-price with a view to avoid litigation has been held not to amount to acquiescence or waiver. So, also, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his right of pre-emption.(4)

But when once the right has vested in consequence of a completed contract, the dissolution of the contract by the vendor and the vendee by agreement or in exercise of the right of rejection on discovering any defect would not destroy the right of the pre-emptor to take the property for the price paid by

(1) See *Toral Komhar* v. *Achhee* [1872], 9 B. L. R., 253, s. c., 18 W. R., 401; also 24 W. R., 198; *Abadi Begam* v. *Inam Begam* [1877], I. L., 1 All., 521, where it was held not to have been abandoned.

(2) *Bhairon Singh* v. *Lanman* [1883], I. L., 7 All., 23.

(3) *Habib-un-Nissa* v. *Barkat Ali* [1886], I. L., 8 All., 275.

(4) *Muhammed Nasir-ud-din* v. *Abdul Hassan* [1894], I. L., 16 All., 300; *Muhammad Yunus Khan* v. *Muhammad Yusuf* [1897], I. L., 19 All., 334.

the vendee.(1) For the pre-emptor is no party to the dissolution by mutual agreement between the seller and purchaser, nor can he be affected by the rejection of the vendee as he has no control over the latter's action, and accordingly, when once the right of pre-emption has come into existence, it cannot be destroyed by the action of others,(2) but may be destroyed by his own acts.

In order to debar a party entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger.(3) The ordinary law of pre-emption is not applicable to compulsory sales in execution of decrees,(4) but where a sale is effected by the Collector under the orders of the Civil Court by private contract, the pre-emptive rights of persons entitled thereto were not ousted.(5)

SECTION II.

PERSONS ENTITLED TO PRE-EMPT.

The Sunni Hanafî Law relating to the right of pre-emption is the law in force in this country either territorially or by custom. According to the Hanafî Law three classes of persons are entitled to claim the right of pre-emption, not simultaneously, but in succession to each other. And the right may be claimed by one or more persons equally entitled to it.(6) It appertains:—

Persons entitled to pre-empt.

(1) to the co-sharer in the property, called a *shafî-i-sharîk* "pre-emptor by right of co-parcenary;"

(2) to a sharer in the rights and appurtenances, called a *shafî'i-khalît*,—"a pre-emptor by virtue of a right of easement over the property sold." In other words, persons who have a right of easement in respect of the property which forms the

---

(1) "Neither manhood, puberty, justice, or respectability of character are conditions of pre-emption under the Mahommedan Law," 1 Agra, p. 236.

(2) *Bhadir Mahomed* v. *Radha Churn Bolia*, 4 B. L. R., A. C., 219.

(3) *Kanhai Lall* v. *Kalka Prasad* [1905], I. L., 27 All., 670.

(4) *Baijnath* v. *Sital Singh* [1890], I. L., 13 All., 224.

(5) *Kanhai Lall* v. *Kalka Prasad*, supra.

(6) *Gureeboolla Khan* v. *Kebul Lall Mitter*, 13 W. R., 124.

subject of sale,—to use the language of the Arabian lawyers are " sharers in the appendages," are next entitled to claim the right of pre-emption;

(3) to a person whose property is contiguous to the subject of the sale technically called a *shafî'i-jâr*, " pre-emptor by right of vicinage."

The *shafî'i-sharîk* has a stronger right than the *shafî-i-khalît* and so the latter has a preferential claim to the *shafî-i-jâr*. In other words, one who has actually a share in the property has a stronger claim than a person who has a mere easement over the property. Similarly, a person claiming by right of vicinage or proximity stands in an inferior position to one who possesses a right of easement over the property sold.

Shafi-i-khalit.

In the case of *Gurreebullah Khan* v. *Kubul Lall Mitter*(1) the Calcutta High Court with reference to the word *sharîk* said as follows :—" The term *sharîk* cannot be restricted to cases in which the parties enjoy the properties jointly. In the contemplation of Mahommedan Law those who occupy other houses in the same mansion are regarded as partners together with the person, the sale of whose share in a house gives rise to the question of pre-emption."

A co-sharer has a right of pre-emption in large estates but a neighbour's right is much more restricted.(2)

In the case of *Chand Khan* v. *Niamat Khan*,(3) the owner of a piece of land, through which the land in respect of which the right of pre-emption was claimed received irrigation, was held entitled, and correctly on principle, to a preferential right to purchase against a mere neighbour. In other words, the owner of a dominant tenement is entitled to a right of pre-emption in respect of the servient tenement and *vice versâ*, in preference to a person claiming on the ground of vicinage. In the case of *Ranchondas* v. *Jugaldas*(4) the Bombay High Court has held that the right of support is not an appendage to property; it is merely included in the incident of

---

(1) 13 W. R. 124.

(2) See *post*, p. 722.

(3) [1869], 3 B. L. R., A. C., 296; s. c., 12 W. R., 162.

(4) [1899], I. L., 24 Bom., 414; *Karim* v. *Priyo Lall Bose* [1905], I. L., 28 All., 127.

neighbourhood. And, accordingly, where *A's* house joined the house in dispute towards the east; and *B's* house joined the house in dispute towards the south and was separated from it only by a wall, *B's* house was subject to the easement of support in favour of the house in dispute and *A's* house was subject to the easement of receiving and carrying off the rainwater falling from the roof of the disputed house. *A*, as owner of the servient tenement, was a "participator in the appendages" of the house in dispute, and, as such, had a preferential right to purchase the house in dispute over *B*, who was a mere neighbour.

A joint owner of a part of the property (such as a partner in a particular room or in a cistern or a reservoir in a field) has a superior right to one whose property is merely adjacent to that room or cistern or reservoir. And his right is superior even to that of one who is merely a neighbour to the entire property.

When a building situated in a private lane contains several houses and one of these houses is owned by two persons, one of whom sells his share to an outsider, the right of pre-emption appertains first to the vendor's co-sharer in the house, then to the partners in the building thereof, and next to the people in the street who are all alike. "If all these give up their right it belongs to the *mulâsik* or contiguous neighbour by whom is meant the neighbour behind the mansion sold who has a door opening into another street."

Right of pre-emption based on vicinage

A house belonging to two persons is situate in a street which has no thoroughfare and one of the partners sells his share to a stranger, the right of pre-emption belongs first to the partner in the house, then to a partner in a party-wall, then to all the people in the street equally, and then to the person whose house is behind that which is sold.

A person having a right of way over the property sold has a preferential claim to one who has only a right of water without any interest in the site of the water.

So where a piece of land is sold over which one person has a right of way and another a right to discharge the water of his house, the former's claim is stronger.

Between neighbours, proximity to the subject-matter of the claim gives the preference, for example, one who is nearest is preferred to one who is further off.

If a house situated in a blind lane shut up at one end, communicating through another blind lane but of greater extent, happens to be sold, the residents of the short lane only are entitled to the right of pre-emption ; whereas if a house situated in the long lane were sold, the inhabitants of both lanes would be so entitled. The *Hedâya* gives the reason of this thus : "that the right of egress and ingress in the short lane is participated only by its own inhabitants ; whereas the right in the long lane appertains equally to the inhabitants of both, and therefore the residents of both lanes are entitled to claim the house by the right of pre-emption."

Abandonment by one pre-emptor.

If the person who has a preferential right waives or relinquishes his right or claim, the person next in order would be entitled to enforce his own right. For example, if a *shafî-i-sharîk* abandon his right of pre-emption, it would devolve on one who is the holder of a dominant tenement, and if he also give up his right it would devolve on the *shafî'i-jâr* or neighbour.

The *jâr-i-mulâsik* or a person whose house is situated at the back of that which is sold, has a better claim than other neighbours, the reason being that his house is close to the living apartments of the house sold.

But when the house sold is large consisting of several residences, the right of pre-emption belongs to the person residing adjacent to the house without any distinction as to the side on which he lives. Similarly, if any portion of the premises is sold. The reason of this is that when the house is large, consisting of several residences, to insist on the proximity of the living apartments would be useless.

Right of pre-emption on the part of neighbours.

When a house situate in a street without a thoroughfare belongs to two persons, one of whom sells his share, the right of pre-emption belongs, in the first place, to the other partner in the house. If he abandon his right, it would belong to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not, for they are all *khalîts* in the way. If they all surrender that right, it belongs to a *mulâsik* or contiguous neighbour. If there be a lane leading from this street and without any egress through it, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner lane because they are more "specially intermixed" with it than the people of the other street ; but if a house in the outer street were sold the right

of pre-emption would belong to the people of the inner lane as well as to those of the outer street, for the right of way possessed by the residents in both happens to be equal. But were the lane open with a passage through and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. Similarly, where there is a thoroughfare, which is not private property, between two mansions (that is, when they are situate on opposite sides of the way) and one of them is sold, there is no pre-emption except for the adjoining neighbour. If the road be private property, it is the same as if there were no thoroughfare. But when the people residing in a particular street have no right to close it at any time, in other words when it is a public thoroughfare, persons residing on one side have no right of pre-emption in respect of any property on the other side. The Allahabad High Court has held in accordance with this principle that in order that two persons may become *Shafi'i-khalîts* or persons having a right of pre-emption in virtue of the common enjoyment of, *e.g.*, a road, it is necessary that such road should be a private road and not a thoroughfare.(1) Among persons who are *Shafi'i-khalîts* by reason of being sharers in a right of way all those who are sharers in such right of way have equal rights of pre-emption, although one of them be a contiguous neighbour.

When there are a number of persons entitled to claim a property by right of pre-emption(2) and some of them are absent, the Kâzi will adjudge the property to those who are present; but if the absentees appear subsequently and assert their claim, they would be entitled to their proportionate shares.(3) In none of these cases it is necessary that the site should also be sold.(4)

The right of pre-emption extends to agricultural estates.

It has been held that the right of pre-emption extends to agricultural estates, and is not confined merely to urban properties or small plots of lands.(5) And though the right founded on the basis of vicinage has been limited by the Courts in India to parcels of

(1) *Karim Bukhsh* v. *Khoda Bukhsh*, [1894], I. L., 16 All., 247.
(2) See *Moharaj Singh* v. *Lalla Beechuk Lall*, 3 W. R., 71.
(3) Comp. *Saligram* v. *Kalishankar* [1905], I. L., 27 All., 465.
(4) *Zahar Ali* v. *Nur Ali*, [1878], I. L. 2 All., 90.
(5) *Karim Bukhsh* v. *Kumuruddin Ahmed*, 6 N. W., 377.

land and houses,(1) such a right founded upon actual co-parcenary has been held to apply to villages or large estates.(2)

In *Mahommed Hossein* v. *Mohsin Ali*(3) the Calcutta High Court distinctly laid down that though a neighbour could not, under the Mahommedan Law, claim a right of pre-emption in respect of a share in villages or large estates, a co-sharer undoubtedly could, and that a neighbour's right extends only to houses, gardens and small plots of land.

The Calcutta High Court has also held that, when a Mahommedan co-owner of a property sells his share to a Hindu, his co-sharers have no right of pre-emption.(4) The reasoning of this decision is far-fetched and somewhat difficult to follow; and it has been expressly dissented from by the Allahabad High Court in *Brij Mohun Lall* v. *Abul Hassan Khan*,(5) in which it was held that in a case where the pre-emptor and the vendor are Mahommedans, and the vendee a non-Mahommedan, the Mahommedan Law is to be applied to the matter in advertence to the terms of s. 24 of Act VI of 1871 (The Bengal Civil Courts Act). The learned Judges added further, and it is submitted, correctly, that though the Courts are not bound to administer the Mahommedan Law in claims for pre-emption, yet on grounds of equity that law had always been administered in respect of such claims as between Mahommedans, and it would not be equitable that persons who were not Mahommedans, but who had dealt with Mahommedans in respect of property knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahommedan Law, be permitted to evade those conditions and obligations.

Applicable to a non-Moslem vendee.

---

(1) *Abdul Azim* v. *Khundkar Hamid Ali*, 8 B. L. R., A. C., 63; *Ejnash Koer* v. *Amjad Ali*, 2 W. R., 261; *Chowdhury Joogul Kishore Singh* v. *Poocha Singh*, 8 W. R., 413.

(2) See also *Govind Doyal* v. *Inayatullah*, I. L. [1885], 7 All., 775; *Mahommed Hossein* v. *Mohsin Ali* [1870], 6 B. L. R., 41; s. c., 14 W. R., 1 B., 1; see also *Ukhoy Ram Shahaji* v. *Ram Kant Row*, 15 W. R., 225.

(3) Supra, see also *Jehangir Bukhsh* v. *Lalla Bhikari Lall* (in review), 7 B. L. R., 24; *Shaikh Karim Bukhsh* v. *Karim-ud-din Ahmed* [1874], 6 N. W. P. Rep., 377; *Abdul Rahim Khan* v. *Kharaty Singh* [1892], I. L., 15 All., 104.

(4) *Kudrutullah* v. *Mohini Mohun Shaha* [1869], 4 B. L. R., F. B., 134.

(5) [1885], I. L., 7 All., 775.

A pre-emptor not bound to frame his suit for whole property if only entitled to a share.

Where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption and not to the whole of it, he is not bound to frame his suit for the whole of the property sold, but only for so much as he would be entitled to, having regard to the claims of the other pre-emptors.(1)

Where a pre-emptor sued for possession, by right of pre-emption of certain property sold by one and the same sale-deed, claiming as to one portion of the property sold under the Mahommedan Law and as to another under the *wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Mahommedan Law applied, it was held that he was not entitled to pre-emption in respect of any portion of the property covered by the deed of sale.(2)

SECTION III.

CONDITIONS ON WHICH THE RIGHT OF PRE-EMPTION DEPENDS.

There are two essential formalities the performance of both of which is a condition precedent to enable a person to claim the right of pre-emption.(3)

A person who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another, must immediately on receiving information of the sale, express in explicit terms his intention to claim the property. *The intention must be formulated in the shape of a demand.* No express formula is necessary so long as the assertion of the right, or what is called a demand is expressed in unequivocal language; this is called *talab-i-mowâsibat* or *immediate demand.*(4)

In making this demand there must be no delay on the part of the pre-emptor. It must follow immediately upon the receipt of

---

(1) *Abdullah* v. *Amanatullah* [1899], I. L., 21 All., 292.
(2) *Mujibullah* v. *Umed Bibi and another* [1898], I. L., 21 All., 119.
(3) *Jadu Sing* v. *Rajkumar* [1870], 4 B. L. R., A. C., 171.
(4) *Ibid.* See also *Prokas Sing* v. *Jogeswar* [1868], 2 B. L. R., A. C., 12; and *Jugdeo Singh* v. *Kazi Sayed Mahomed Afzal*, supra.

the information. It has been held that any delay in making this demand on hearing of the sale defeats the right of pre-emption.(1) It is not necessary, however, that it should be made in the presence of witnesses.(2)

As already stated no particular formula is necessary, so long as the claim is unequivocably asserted. Nor is it material in what words the claim is preferred; so long as they imply a *claim* they are sufficient. "Thus," says the *Hedâya*, "if a person were to say 'I have claimed my *shufâ*' or 'I shall claim my *shufâ*' or 'I do claim my *shufâ*,' all these are good, for it is the meaning and not the style or mode of expression which is here considered."

"Similarly, if he said 'I have demanded,' or 'I take the mansion by pre-emption,' or 'do demand pre-emption' it would be lawful."

But if he were to say to the purchaser 'I am thy *shafî*' or 'pre-emptor,' it would be void. The reason of this distinction is evident, as a mere statement of a fact does not evince any desire on his part to avail himself of his right.

As the presence of witnesses is not necessary at the formulation of this demand, the evidence regarding the performance of this preliminary formality generally rests on the evidence of the pre-emptor.

But the demand must be made after the sale has been completed. If made whilst negotiations are going on between the vendor and the vendee it is of no avail.

(2) The second condition is that the pre-emptor should, with as little delay as is possible under the circumstances, repeat before witnesses his demand, (*a*) *either on the premises in dispute, or* (*b*) *in the presence of the vendor or* (*c*) *of the vendee, calling on the the witnesses to bear testimony to the fact.*(3) *This formality is called talab-i-ishtish-hâd* or *demand by invocation of witnesses.*

As the right to pre-emption is *strictissimi juris*, failure to perform the "demands" in accordance with the requirements of the law would defeat the claim.

---

(1) *Ali Muhammed* v. *Taj Muhammed* [1870], I. L., 1 All., 283; *Jarfan Khan* v. *Jabbar Meah* [1884], I. L., 10 Cal., 383; see *post* p. 739.

(2) *Jadu Sing* v. *Raj Kumar*, supra.

(3) *Mubarek Husain* v. *Kaniz Banu* [1904], I. L., 27 All., 161; *Ganga Prasad* v. *Ajudhia Prasad* (1905), I. L., 28 All., 24.

This formality is insisted upon with the object of getting evidence of the fact that the pre-emptor has really asserted his right. It must be performed within a reasonable time and without any unnecessary delay after the first demand. An unnecessary delay in the assertion of the second demand would defeat the claim. The question of time or delay is one of fact, and would depend on the circumstances of the particular case.(1)

Talab-i-ishtish-hâd.

In order to entitle the claimant to perform the second demand in the presence of the vendee it is not necessary that he should be in possession of the property in respect of which the right is claimed.(2) For the performance of the ceremony of *Talab-i-ishtish-hâd* the pre-emptor must take some witnesses with him to the vendor, if the property sold be still in his possession, or to the vendee or to the property which is the subject-matter of the claim. And there, in the presence of the witnesses, he must say to the following effect : " such a person bought such a property (sufficiently indicating the same) of which I am the *shafî* ; I have already claimed my right of *shufâ* and now again claim it, be therefore witness thereof."

The Courts in India have held that at the time of making this second demand the pre-emptor should distinctly state that he has already made the *talab-i-mowasibat*.(3) They have also held that where certain persons claimed pre-emption in respect of a share in an undivided village and proved that they made an immediate assertion of their intention to pre-empt in the presence of witnesses within the area of the zemindari to which the share sold belonged, in the absence of any indication that the demand was not made *bonâ fide*, the demand of pre-emption was a good demand made "on the premises" within the meaning of the Mahommedan Law.(4)

---

(1) *Ali Muhammad Khan* v. *Muhammad Said Hussain* [1896], I. L., 18 All., 309 ; *Jaridan* v. *Latif Hossain*, 8 B. L. R., 160.

(2) *Rajjub Ali Chopdar* v. *Chandi Churn Bhaddra* [1890], I. L., 17 Cal., 543 ; *Abbasi Begum* v. *Afzal Husain* [1898], I. L., 20 All., 457 ; *Ali Muhammad Khan* v. *Muhammad Said Hussain* [1896], I. L., 18 All., 309.

(3) *Rajjub Ali Chopdar* v. *Chandi Churn Bhaddra*, supra ; *Mubarak Hossein* v. *Kamiz Banu* [1904], I. L., 27 All., 160 ; *Abbasi Begum* v. *Afzal Husain*, supra ; *Zamir Husain* v. *Dantal Ram* [1883], I. L. 5 All., p. 110.

(4) *Kulsum Bibi* v. *Faqir Muhammad Khan*, [1896] I. L., 18 All., 208.

Talab-i-ishtish-hâd (contd.).

These formalities may be observed by the claimant personally or by proxy.(1) It has also been held that the personal performance of the *talab-i-ishtish-hâd* depends on the claimant's ability to perform it. He may do it by means of a letter or a messenger or may depute an agent, if he is at a distance and cannot attend personally.(2) The law requires that the performance of the ceremonies must be strictly established. But the course of decisions in India has not been uniform in the application of the principle.

The pre-emptor must offer to pay the price that has been paid by the vendee, or, if he considers the consideration alleged as not real, must express his willingness to take the property for the actual price paid for it.(3) But he is not required to tender the price at the performance of either ceremony.

The right of pre-emption, even where resting on custom is, generally speaking, co-extensive with the rules of the Mussulman Law.(4) And unless it is proved that it is not customary to perform both the *talabs*, the party claiming the right of pre-emption is bound to comply with the requirements of the Mussulman Law. But where it is customary not to perform either of the two demands, even a Mahommedan pre-emptor is not bound to go through all the formalities.(5)

It has been sometimes held(6) that the demand must be in the form given in the *Hedâya*, but that does not seem to be a correct view of the law ; what the law requires is that the demand must be to that effect and no more.

---

(1) *Syed Wajid Ali Khan* v. *Lalla Hanuman Prasad* [1869], 4 B. L. R., A. C., 139 ; s.c., 12 W. R., 484 ; *Imamuddin* v. *Shahjan Bibi* [1870], 6 B. L. R., 167, note ; *Ali Muhammad Khan* v. *Muhammad Said Khan*, supra. Where the property is in the charge of the Court of Wards, the manager is entitled to perform the ceremonies ; *Jadu Lall Sahu* v. *Maharani Janki Koar*, P. C. 20th March 1912.

(2) *Lagu Prasad* v. *Debi Prasad* [1880], I. L., 3 All., 236 ; *Karim Bakhsh* v. *Khuda Bakhsh* [1894], I. L., 16 All., 247.

(3) *Mujib-ullah* v. *Umed Bibi* [1898], I. L., 21 All., 119 ; Comp. *Abdulmajid* v. *Amolak* [1907], I. L., 29 All., 618.

(4) *Prokas Singh* v. *Jageswar Singh* [1868], 2 B. L. R., A. C., 12 ; *Jadu Singh* v. *Rajkumar* [1870], 4 B. L. R., A. C., 171 ; *Ali Mohammed* v. *Taj Mohammed* [1896], I. L., 1 All., 285 ; see also *Harihar Deb* v. *Sheo Proshad* [1884], I. L., 7 All., 41.

(5) *Ramdular Misser* v. *Jhumak Lall Misser*, 8 B. L. R., p. 455 ; s. c., 17 W. R., 265 ; *Gordhun Das Girdhurbhai* v. *Darankar*, 6 Bom. A. C., p. 263.

(6) *Fakir Rawat* v. *Emam Bukhsh*, B. L. R., Supp. Vol., p. 35 ; s. c., W. R., F. B., 143.

But the *talab-i-ishtish-hâd* may be combined with the *talab-i-mowâsibat, e.g.*, if at the time of the *talab-i-mowâsibat*, the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser or on the premises to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the second.(1)

If the property was sold for a price payable at a distant period, the claimant may either wait until then to pay the price and take the property, or he may pay it immediately and take the property at once, but unless the vendor had given any time to the purchaser for the payment of the price, the pre-emptor cannot claim any respite therefor.

The claimant by virtue of the right of pre-emption is bound to pay for any improvement effected by the purchaser unless the improvements are detachable. In case of deterioration in the hands of the purchaser, the pre-emptor is entitled to a deduction, unless the deterioration has taken place without the instrumentality of the purchaser, in which case the pre-emptor must pay the full value.

If a house has been sold in exchange for goods or effects, the pre-emptor is entitled to take it for the value of such effects "for effects are amongst the things denominated *zât-ul-kâyim* or things which being estimable are compensable by an equivalent in money. If, on the other hand, a man sells a house for compensation in wheat, silver or any other article estimable by measure or weight, the *shafî* may take it for an equal quantity of the same article, because these are of the class of *zât-ul-imsâl* or things compensable by an equal quantity of the same species."

If a piece of land is exchanged for another piece, the pre-emptor of each piece would be entitled to take it for the value of the other land "being of the class of *zât-ul-kâyim* or things compensable by an equivalent in money."

If the property has changed hands and is in the possession of the vendee, the pre-emptor must take it on the price stated by the purchaser to have been paid by him.

---

(1) [1869], 4 B. L. R., A. C., 171; but see 8 B. L. R., 455. Comp. (1870), 4 B. L. R., A. C., p. 139; 6 C. L. R., p. 166; *Nundo Pershad Thakur* v. *Gopal Thakur* [1884], I. L., 10 Cal., 1008.

It is otherwise if the property is still in the hands of the vendor, in such a case the consideration mentioned by him should be paid by the pre-emptor.

Abatement of price by the vendor.

Any abatement in the price made by the vendor in favour of the purchaser would accrue to the benefit of the pre-emptor. But should the vendor, after the conclusion of the sale, remit the whole of the price to the vendee, the pre-emptor would not be allowed to avail himself of the remission.

The reason of the distinction is that an abatement in the price is connected with the original bargain or sale and the pre-emptor is therefore entitled to claim its benefit, whilst an entire remission is unconnected with the transaction, and is more in the nature of a subsequent gift.

Should the vendee, after the bargain is concluded, agree to an augmentation of the price in favour of the seller, the pre-emptor would not be liable for such increase, for his right is founded on the original contract.

Similarly, if a house be sold for one price and afterwards another contract be made in respect of the same house with the same purchaser settling a larger price, the pre-emptor is not prejudiced by such augmentation, but is entitled to his right of pre-emption for the price first agreed upon.

Period of limitation.

Under the Mussulman Law there is no fixed period within which a pre-emptor, whose claim is not acceded to, should prefer his claim called *talab-i-khusûmat* or *talab-i-tamlîk* in Court. Under Schedule II of the Indian Limitation Act (XV of 1877) Art. 10, however, the period of limitation for a suit to enforce a right of pre-emption is one year.

If a suit is not brought within that period, the claim would be barred.

SECTION IV.

THE PROCEEDINGS IN COURT.

Where the claim to pre-emption is based either on custom or special agreement, the British Indian Courts have held that in

order to assert the right, the vendor and claimant must both be subject to Mahommedan Law.(1)

The Calcutta High Court has introduced a further qualification. It has held that the vendee should also be a Mahommedan,(2) which destroys the whole policy of the Mahommedan Law. The Allahabad High Court, on the contrary, has laid down, it is submitted rightly, that in order to maintain the right, *it is not necessary that the vendee should be a Mahommedan.*(3) It holds as already stated that it would not be equitable that persons who were not Mahommedans, but who had dealt with Mahommedans in respect of property knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahommedan Law, be permitted to evade those conditions and obligations.

When a plurality of persons belonging to the same category are entitled to the privilege of pre-emption their rights are equal without reference to the extent of their shares,(4) *e.g.*, if *A*, *B* and *C* are co-sharers in a property, *A's* share being one-third, *B's* being half, and *C's* being one-sixth, and *A* sells his share to *D*, *B* and *C* will become entitled to *A's* share in equal moieties.

A Full Bench of the Calcutta High Court has held that when one co-sharer conveys his share to another co-sharer no other co-sharer if any, can have a right of pre-emption, the right of all being equal, and the reason on which the right is founded being therefore absent.(5)

The Allahabad High Court has taken a different view and held that when there are more than two co-sharers and one sells his

---

(1) *Dwarka Das* v. *Hossain Bukhsh* [1878], I. L., 1 All., 564; *Poorno Singh* v. *Hurry Churn Surmah* [1872], 10 B. L. R., A. C., 117.

(2) *Sheik Kadratullah* v. *Mahini Mohan Shaha* [1869], 4 B. L. R., A. C., 131

(3) *Brijmohan* v. *Abdul Hasan Khan* [1885], I. L., 7 All., 775.

(4) *Moharaj Singh* v. *Lalla Bheechuk Lall* [1865], 3 W. R., 71. In the case of *Abbas Ali* v. *Maza Ram* [1888], I. L., 12 All., 229, a Division Bench of the Allahabad High Court held that under the Shiah Law, no right of pre-emption exists in the case of property owned by more than two co-sharers. This view is opposed to two other decisions of the same Court, and its correctness is open to question; *firstly*, on the ground that the Sunni Hanafi Law furnishes the guiding rule in this country in cases of pre-emption; and, *secondly*, that the Shiah Law is by no means as explicit as has been assumed in this case.

(5) *Lalla Nowbut Lall* v. *Lalla Juvan Lall* [1897], I. L., 4 Cal., 831.

share to another, the remaining co-sharers are entitled to take the share sold in equal parts with the vendee co-sharer.

For example, if there are four co-sharers *A*, *B*, *C* and *D*, and *A* sells his share to *B*, *C* and *D* would be entitled respectively to one-third of that share.

This view is undoubtedly in conformity with the enunciations of the Mahommedan jurists. The principle is based on the following ground.(1) As all the pre-emptors have equal rights against a stranger, their rights are the same *inter se*, and it would be unfair to give preference to one sharer over the others. And any one pre-emptor may pre-empt in respect of his specific share.(2)

But both Courts are agreed that where a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer vendee is concerned.(3)

Nor is the owner of a piece of land entitled to pre-emption in respect of a house standing thereon, when his right in the land is wholly separate and distinct from the right in the house which belongs to another person with whom he has nothing in common.(4)

The pre-emptor is not bound to produce or tender the price during the pendency of his suit. It is necessary, however, that he should tender the price to the buyer or deposit it in Court when once the decree has been made in his favour. But a delay in the payment of the price does not defeat the right which under the decree has become vested in the pre-emptor. It is usual, however, for the Courts of Justice in India to fix a period of time within which the price should be paid. If not so paid the right drops.

The buyer is entitled to retain the property in spite of any decree in favour of the pre-emptor until he has received the price.

Effect of a decree declaring the right.

When two or more persons are entitled to the right of pre-emption in a particular property, each one of them can claim the

(1) *Amir Hasan* v. *Rahim Bukhsh* [1897], I. L., 19 All., 466, 831.

(2) *Abdulla* v. *Amanatullah* [1899], I. L., 21 All., 292.

(3) *Manna Singh* v. *Ram Dhin Singh* [1881], I. L., 4 All., 252; *Harjas* v. *Kanhya* [1884], I. L., 7 All., 118; *Saligram Sing* v. *Raghubar Dyal* [1887], I. L., 15 Cal., 224.

(4) *Pershadi Lall* v. *Irshad Ali*, 2 N. W. R., 100.

property in its entirety. But when a decree has been made in favour of two and one of them gives up his share, or even if without a decree, one of the two pre-emptors surrenders his right after taking possession of the property, the other does not become entitled to the share so given up or surrendered. In other words, before the right has become effectuated by actual delivery of the property by the buyer to the pre-emptor, or by the decree of the Judge, each of several pre-emptors has a right to the whole, and a waiver by one gives to the other a right to the whole. But after the right has effectuated as above, each one has a separate interest and can surrender it to the buyer if he pleases, without giving any right to his co-pre-emptors.

When a decree is made in favour of one who is entitled to the right of pre-emption in the second or third degree and subsequent thereto a person with a superior claim asserts his right, the latter would be entitled to a decree for the whole by cancellation of the first.

Option of inspection.

The pre-emptor has the option of inspection even after decree by Judge. "If the Kâzi," says the *Hedâya*, "were to make a decree in favour of the pre-emptor before he has seen the property in dispute, the pre-emptor has an option of inspection and if any defect be afterwards discovered in it he has an option from defect, and may, if he please, reject it notwithstanding the purchaser should have expected such defect from the bargain, or in other words, should have exempted the seller from responsibility for such defect." "Because, as the transfer of property by right of *shufâ'a* is the same as a transfer of property by sale, the pre-emptor has, therefore, under both the above circumstances the power of rejection in the same manner as any other stranger, and this power in the pre-emptor is not destroyed by the purchaser having seen the property or having so exempted the seller, for he (the purchaser) was not deputed by the pre-emptor, and his act of course does not affect the pre-emptor's right." The validity of the objection taken by the pre-emptor must, it seems, depend upon how far it is *bonâ fide*, or made merely for harassing the other parties.

Improvements made by the buyer.

If the buyer has made any improvements in the property the pre-emptor must either pay their value or cause them to be removed. But if he has grown a crop on the land, the pre-emptor

must wait for its ripening, after which he will take the land at the full price.

Should the buyer erect buildings or plant trees upon the land and a decree is made for the land, the pre-emptor has the option of taking the land together with the building or trees, paying the value of both or compelling the purchaser to remove them.

Deterioration.

When the property, which forms the subject-matter of dispute, deteriorates in the hands of the purchaser, the claimant is entitled to a proportionate reduction in the price, unless the deterioration has not been caused by the purchaser, in which case the pre-emptor must either pay the whole price or resign his claim.

If the purchaser wilfully breaks down any buildings or structure, the pre-emptor may either resign his claim or may take the area of land for a proportionate part of the original price, but he is not entitled to the materials because they form now a separate property, and are no longer appendages of the land, and the right of pre-emption extends only to the land and to things so attached to it as to be appendages.

When any portion of a house or garden is destroyed by accident or natural causes, the pre-emptor has the option of either resigning the whole or taking it, paying the full price. It is otherwise with land, and if a portion thereof is diluviated the pre-emptor may take the remainder, paying a proportionate price therefor. The reason of this distinction is said to be that a house or garden is a mere appendage to land, whereas land is the real subject to which a right of pre-emption appertains.

When a person after his purchase pulls down the buildings, the price is to be divided according to the value of the buildings as they were while standing and the value of the cleared space, and the pre-emptor is to take the land at so much of the price as corresponds to the latter.

If the buildings are burnt down or swept away by an inundation so as to leave nothing in the hands of the purchaser, the pre-emptor must take the site at the full price. In other words, the purchaser is not damnified by loss occasioned by what in English law would be called "an act of God."

Any intermediate dealing by the buyer with the property is voidable at the instance of the pre-emptor, for example, if the

purchaser disposes of the subject of the claim, such sale is void so far as the pre-emptor is concerned. If the pre-emptor has, after obtaining possession of the property, made any improvements in it by erecting buildings, planting trees and so forth, and if it be proved that the land belonged to some person other than the vendor or vendee, in such a case the pre-emptor is entitled to recover back the price paid by him from whomsoever he had taken the property, and is at liberty to remove what was done by him upon the property or land in question, but he cannot recover from either party the value of the improvements made by him.

Relinquishment of the right.

The right of pre-emption may be relinquished either expressly or impliedly.

The pre-emptor may expressly forego the right of pre-emption, with or without any compensation.

Implied relinquishment depends upon inferences deducible from his conduct. If he omits without any sufficient cause to perform the demands after learning of the sale, the inference is that he has abandoned his right; and the law, therefore, holds that such omission avoids the right. Acquiescence in the sale either by offering to purchase from the buyer the property sold, or by asking him if he would give it up to him, or by taking it from him on lease, amounts in law to a relinquishment.(1) But these acts have that result only when they are done with the knowledge of the sale.

According to the Hanafî Law the right of pre-emption is a personal right and does not survive to the pre-emptor's heirs. Of course, if they are themselves entitled to claim the right, they stand on a different footing.

Hanafî doctrine.

Thus the right of pre-emption is rendered void by operation of law when the pre-emptor dies after making the necessary demands, but before he has taken over the property which forms the subject-matter of dispute, or before he has obtained a decree therefor from the Court.(2) But it is not rendered void by the death of the purchaser, and the pre-emptor can, therefore, assert his right and take the property from his heirs.

---

(1) See *Habib-un-nissa* v. *Barkat Ali* [1886], I. L., 7 All., 275.
(2) *Muhammed Husain* v. *Niamatunnissa* [1897], I. L., 20 All., 88.

Shiah and Shâfeï doctrine.

According to the Shâfeïs and the Shiahs the right of pre-emption is a heritable right and devolves upon the heirs of the pre-emptor.

When a man purchases from one by a single bargain several houses in a street in which there is no thoroughfare and the pre-emptor desires to take one of them, if his right of pre-emption is based on partnership in the right of way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity ;(1) but if the right be based on neighbourhood and he is neighbour only to the house which he wishes to take, he may lawfully take that alone.(2)

According to the *Hedâya* when the purchased property consists of several parts, each separate and distinct from the other, as for instance when two houses are purchased by one bargain, the pre-emptor cannot take one of them without the other if he is pre-emptor of the two together. He must either take both or leave both, whether the houses are adjacent to or separated from each other, and whether they are situate in the same or different cities.

In accordance with this doctrine it has been held that when the deed of sale covers two properties in respect of one of which only the claimant has a right of pre-emption he is entitled to sue for that alone. But if his right extends to the entire subject-matter of the particular transaction he cannot split it up so as to take one part of the property and reject the other part. He must abide by the bargain as a whole.(3) He must, therefore, take or leave the whole whether the purchase be by one person from one or by one from two or more.

But where a property is purchased by several persons in specified shares the pre-emptor may take the whole or the portion of any of them.

When the person claiming the right of pre-emption sells previous to the decree of the Kâzi the property upon which his right is founded, that right becomes extinguished.

---

(1) Comp. *Kazee Ali* v. *Mussulullah*, 2 W. R., 28 ; *Surdharee Lal* v. *Lopoo Moodee*, 25 W. R., 500 ; and *Durga Persad* v. *Munsi* [1884], I. L., 6 All., 423, and the other cases referred to there.

(2) *Roushan Koer* v. *Ram Dial Roy*, 13 Cal. L. R., 45.

(3) *Durga Prasad* v. *Munsi*, supra ; *Amir Hassan* v. *Rahim Bakhsh* [1897], I. L., 19 All., 466.

When the pre-emptor has different rights of pre-emption, the extinction of one does not affect the other, and therefore when he is both a partner and a neighbour, and he sells his share on which his right in the former capacity is founded, he may still assert his claim on the ground of neighbourhood.(1)

Right relinquished upon mis-information.

Where the right had been relinquished upon mis-information of the amount, or the kind of price, or of the purchaser, or of the property sold, the pre-emptor can assert the right on being informed of the true facts. For example, if he relinquished his right on being informed that the price was 1,000 dirhems, whereas in reality the price was less, he may, on coming to know of the truth, still assert his right.(2)

Relinquishment of the right.

Nor does relinquishment in favour of one operate in favour of another. For example, if the pre-emptor on learning that *A* is the purchaser, waive his right, he can, on subsequently learning that the purchaser is in reality *B*, assert his title.

If the pre-emptor act as an agent of the vendor in the transaction he has no right of pre-emption ; it is otherwise if he acts as an agent for the purchaser.

Where a minor is entitled to a right of pre-emption, his guardian may abandon the right if he consider it necessary.

Where the pre-emptor brings an action to assert his right, and it is found that he had, before suit, transferred to another the property on which his right was founded, his action must fall to the ground.(3) In order to obtain relief his right must be subsisting at the time of the decree.(4) But to destroy the right the alienation must be absolute and not partial.(5)

The pre-emptor cannot transfer his *right of pre-emption* before decree,(6) although he may convey the property sued for after decree.

---

(1) In two cases the Calcutta High Court has held that where a plaintiff sought to enforce a right of pre-emption upon the ground of partnership, he could not obtain a decree on the ground of vicinage ; *Kunja Behari Lal* v. *Girdhari Lal* [1868], 1 B. L. R., S. N., 12 ; s.c., 10, W. R., 182 ; *Shiu Sahai Mullick* v. *Hari Sahai Sing* [1869], 3 B. L. R., All., 142. But this is different from the superior right becoming extinguished by operation of Law.

(2) Comp. *Abadi Begum* v. *Imami Begum*, supra ; and *Bhairon Sing* v. *Lalmon* [1884], I. L., 7 All., 23.

(3) *Janki Parshad* v. *Ishar Das* [1899], I. L., 21 All., 374.

(4) *Ram Gopal* v. *Piari Lall* [1897], I. L., 21 All., 441.

(5) *Rajo* v. *Lalman* [1882], I. L., 5 All., 180.

(6) *Ram Sahai* v. *Gaya* [1884], I. L., 7 All., 107.

A right of pre-emption, based on the village settlement record or *wajib-ul-arz* in the North-Western Provinces, is not in all respects analogous to the pre-emptional right under the Mahommedan Law. It has been held by the Allahabad High Court that when there are several co-sharers in a village and one of them sells his share or part of his share to another co-sharer and a stranger, under one and the same deed of sale, if the interest conveyed to the stranger can be separated from that conveyed to the co-sharer, the remaining co-sharers would be entitled to claim the stranger's interest, otherwise they would be entitled to succeed against both vendees.(1)

Where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act (IV of 1882) the right to sue for pre-emption accrues, not from the date fixed in the decree under section 86, as the date upon which payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the said Act.(2)

The law allows certain devices for the evasion of the right of pre-emption, *e.g.*, where a man sells the whole of his house excepting only the breadth of one yard extending alongside the house of the pre-emptor, the latter is not in this case entitled to claim the right of pre-emption, because he is no more a neighbour. Similarly if the vendor were to grant the intervening part of his house as a free gift to the purchaser and put him in possession.

---

(1) *Ram Nath* v. *Badri Narain* [1896]. I. L., 19 All., 148; *Sheobharos Rai* v. *Jiach Rai* [1886], I. L., 8 All., 462.

(2) *Batul Begum* v. *Mansur Ali Khan* [1898]. I. L., 20 All., 315; *Anwar-ul-Haq* v. *Jwala Prasad*, ibid., 358; *Raham Ilahi Khan* v. *Ghasita*, ibid., 375.

CHAPTER XXIX.

THE SHIAH LAW OF PRE-EMPTION.

THERE is great divergence between the Shiahs and the Hanafîs with regard to the persons who may claim the right of pre-emption.

Under the Shiah Law co-sharers in the property, that is *shafî'i-shârîk* alone are entitled to the right of pre-emption ; but as the Sunni Hanafî Law of pre-emption is the law in force in this country either territorially or by custom, a Sunni would be entitled to pre-emption on the basis of a right of easement or vicinage when the vendor is a Shiah.(1) The same rule would apply if the vendor happen to be a Sunni. The Allahabad High Court, however, has held that when both the vendor and the vendee are Sunnis, a pre-emptor belonging to the Shiah sect claiming on the ground of vicinage has no right of pre-emption.(2)

Although according to the Shiah Law only a partner in the property sold can claim the property by right of pre-emption, there is no right of pre-emption when there are several sharers, and one of them only sells his share.(3) Some legists, however, are of opinion that even where there are more than two partners and one sells his share, a right of pre-emption arises in favour of the other co-sharers.

It is not necessary, however, that the person claiming the right of pre-emption should be a partner in the substance of the thing. So long as he has an existing interest of a substantial nature which is likely to be interfered with or disturbed by the introduction of a stranger, the law will recognise the right. For example, if two persons hold two tenements separately, but have a pathway or road or watercourse in joint enjoyment by virtue of their holdings either of them will have a right in respect of the other's tenement.

---

(1) *Jugdeo Singh* v. *Kâzi Sayed Mohamed Afzal* [1905], 9 Cal. W. N., 26.
(2) *Kurban Hosain* v. *Chote* [1899], I. L., 22 All., 102.
(3) See *Domi* v. *Ashasha Bibee*, 2 N. W., 360.

AA, ML

A man, who has only an easement over another's property, or a mere neighbour has no right to claim the property in question in preference to a third person. If the easement is one of right or has vested by operation of law, it will not be interfered with by the purchaser, and no inconvenience can accrue to the holder of the dominant tenement; so also in the case of a neighbour, no question of inconvenience can arise.

Who may exercise the right.

When a person entitled to claim a property by right of pre-emption is not *sui juris*, being either under age or *non compos mentis*, his guardian should exercise the right on his behalf, provided the same be for the advantage of the ward.

Failure on the part of the guardian to make the demand does not extinguish the right of the person entitled; and should the guardian abandon the claim, the minor on attaining puberty, and the insane person on recovering his reason, may still assert it.

A person, who was absent at the time of sale, is entitled to prefer his claim, however prolonged his absence might be, in case he was during his absence unable to prosecute it in person or through an agent.

A sick person, or one who is undergoing imprisonment and therefore unable to prefer his claim, stands in the same position as one who is absent.

Right comes into operation on the conclusion of the contract.

According to the Shiah Law, the right of pre-emption comes into operation immediately on the conclusion of the contract, and not merely on the completion of the transfer.

As in the Hanafi Law, the pre-emptor must take the whole of the property or abandon the whole, he cannot split up the contract in his favour.

He must take at the contract price, whether the real value of the share be more or less, without being liable for incidental expenses.

If the purchaser add something to the price after (completion of) the contract and expiration of the period of option, such addition is not an augmentation of the price but a gift, and the pre-emptor will not be liable for it.

If, however, the augmentation is made during the period of option, the Shaikh has declared that it constitutes a part of the

original price and stands on the same footing as if it had been stipulated in the contract; but "this opinion," says the author of the *Shâraya*, "is attended with some difficulty as being inconsistent with what has already been said of the transfer being completed by the contract."

In like manner, if the seller should make any abatement from the price, such abatement is unconnected with the contract, and the purchaser is by no means bound to surrender the share until he has received the full price settled at the making of the contract.

If a person were to purchase a property in exchange for a jewel or such like article, the pre-emptor may take the property at its value at the time of the contract, which must be properly appraised.

Unavoidable delay in preferring claim does not occasion loss of right.

The pre-emptor should prefer his claim as soon as he is informed of the contract. Unavoidable delay caused by absence, illness or incarceration preventing his preferring the claim through an agent, does not lead to the extinction of the right.

Similarly, if the delay is owing to his having been wrongly informed of the amount or kind of price, his right does not drop.

Due diligence necessary.

He must use due diligence in prosecuting his claim. For example, when travelling with that intent, he is not obliged to use greater expedition in his journey than is habitual to himself. Further, should he be engaged in the performance of any religious duty, whether indispensable or discretionary, he is not obliged to break it off, but may lawfully wait till it is completed. In like manner, if the time of prayer is at hand, he may wait till he has purified himself, and perform his devotion without hurry or restraint.

Neglect on the part of a person, who receives intelligence of a sale whilst on a journey and unable to prefer his claim by personally appearing or appointing an agent to call upon witnesses to attest his intention to demand it, does not extinguish his right. But when he is in a position to assert his claim either in person or by appointing an agent and neglects to do so, his right is entirely lost. Should the vendor and vendee agree to rescind the contract that would not destroy the right of the pre-emptor, and he may, despite such rescission, claim to have the property conveyed to him.

Acquiescence.

As under the Hanafî Law, acquiescence in the sale, either express or implied, will extinguish the right.

No dealing by the vendee would affect the right of the pre-emptor, and if he sells the subject of the claim to a third person, the pre-emptor would be entitled to take it from him.

The pre-emptor's right is against the vendee, and he takes the property from him and not from the vendor, but if the property continues in the hands of the latter, he may take it from him, though the responsibility rests upon the vendee.

If the subject of sale should perish or become damaged without any act on the part of the purchaser, or by his act but before it was demanded by the *shafî'i*, in that case it is optional with the latter to take the property at the full price, or abandon it entirely, and in the event of his taking it, he is entitled to all the ruins or fragments that remain, whether they are still on the spot or have been removed from it.

If, on the other hand, the property has become injured or has deteriorated owing to some act of the purchaser after demand made by the pre-emptor, the purchaser is responsible.

Erections made by the purchaser.

If the vendee should, before any demand has been made, plant trees or erect buildings upon the land, he is entitled at his option to take up the trees or remove his buildings without levelling the ground, while it is optional with the pre-emptor to take it at the full price, or to relinquish his right absolutely.

If again, the vendee should decline to remove the trees or buildings, the pre-emptor has three courses open to him, *viz.*, he may either remove them himself, paying the purchaser compensation for any loss he may sustain thereby, or he may take possession of the whole, paying in addition to the price the value of the trees or buildings which thus become his property with the consent of the purchaser, or he may abandon his claim altogether.

Accretions to the property.

If the subject of the claim should increase in such a manner that the increase is connected with and forms part of it, the accretion would belong to the pre-emptor, but if the accretion is separable from the *corpus*, it would belong to the vendee.

If a person should sell his share in two houses, and the pre-emptor is a partner in both, he may lawfully take or abandon both or he may take one and forego his claim in respect to the other. But in the case of a single mansion he cannot forego his claim to a part.

If the sale is in the nature of an exchange, the price being a specific article, and it turns out to be the property of some person other than the vendee, as the sale is null, there is no right of pre-emption. But if the price was fixed in some commodity estimable by weight or measure as wheat or grain or corn, the right would be fully established, even though the articles in question should turn out to be the property of another person. Similarly, if the consideration is in coin or money, which is found to belong to somebody other than the vendee, the right of pre-emption, having once come into existence, will not fall to the ground.

If the subject of the sale should appear to be defective, and the vendee in consequence thereof should receive a compensation for the defect, the pre-emptor is entitled to a deduction in the price. But should the vendee keep the subject of the sale without seeking any compensation for the defect, the pre-emptor must either take it at the full price, or abandon his claim altogether. Should the pre-emptor abandon his claim upon being informed that there are two vendees, and it then appear that there was only one, or if he was informed that there was only one vendee, and it turns out that there were two, or if he was told that the purchaser bought for himself, and it afterwards appear that he bought for another, in all these cases the right is not lost.

Right of pre-emption heritable.

The Shiahs agree with the Shâfeis in holding that the right of pre-emption devolves by inheritance upon the heirs of the pre-emptor, so that if he should die leaving a widow and a child, an eighth of it goes to the widow and the remainder to the child.

And if one heir were to relinquish his share of the right, it would not drop or be extinguished, but the other might take the whole.

Attaches only to immovable property.

The right of pre-emption attaches only to immovable property. With respect to trees and buildings, the right of pre-emption is established if they are sold as appendages of the ground on which they stand.

The right of pre-emption is established with respect to rivulets, roads, baths, &c., provided the division thereof would not occasion a loss or damage such as to render the property useless.

By damage the Shiahs understand such injury as would render the property useless after division, in which case the person who would be injured cannot be compelled to make a partition.

Where, again, the bath or road or rivulet is of such a character that its utility would not be destroyed by division, the co-owner may be compelled to admit of a partition, and (if he should sell his share) the right of pre-emption would take effect in favour of his partner.

If a person should sell a piece of land which is his exclusive property and with it his share in another joint tenement by one bargain, the right of pre-emption attaches to the share exclusively at the due proportion of the price.

When the right of pre-emption comes into existence.

It is an indispensable condition for the operation of the right of pre-emption that the share of the property should have been transferred by sale. If the share has been assigned as a dower or given in charity or bestowed by way of gift or in composition for a claim, it is not subject to the claim of pre-emption.

If a mansion should be partly *wakf* and partly free, and the portion which is free be sold, the beneficiaries of the *wakf* have no right of pre-emption. The author of the *Jawâhir* says, however, that "a right would be established."

When the pre-emptor takes possession of the property and then discovers a defect which existed prior to the sale, if both he and the purchaser were equally aware of the defect neither of them has any option (in the matter); but if they were both ignorant of the defect, and the *shafi'i* returns the property to the purchaser, the latter has an option either to reject the sale altogether, or to demand a compensation for the defect from the seller.

If, however, the *shafi'i* should elect to retain the property, the purchaser has in that case no right to cancel the sale because the share has passed out of his hands.

So also if the pre-emptor was acquainted with the defect and not the purchaser. But if the purchaser was apprized of it and not the pre-emptor, the latter only would have the right of rejection.

There are devices not recognised under the Hanafi Law, for defeating the right of pre-emption, two of which are the following :—

The property may be sold for a price above its value, and then something of trifling value may be received in exchange for it, which would compel the pre-emptor to pay the full price if he choses to avail himself of his privilege.

In like manner, if the property is sold at an excessive price, and the seller receives part of it giving a release for the remainder, this also obliges the pre-emptor either to submit to a considerable loss, or to abandon his claim.

CHAPTER XXX.

BAILMENT.

SECTION I.

THE DIVISIONS OF BAILMENT.

BAILMENT under the Mahommedan Law is a contract by which one person entrusts to another a certain thing for a determinate or indeterminate period, or for a specific purpose without consideration. If consideration is agreed upon, it may be made payable either at stated periods or on the completion of the work or on the return to the bailor of the thing bailed. It may even be payable in advance.

There is no special word in the Mahommedan Law to convey the general meaning of the term bailment, but it is treated under several heads according to the purpose for which the thing is bailed, *e.g.* (1) *'Aâriat* or commodate loan; (2) *Ijâra* or hire, which includes all kinds of specific bailment; (3) *Wadi'at* or deposits; (4) *Rahn* or pledges, and so on.

I shall deal briefly with the subject of specific bailment in this chapter, touching on the subject of *'Aâriat* only slightly to indicate the analogy existing between the Mussulman Law and the English Common Law.

SECTION II.

IJÂRA.

Specific bailment.

When a person has been let into the occupation of a house or land, he is bound to pay the stipulated rent, even although he should not reside in or make use of it, because as it is impossible to make delivery of the usufruct, the delivery of the subject from which the usufruct is derived is a substitute for it, "since in delivering the article ability to enjoy the usufruct is established."

But when no hire is agreed upon, and the bailment is not gratuitous, the tenant is liable for the customary rent.

But if after obtaining possession of the subject of hire, he was to lose possession by some wrongful act of a third person, the tenant is no longer responsible for the rent.

If it be not otherwise specified in the contract, rent may be demanded from day to day and upon the hire of an animal (upon a journey) from stage to stage.

But a workman who is entrusted with a job is not entitled to his recompense until his work is finished.

Where an article has been bailed to another for some specific purpose upon a stipulated consideration, the bailee has a lien for the price upon the article bailed; "for example, a baker hired to bake bread may detain the bread until his hire has been paid. So also a tailor may detain the clothes prepared by him."

The bailee is not responsible in case of accident during such detention.

But where the work is of such a nature that it does not produce any visible effect in the article, it cannot be detained.

Where the bailment is special, the bailee cannot entrust the article to any other. For example, if a book be given to *A* to be copied by him specially he cannot give it to another for that purpose.

Where the contract is unqualified or absolute, the bailee is at liberty to give the use of the article to any person. The hire of an animal is lawful, either for carriage or for riding. If, therefore, the riding be absolutely expressed, the hirer is at liberty to permit any person he pleases to ride on the animal. In the same manner, also, if a person hire a dress for the purpose of wearing it unrestrictedly and in an absolute manner, he is at liberty either to wear it himself or to give it to any other person to wear.

But in a restricted contract, any deviation with respect to the use renders the bailee responsible for the article bailed, unless it be of a nature not liable to injury from such deviation. "Land, however, and every other article not liable to be differently affected by a different occupant (such as a tent or pavilion) is not restricted in point of use by the mention of a particular person, and consequently the hirer is at liberty to put any one to reside in it that he pleases, since the exclusive restriction is of use only because of its preventing a difference of effect." Specific bailment.

Where the nature of the use to be made of the thing bailed is specified in the contract, the bailee cannot deviate therefrom. "If a person were to hire an animal to carry a burden and the person who lets it were to specify the nature and quantity of the article with which the hirer is to load the animal, such as five bags of wheat, the hirer in this case is at liberty to load the animal with an equal quantity of any article not more troublesome or prejudicial in the carriage than wheat, such as barley or rape-seed, as all articles of that description are included in the permission contained in the contract. The hirer, however, is not at liberty to load the animal with any article of a more prejudicial nature in the carriage than wheat, such as salt, &c., as this would be in violation of the contract between the bailor and the bailee."

Nor would a person who has hired an animal to carry a certain quantity of cotton be at liberty to load the animal with a similar quantity of iron, since it is highly probable that the carriage of the iron may be more prejudicial to the animal than the carriage of the cotton.

Where the bailee uses the article beyond that specified, he incurs a proportionate liability in case of accident, *e.g.*, a rider taking up an additional rider, incurs responsibility for half the value of the animal. And where a hired animal perishes from ill-usage, the hirer is liable for its value.

Where an animal is hired or borrowed for a specific journey, any deviation therefrom induces responsibility.

The change of a saddle for another of the same sort does not give rise to a liability, unless the weight be different, when responsibility attaches in proportion to the excess. But if the nature of the saddle be different, responsibility attaches *in toto*.

A person employed to carry a burden does not incur any liability by any immaterial deviation from the prescribed road.

Land hired for cultivation.

Where land is hired for cultivation any injurious mode of dealing with it gives rise to a proportionate responsibility.

A tailor is responsible for deviating from his orders.

An invalid condition attached to a contract of bailment avoids it altogether.

Specific bailment.

An indefinite thing may be bailed lawfully, *e.g.*, a person may let his share or portion in a house.

Responsibility does not attach from the customary use of an article under an indefinite contract.

Bailees are generally divided into two classes, common or particular.

A common bailee is one to whom an article is bailed in the ordinary course of his work.

A particular bailee is one to whom an article is entrusted not by virtue of his calling, but upon a special contract.

The article committed to a common bailee is a deposit in his hands. If the article should perish whilst in his possession he is responsible for its loss, unless it is lost or destroyed by any irremediable and irresistible accident, such as a fire burning down his house, or robbers, who could not be repelled, taking it away forcibly. But when the article is lost from any cause which might have been avoided, such as usurpation or theft, it would amount to negligence, and the bailee would be responsible, in the same manner as a trustee who lets on hire the deposit in his hands.

A surgeon or farrier, acting agreeably to customary practice, is not responsible in case of accident.

The liabilities of a particular bailee are governed by the contract.

A gratuitous bailee incurs no responsibility beyond taking ordinary care of the article entrusted to his charge.

Section III.

'Aâriat or Commodatum.

"In the language of law," says the *Fatâwaî Alamgiri*, "*'aâriat* means the constituting a person, the owner of the usufruct of a property without consideration. This is according to Abû Bakr Râzi and the universality of our masters, and it is correct as stated in the *Sirâj-ul-Wahâj*."

"Its essential is the consent of the giver of the loan, the consent of the bailee not being necessary. This is the opinion of our three masters" [*viz.*, Abû Hanîfa, Abû Yusuf and Mohammed].

"The consent of the bailor may be given in these words, 'I have given this to thee by way of *'aâriat*,' or 'I have given this cloth or house for thee,' or 'this slave for thy service,' or 'this beast for carrying thy burden,' or 'this land is for thy sustenance'.

if there is no intention of making a *hîba*, all these will constitute an *'aâriat*."

"Similarly if he were to say 'this house is a *sukna* (abode) for thee or '*umra sukna* (abode for life)'; so it is stated in the *Badâya*."

"In reality it ['*aâriat*] is the giving to another the usufruct of a thing which is not liable to destruction in the use of it for a period of time, either determinate or indeterminate."

"Understanding is a condition but not puberty, and accordingly a boy who has been authorised by the Kâzi to engage in trade may lawfully give a thing in *'aâriat*."

"It is also a condition that the thing is capable of being used without being destroyed; but if liable to be consumed, its *'aâriat* is not lawful. So it is stated in the *Badâya*."

"In the *Kitâb-ul-Kâfi* it is stated from Hâkim Shahîd that the *'aâriat* of *dirhems* and *dinârs* is a loan; and so of all articles that are capable of being weighed or measured.....But when *dirhems* and *dinârs* are borrowed for being used as weights or ornaments, then they form the subject of an *'aâriat*. And it is not valid to derive any benefit from the subject of an *'aâriat* than is bargained for. So it is stated in the *Ghâit-ul-Bayân*."

"There are several kinds of *'aâriat*, (1) where the period as well as the mode in which profit may be derived from it is left indeterminate, in which case the bailee may use it as he likes, and whenever he likes; (2) where both the period and the mode of user are expressly fixed, the bailee cannot contravene the conditions, unless for the safety of the thing bailed; (3) where the period is fixed and not the mode of user; and (4) where the mode of user is fixed, but not the period."

"Its legal effect is that the bailee is entitled to the use or usufruct of the thing bailed without having to pay any compensation therefor."

"The subject of *'aâriat* is a trust. If it is lost or destroyed without the neglect or default of the bailee, he is not liable. There is a difference among 'our' jurists as to the validity of a condition by which the bailee has bound himself for any loss to which he has not contributed by his neglect or default. Some jurists have held such a condition to be valid; others not."

"But when he has contributed to its loss, he is liable by *consensus*. For example, if he has knowingly used a beast of burden by day or night in work for which it is unfitted, he would be liable for its loss."

The rules relating to the liability of a person who has taken a thing on *'aâriat*, and other matters connected therewith, are minutely laid down in the *Fatâwai Alamgiri*, but it is unnecessary to go into them here, as the Indian Contract Act is applicable to all those questions.

APPENDIX.

CHAPTER I.

TRANSLATION OF EXTRACTS RELATING TO WAKF.

The Shiah Law.

Ghunia.

"For the validity of a *wakf* several conditions are necessary. Some of them are the following:—That the *wâkif* is the owner of the property, and that he possesses the capacity of disposition. If the *wâkif* is under inhibition from insolvency the *wakf* is not valid."

"It is also necessary that the *wakf* should be express in terms; and that an approach to Almighty God should be intended therefrom."

"The express terms [for the constitution of a *wakf*] are *wakafto*, *habasto* or *sabalto*, 'I have consecrated,' 'I have tied up,' or 'I have given in the way [of the Lord].' If he says *tassadukto*, it is capable of two interpretations. Such is the case with *haramto* and *abadato*."

"It is also necessary that the subject of the *wakf* should be *m'aalum* (known), capable of being delivered, and of yielding profit, retaining its existence [for ever]. By consensus both movable as well as immovable property, *mushâ'a* as well as separated property are equal [that is, a *wakf* of these is equally valid]."....

"And as to [the validity of] *wakf* of *mushâ'a*, [the proof is] that the Prophet [may the blessings, &c.] told Omar (may God be pleased with him) with respect to his share of the lands of Khaibar 'tie up the substance (*asl*) and give its usufruct in the way of the Lord,' although the shares of Khaibar were *mushâ'a*, and had not been partitioned by the Prophet (may the blessings, &c.,) but were [only] specified."

"And the majority hold that a *wakf* of *dirhems* and *dinârs* [to be retained in specie] is not lawful, for profit cannot be derived from them whilst retaining their substance in existence." [But according to the later jurists when profit can be derived by investment of money in trade or commerce, the *wakf* thereof is lawful.]

"Another condition is that the *moukoof-alaih* be different from the *wâkif*; accordingly if a *wakf* is made upon one's self it is not valid." [Here lies the principal point of difference between the Shiahs and the Hanafîs.]

"But there is a difference of opinion" [on this point].

"When a *wakf* is made in favour of a generality of Mussulmans, in such a case without any difference of opinion, the *wâkif* may participate in its benefits."....

"Another condition is that the object of the *wakf* be known and capable of identification, and that a *wakf* thereof would obtain the approval of the Deity."..... The object of the *wakf* must be known.

"And without difference of opinion a [commencement in] *wakf* cannot be made on a child *en ventre sa mère* or a slave."

"But a *wakf* on children who are in existence and descendants to be born afterwards is valid by *consensus*."(1).....

[In other words, a beginning must be made with an object in existence.]

"A *wakf* on masjids, bridges, &c., is valid, for from those objects good accrues to all Moslems."

"Another condition is that the *wakf* should be perpetual. So that if a person were to say I have made this *wakf* for a year, it will not be valid."

"It is also necessary that the property should be transferred to the beneficiaries or to some person on their behalf."....

"When all these conditions are found in a *wakf*, the right of the *wâkif* becomes extinguished for ever; and he cannot revoke it nor alter in any way the purpose or purposes for which he has made the consecration."

"Among 'us' the beneficiaries may lawfully sell the subject of the *wakf* [only] where no profit is derived from it, and there is risk of its being ruined or destroyed."

---

(1) That is, if commencement is made with children in existence, the *wâkif* may lawfully include his after-born children, as well as the progeny of his children who are not in existence yet.

"The directions laid down by the *wâkif* for the application of the usufruct must be carried out."

"When a *wakf* is made in favour of *awlâd* (children), and the *awlâd* of the *awlâd*, in such a case by consensus, the children of daughters will be included, for, etymologically as well as legally, the term *walad* is applicable to a daughter."

"When a man makes a *wakf* on his *nasl* (posterity) or *'akab* or *zurriat*, in such a case *nasab* will be recognised through the mother," [that isall persons tracing their descent to the *wâkif* on their mother's side will be included in the benefit of the *wakf*].

"If the *wakf* is in favour of one's *'itrat*, it is equivalent to saying that it is for his descendants."....

"If the *wakf* is in favour of one's neighbour, and they are not named, then all persons residing on all sides within the space of forty yards in the neighbourhood of the *wâkif's* house will be included in that *wakf*. This is by consensus."

"If the *wakf* is for a beneficial purpose, but the term 'beneficial' is *bâtil* regarding it [that is, if the purpose is *not* beneficial], or when the beneficiaries of the *wakf* have become extinct in such cases, the *wakf* will be applied to purposes of benevolence (*wujûh-ul-khair*). Some have said that the *wakf* will revert to the heir's [of the *wâkif*], but the former [opinion] is the most approved."

Extract from the Kitâb-ul Intisâr.

"The *Imâmias* are alone in holding that when the [subject of a] *wakf* has become ruined and it is not possible to derive any profit from it, in such a case the beneficiaries may sell it and derive benefit from its price."

Extract from the Nihâya.(1)

"Whatever property a man possesses, a *wakf* thereof is lawful, wheher it be held jointly or separated."

"It is necessary that a *wakf* should be perpetual. To make it for a period is not lawful."

[If it is made for a period it would take effect as an *'umra* or *hubs*. Under the Hanafî Law limited estates not being recognised, a *wakf* for a period takes effect as a perpetual *wakf*.]

(1) A work of great authority in India, see Morley's Dig., Introd., p. cclxxxvi.

"A *wakf* is not valid on an object that is not in existence." [And this again is different from the Hanafî Law.] But if, commencement is made with an existing object the *wakf* may be continued for objects not in existence.

"But when a man has made a *wakf* for his children, although they are infants, he may lawfully include the progeny that may be vouchsafed to them."(1)

"He may also include his own subsequently born children."

"When a man has made a *wakf* in favour of his *awlâd*, and they are both males and females, in such case if he has given preference to one over the other, his condition should be regarded. But if he has not mentioned anything about it, in that case the male and female among his children and children's children will share equally, for the term *walad* includes all. But if he says they will take according to the Book of God, the male will take double the share of a female."

"A *wakf* for the *K'aaba*, mosques and *mashâhid* [mausoleums of the Imâms] or for the general good of the residents of a particular locality is an approach to the Deity and lawful."

"The subject of the *wakf* can never be sold or given in *hiba* or charity. But when the *wakf* is in imminent danger of being destroyed, or if the beneficiaries are in such emergent need that the sale of the *wakf* is absolutely beneficial for them, or if serious disputes have arisen among the beneficiaries, the property may be sold and the proceeds applied in the same way as directed by the *wâkif*. [This will presumably be done under the directions of the Judge.] But in no other circumstance, the sale of a *wakf* is lawful."

(1) That is, if commencement is made with children in existence, the *wâkif* may lawfully include his after-born children, as well as the progeny of his children who are not in existence yet.

CHAPTER II.

TRANSLATION OF EXTRACTS RELATING TO WAKF.

The Hanafi Law.

Kinia't-ul-Munia.(1)

"When a *wakf* is made upon children and children's children, males and females are equally entitled therein;" p. 198.

"In the *wakf* of Hilâl [it is stated], *wakf* may be of three kinds, one kind being *wakf* for the poor exclusively; another kind being for the affluent, and *after* them for the poor; and the third being for the rich and poor alike, such as *rubâts*, *khâns*, cemeteries, mosques, aqueducts, bridges, &c., for both rich and poor have their needs attached to such objects;" p. 201.

"When the *wâkif* appoints a *mutwalli*, the latter cannot discharge himself by saying, 'I have discharged myself,' *i.e.*, cannot discharge himself *suo motu*, but he must ask the *wâkif* or the Kâzi to discharge him, who will thereupon remove him; p. 209.

Wakf created by the Prophet.

Allâmah at-Tahtâwi's *Commentary on the Durr-ul-Mukhtâr.*(2)

"Imâm Shâfei (may God be pleased with him) says: it is established that the Prophet (may the blessings of God be with him) dedicated several houses in Medîna. ..... which are still in existence; and the *Râshidin* Caliphs (the first four Caliphs) and others of the Companions [of the Prophet] made *wakfs*. So also it is laid down in the *As'aâf*;" Vol. II, p. 528.

"In the *Bahr-ur-Râik*, it is laid down, as will appear more clearly afterwards, that the universality of [*Hanafi*] Jurists give *Fatwa* according to Abû Yusuf;(3) only some few have followed Mohammed, but no one has followed the *Imâm* [*viz.*, Abû Hanîfa];" *Ibid.*

---

(1) By Mukhtâr bin Mahmûd bin Mohammed az-Zâhidi, *al-Imâm-ul-ullâma* (the Imâm of the learned), styled *Najm-ud-din*; d. 658 A. H., (A. C. 1259) a commentary on the *Nafis ul-Kudûri*.

(2) A work of great authority, see Morley's Dig., Introd., p. cclxxviii.

(3) That is, with regard to the absoluteness of the dedication merely by the declaration.

"Abû Yusuf holds the mere use of the word *wakf* or *mowkoofa* sufficient. And Shahîd [*viz.*, Sadr-ush Shâhid] has stated that in accordance with universal practice, *we* decide according to it. And it is stated that the jurists of Balkh decide according to the opinion of Abû Yusuf, and hold the *wakf* to be valid when it is merely declared to be *wakf* but no object is mentioned, nor it is said that the *wakf* is in perpetuity."

"In a *wakf* on the affluent there is *kurbat* [approval of the Almighty]."

Inhibition and imbecility.

"Among the conditions of *wakf* are that the *wâkif* should not be under the inhibition of the Kâzi for want of intellect or insolvency as Khassâf and Kamâl have stated. And Kamâl has said that if an imbecile (*safîh*, *i.e.*, a person deficient in understanding) makes a *wakf* on himself and after that on an object which is not liable to failure, such a *wakf* according to Abû Yusuf is valid, and the learned (*Mohakkakîn*) *hold this to be correct.* And according to all, when the Hâkim [Judge] has made an order [in respect thereof it will be valid]. The *Bahr-ur-Râik*, however, has combated this view and has said that a *wakf* is a *tabarr'u* (an act of bounty or charity), and a person of weak intellect is not capable of making any disposition. This objection may be answered thus: a person of weak intellect cannot do an act of generosity in favour of another, but there is no prohibition to his making a *tabarr'u* in his own favour; and [when he makes a *wakf* on himself] it is an act of benevolence for himself, but when after his death others are to get the benefit of the *wakf*, in that case sanction [of the Kâzi] must be obtained."

How far the act of an imbecile may be regarded as valid.

Wakf by an insolvent or one immersed in debt made in death-illness; made in health—binding.

"And the jurists have held that when a person who is indebted to such an extent that his debts surround his property, whilst labouring under a death-illness makes a *wakf*, his dedication should be set aside, and the property should be sold for [the liquidation of his] debts. But when the *wakf* is made in health, it will be *binding* even though the debts should surround his assets, if the *wakf* was made before the inhibition [of the Kâzi]. Such a *wakf* by *consensus* cannot be cancelled. So also it is stated in the *Fath-ul-Kadîr*."

Mention of perpetuity not necessary accor-

"According to the Imâm (Abû Hanîfa) and Mohammed, it is one of the conditions of *wakf* that it should be ultimately destined for an object which will not fail in perpetuity, and if he [the *wâkif*]

ding to Abû Yusuf.

does not mention such a purpose, according to the Imâm and Mohammed, it will not be valid. And Abû Yusuf (may God's blessings, &c.) says that the mention of such a purpose is *not* necessary, but the *wakf* will be valid even if he has only mentioned an object likely to fail, and after that [*viz.*, its extinction] the *wakf* will be for the poor, though he may not have mentioned them, for the intention of the *wâkif* is [from the use of the word] that it, the *wakf*, should be for the poor, though not named. Thus, this condition will be imported by necessary presumption of law. So also it is in the *Hindièh* [*Fatâwai Alamgiri*]."

Wakf of movables.

"Another condition is that the subject is suitable for dedication. According to the correct doctrine both immovable and movable property may be made *wakf*. [With respect to the latter] anything which by usage and practice it is customary [to dedicate] like the Koran, &c., may lawfully be made *wakf*. From this it follows that though in the neighbourhood of Egypt, it not being customary a *wakf* of current coins may not be valid, in the countries of *Rûm* [the Turkish Empire] the *wakf* of *dirhems* and *dinârs*, being customary, is lawful. When such a *wakf* [*viz.*, the *wakf* of *dinârs* and *dirhems*] is made, it will be invested in *muzâribat* (business or commercial transactions), and the income will be devoted [to the purposes of the *wakf*]."

Wakf of a house without the land valid.

"And the *Fatwa* is on this rule that without the land, houses and trees may lawfully be made *wakf*. So it is stated by the Kâri ul-Hedâya."

"The *wakf* must be immediately operative and not remain in suspense" [*i.e.*, be dependent for its operation upon the happening of some contingent event which may or may not happen].

Wakf of an apostate from Islâm.

"The *wakf* of an apostate from Islâm will be invalidated whether he suffers the extreme punishment of the law or does not..... But if he returns to Islâm and confirms it, it will take effect. So Khassâf has explained it at the end of his book."

"Abû Yusuf used to agree with the Imâm [*viz.*, Abû Hanîfa] in the opinion, that a *wakf* did not become binding until after the decree of the Kâzi or unless made by way of a testamentary disposition. But when he went to Medîna on a *hajj* with [the Caliph] Hârûn ar-Rashid and saw there and in its neighbourhood all the numerous *wakfs* created by the Companions of the Prophet, he abandoned Abû Hanîfa's opinion, and made decrees declaring the

obligatoriness of a *wâkf*. In fact all the jurists have followed the rule of the two Disciples; and have held that the *Fatwa* is thereon. .....So it is stated in the *Bahr-ur-Raik*."

Ultimate destination to an object not likely to fail.

"The ultimate destination of a *wakf* should be for an object of piety not likely to fail, but existing in perpetuity. Some say that perpetuity is a condition by *consensus*, but according to Abû Yusuf the mention of perpetuity or of an unfailing object is not necessary, for the words *sadakah* and *wakf*.....distinctly imply that. I have already stated that *wakf*, like emancipation, is the extinguishment of the right of property without its transfer to anybody else, and, therefore, it is stated in the 'Book' [*Mukhtasar-ul-Kudûri*] that after the failure of the objects mentioned it will be for the poor, and *this is correct*."

Mention of perpetuity not necessary when intention express or implied.

"In the *Shark-ul-Multeka* it is stated that when a *wakf* is *mussajjil* [*i.e.*, when the document creating it has been sealed or endorsed by the Kâzi], though all [other] evidence regarding it is lost, and the descendants of the *wâkif* want to set it aside, Mufti Abû S'aûd, in his *M'aarûzat*, has laid down that the Kâzis should be prohibited from listening to such claims. So this should be borne in mind."

Dedication of a mosque.

"In the *Hindieh* it is laid down that when a man erects a mosque, his right to the property does not become extinguished until he has separated it [from his other property], and given permission [to people] to pray therein"....." And if he constitutes one person as *muezzin* and *imâm* and he gives the *azân*, calls out the *takbîr* and offers the prayers, though by himself, it will become a *masjid* by *consensus*. And if he consigns the building to the *mutwalli* appointed for the purpose, it will be obligatery and lawful, though no prayer has been offered therein, *and this is correct*. So also if he consigns it to the Kâzi or his deputy." [This is in the absence of a formal dedication.]

Declaration sufficient.

"In the *Multeka* and its commentary, it is stated that it is laid down by Abû Yusuf that by the mere declaration [of the *wâkif* that he has constituted a property *wakf*], his right therein becomes extinguished absolutely. And the *Tanwîr* [*ul-Absâr*], the *Durrar-ul-Ahkâm*], and the *Vikâyah*, &c., have preferred the rule of Abû Yusuf, and you know that it is preferred in *wakf* and in judicial decisions;" p. 536.

"And according to Abû Yusuf it is lawful for the *wâkif* to reserve the usufruct of the *wakf* or its governance for himself, and on this is the *Fatwa*;" p. 544.

"The conditions as to alteration or exchange [*i.e.*, alteration of investment] is lawful by *ijmâ'a* though some have ascribed this rule to Abû Yusuf. The *Fatwa* is thereon. And in the *Bahr* [*ur-Râik*] it is stated that it is universally agreed that when the *wâkif* has made a condition for himself of altering the *corpus* of the *wakf* [in other words, of altering the investment], both the *wakf* as well as the condition will be valid, and he will have the power to do so."

"In the *Bahr-ur-Râik* it is laid down that if he has conditioned that he may alter it into land, then it will not be lawful to turn it into a house, for he has no power to alter the condition."

"In the *Sharh-ul-Multeka* it is stated from the *Ashbâh* [*-un-Nazâir*] and other [authorities] that the *Fatwa* is on the *kowl* [rules] of Abû Yusuf regarding the constitution of a *wakf* [without the necessity of consignment to a *matwalli*];" p. 545.

"The opinion of Mohammed is adopted for *Fatwa* in holding that the reading of the Koran near a grave is not abominable."

Accretions to dedicated property.

"Trees planted in a mosque become the property of the mosque, as they are on the same footing as a building erected within the mosque [premises]. But trees planted by the side of a public road, a public canal or a village reservoir, remain the property of the owner, and he can transplant them [when he likes]."

Dedication of mortgaged property.

"When the dedicated property is mortgaged to another, and the mortgagor dies before redeeming it, but leaves property along with the debt, it will be satisfied out of such property, and the *wakf* will take effect. But if he leaves no [other] property, the matter will be taken before the Kâzi, and the *wakf* will be cancelled, and the property will be sold to satisfy the debt."

"So long as any one of the kindred of the *wâkif* is fit for the *towliat* a stranger should not be appointed.....when a stranger has been appointed and a person qualified among the kindred is forthcoming, the *towliat* should be given to him."

Wakf property cannot be burdened with debt.

"It is not lawful to burden a *wakf* with any debt. It is stated by Ulalw'alji that if revenue or arrears thereof is demanded from the *mutwalli* of a *wakf*, when he has nothing in his hands from the property of the *wakf*, if the *wâkif* has authorised him to raise money by loan to pay the revenue, it will be lawful for him to do so; in

such a case what Abû Lais has said is to be adopted. If without borrowing there is no help, the matter should be taken before the Kâzi who will authorise the *mutwalli* to raise the loan to be paid afterwards from the produce. This is because the Kâzi has this power. But if he is at a great distance from the Kâzi and to appear before him is impossible, in that case the *mutwalli* may borrow himself, and this is when there is no income that year. But when there has been produce and he has distributed it among the beneficiaries, without reserving anything for the *Kharâj*, he will be responsible to the amount of the *Kharâj*. This is the abstract of what Hamâwi says, and so it is in the *An'faa-ul-Wasâil.*"

Wakf in favour of the *wâkif's* descendants.

"If a man makes a *wakf* of his land on his children and children's children for ever so long as his prosterity lasts, the produce will be divided equally among his descendants, and no preference will be given to males over females, *for the wâkif established an equal right for all of them;* in the *Zâhir-ur-Rawâyèt*, (approved traditions)(1) it is stated that in such a *wakf* the descendants *through* females [*lit.* daughters] will not be included; on this is the *Fatwa*;" p. 562.

Practice as to application of proceeds.

"In the *Anf'aa-ul-Wasâil* it is written from the *Zakhîra* that the Shaikh-ul-Islâm was questioned regarding a well-known *wakf* as to how it should be applied, and what should be spent on the beneficiaries, it being involved in doubt; he answered regard should be paid to what was customary in former times, and to the practice of former *mutwallis*;" p. 564.

"In the *Bahr* [*ur-Râik*] it is stated regarding the allowance of a *mutwalli*, that if he be the *mutwalli* of the *wâkif* [in other words, if he be appointed by the *wâkif*] he will get what is provided [in the *wakf*], though it may be more than the customary salary; but if he be appointed by the Kâzi, he will get what is usual;" p. 566.

"The *Fatwa* is on the legality of taking wages for the reading of the Koran on any specified spot, and also on the saying of [Imâm] Mohammed that it is not sinful to have the Koran read near a grave; so in the *Bahr.*"

Fitness a test for appointment to the cufatorship.

"If the *wâkif* has fixed the *towliat* for the fittest and *then the fittest*, in such case the *mutwallishîp* will be for the fittest of his children; if the fittest happen to be *fâsik* [addicted to vice], then

(1) A collection of approved traditions commonly known by that name.

the one nearest to him in fitness will get the *towliat*. If afterwards the former abandons viciousness and becomes just and is superior in fitness to the latter, the *wilâyèt* should be given back to him. If the fittest rejects the *wilâyèt*, then the *towliat* should be given to the one nearest to him in fitness. If they are all equal in fitness, then the one older in age should be appointed, whether that person be a man or a woman. And if there is none among them fit, in that case the Kâzi may appoint a stranger; but when any fit person is forthcoming among them afterwards the *wilâyèt* is to be given back to him;" p. 567.

If all equal in fitness.

"The Kâzi-ul-Kuzzât [or the Chief Kâzi] alone has the power of appointing *mutwallis* and executors and by Kâzi is not meant every Kâzi. So also it is stated in the 27th section of the *Jâm'aa-ul-Fusâlain*;" p. 567.

"In the *Hindièh*, it is stated that when a *wakf* is made on one's *nasl* and *zurriat*, in that are included one's descendants through males as well as through females, whether near or remote;" p. 568.

"When a person says this land of mine is *wakf* on my *walad* [child in the singular], in that case, the produce will be for the child [or children] of his loins, whether male or female. And if he said, this is a *wakf* for my male *walad*, then the produce will be only for the male child [or children] of his loins. And when the children of his loins cease to exist, then the produce will be expended on the poor, it will not go to the *walad-ul-walad* [he having used the singular expression (*walad*), the presumption is that he meant to restrict the *wakf* to his own children]. But if at the time of the *wakf* [created with the word *walad*], there was no child of his loins in existence, but a child [or children] of his son whether male or female, then the produce will be spent only on such grandchild [or grandchildren] and none of a lower generation will share in it. And in the *Zâhir-ur-Rawâyet* it is stated that the child of a daughter will not be included therein, and the *Fatwa* is on the *Zâhir-ur-Rawâyèt*."

"And if the *wâkif* had said that this is a *wakf* for my *walad* and the *walad* of my *walad*, and he did not restrict it for males, in such a case the children of his loins and the children of his sons and the children of his daughters will be included, and this is correct. All these will share equally in the produce, and the *wâkif's* own children will not be preferred to the children of his sons, nor the children of his sons to the children of his daughters, unless he has

restricted it to males, then the male children of his sons and daughters will be included. And this is correct."

"And if he added the third generation and said thus, 'on my child and the child of my child, and the child of my child's child,' in this *wakf* his *nasl* [posterity] will be included, and so long as his prosterity lasts, the produce will be expended on his descendants; and *if there is a single one of his descendants existing, however remote, nothing will be given to the poor.* If the *wâkif* [*in such a wakf*] has used any expression which denotes that his descendants will take in such an order, *e.g.*, if he has said thus, 'the nearest will be nearest,' or thus, 'on my child and then on my child's child,' or thus '*batnan-b'aad-batn*,' in all such cases, a commencement will be made [*in the distribution of the produce*] as condition by the *wâkif;* [thus it is stated in the] *Durrur* [*ul-Ahkâm*]."

"If the *wâkif* at the outset used the plural expression, on my *awlâd* [children], in that case the *wakf* will be for his descendants so long as they exist, and the near and the remote will be equal unless the *wâkif* indicated the order in which they should take."

Khazânat-ul-Muftiïn.(1)

EXTRACTS FROM THE CHAPTER ON WAKF.

"Etymologically the meaning of *wakf* is detention. In.... law, according to Abû Hanîfa (may the mercy, &c.), the detention of the substance of a thing in the proprietorship of the owner and the consecration of its usufruct on the poor or on any object among objects of benevolence. Thus, this will be in the same way as an *'aâriat* and therefore will not be binding, and it will be lawful for the *wâkif* to revoke it and sell the property."

"And according to the Disciples, it is the detention of property in the ownership of Almighty God, and the right of the *wâkif* becoming extinguished in it [*viz.*, the property dedicated], it is transferred to Almighty God for the purpose, that its profits may be expended on His creatures. And therefore it [a *wakf*] is binding and [the subject of] it can never be made a gift of, nor can it be inherited nor sold, and it is on the footing of a mosque."

---

(1) "The Treasure-house of the Muftis," frequently quoted by the Law Officers and referred to in the *Fatâwai Alamgiri* and in the cases given in Macnaghten's Principles and Precedents of Mahommedan Law, see p. 332 and p. 342. See also Morley's Dig. Introd., p. cclxxxvii.

"According to Imâm Mohammed there are four conditions for the validity of a *wakf*, to consign it to a *mutwalli*, to separate it [from the other property of the *wâkif*], not to reserve for one's self any interest in the produce of the *wakf*, and to make it perpetual in this way that its ultimate application should be for the poor... And Abû Yusuf has laid down that no such condition is necessary and the *Mashâikh* of Khorasân have adopted the opinion of Abû Yusuf; the jurists of Bokhara that of Mohammed." "If a man make a *wakf* of his land on a specified body of people attached to a mosque, though he may not have destined its end for the poor according to the universality of jurists, the *wakf* would be valid. And this is recognised as authoritative. If he has constituted his house as a mosque and appointed a person as *muezzin*, and this person gives the *azân* and makes the *ikâmat* and offers the prayers [though] by himself, this will amount to consignment and this is recognised. ....." When a mosque is ruined and people have no need for it, the jurists hold that it is a mosque for ever, and this is most correct."

"The burying of one corpse in a cemetery, the alighting of one person in a *khân*, the passing of one person along a road, the drinking of one person at a well.....is equivalent to consignment and is sufficient [even without formal dedication], according to the authoritative opinion."

Mushâ'a.

"*Shuyu'u* is in truth a bar to complete seisin, but those who do not consider consignment as a condition of *wakf*, also uphold the validity of the *wakf* of *mushâ'a*. According to the *Mashâikh* of Khorâsân the *wakf* of *mushâ'a* is valid; according to Mohammed it is not, and this was adopted by the jurists of Bokhara. [But] all moderns have decreed according to the rule of Abû Yusuf that it [the *wakf* of *mushâ'a*] is lawful, and this is authoritative."

"It should be known that when a 'confused' [joint undivided] property is not capable of partition, it can be lawfully dedicated without difference of opinion."

Wakf of money and movable property in general.

"If a man makes a *wakf* of *dirhems* or food or whatever is weighed or measured according to Imâm Zuffar it is lawful. When asked how such things can be made *wakf*, he answered the money should be invested in *muzâribat* and whatever profit is derived therefrom will be devoted to the purposes of the *wakf*; and what is weighed or measured will be sold and its price like *dirhems* will be invested in trade or business. And the jurists have held, and

analogy is so, that if the *wâkif* provide thus 'this measure of wheat will be loaned to the poor, for purposes of cultivation for themselves : and that after they have reaped the crops, the same measure will be taken back from them, and similarly for ever it should be loaned to other poor [people]'; this will be lawful. And like this there are numerous *wakfs* in Damawand and the hilly tracts of Tabaristan."

"When a man has made a *wakf* and has [expressly] conditioned the *wilâyèt* [governance] for himself or anybody else, in that case the governance will be for him or that person. And the *wâkif* is superior to anybody else. And whoever has constructed a mosque has a superior right to appoint its *muezzin* and to spread its carpets [that is, to manage its affairs]."

"If the *wâkif* is not trustworthy, the Kâzi out of regard for the interest of the beneficiaries will take away the *wakf* from his hands and will appoint another *mutwalli* in his place, whether the *wâkif* reserved the *wilâyèt* for him or not. Even though he reserved the *wilâyèt* for himself and conditioned that the Kâzi shall not have the power of removing him, that condition being contrary to the *Shar'aa* is *bâtil*. But the Kâzi will have the power to remove him and appoint another when it has been proved that he is not trustworthy. This power is similar to the power of the Kâzi to remove an executor appointed by a deceased for his minor child who proves himself untrustworthy."

"And all that has been stated in relation to the question of the government of a *wakf* is founded on the rules laid down by Abû Yusuf with whom is the *Fatwa*.....In the *wilâyèt* of a *wakf* the *wâkif* is superior, and then his heirs and his kindred, unless they are *fâsik* [addicted to vice] or have become *fâsik* in which [latter] case it will be taken away from them and a stranger may be appointed. If they become fit again, it [the office] will be returned to them." The Mutwalli.

".....If the *wâkif* appoints a stranger as his *mutwalli*, and then wishes to remove him and take up the *towliat* himself, he will have that power."

"The *mutwalli* may lawfully make a *wasiat* [in respect of the trusteeship] to another for after his death."

"If the *wâkif* has said to another 'you are my *wasi* in this *wakf*,' this is *tawkîl* [*i.e.*, the appointment of an agent], and so long

as the *wâkif* is alive, the *wilâyèt* will be for him [the person so appointed], and after the *wâkif's* death, the *wilâyèt* will cease unless the *wâkif* had said that the *wilâyèt* will be [also] for that person after his death."

"If there is no *mutwalli* for the *wakf* until death has approached the *wâkif* and then he made a *wasiat* to another in this way that he will be the *wâkif's wasî* in all his *amwâl* [property] and the *mutwalli* of his *wakf*—it will be so. And if the *wâkif* afterwards appoints another *wasî*, this latter will not be the *mutwalli*.

"If no *mutwalli* was appointed until the Kâzi appointed one, the *wâkif* will not have the power of removing him in order to have himself the *towliat*.

"If the *wâkif* has appointed two persons as the *mutwallis*, and one of them dies appointing the other as his *wasî*, the surviving *mutwalli* will have the power over all the affairs of the *wakf*."

"The beneficiaries have no right to partition the *wakf* property among themselves.....nor can the *mutwalli* hypothecate it for any debt he may have incurred for the *wakf*, and if he has done so, and the mortgagee has been in possession for any time, he shall be liable for the usual rent (*ujr-ul-misl*)."

The powers of the *Mutwalli*.

"If the *wâkif* has consigned by will the *wakf*, and upon that has made a condition that the executor will not have the power to leave the trust to another, this condition will be lawful."

....."And if the condition be that the *wilâyèt* will be for so-and-so and after him for so-and-so this will be lawful, for this is like a *wasiat*."

"If he has made a *wasiat* [in respect of the trusteeship of the *wakf*] to two persons, and one of them should accept and the other decline, the Kâzi in that case should appoint another in the latter's place, so that the intention of the *wâkif* that the affairs of the *wakf* should be conducted by the joint judgment of two persons may be carried into effect."....."And the Kâzi may lawfully entrust the entire *wilâyet* to him who has accepted."

"If the *wâkif* says that the most excellent (*afzal*) of his children will be the *mutwalli*, in that case the *wilâyèt* will be for the *afzal* among them. If he proves to be wicked, then the next to him should be appointed, and if he abandons his wickedness and adopts the ornaments of piety and dignity, and is better qualified than the second, the *wilâyèt* will be restored to him. And

when both are equal in honesty, uprightness, judgment, and excellence, then the one best acquainted with the affairs of the *wakf* will have a superior claim, and if one of them is superior in piety and virtue and the other in the knowledge of the affairs of the *wakf* and is not likely to deceive, the latter should be preferred.''

'' And if he has consigned the trust to 'Abdullah until Zaid's arrival, it will be done as he said.''

'' And if the *wâkif* has consigned the trust to another and that person dies during the lifetime of the *wâkif*, the *wâkif* will have the power of appointing another *mutwalli*, though the last one might have been nominated by the Kâzi.''

'' When the descendants of the *wâkif* and members of his family are in existence, a *mutwalli* should not be appointed from among strangers. But when there is no one fit among them, a stranger may be appointed, and if a stranger has been appointed, and then some one fit among the members of the *wâkif's* family is forthcoming, the *towliat* should be given to him.''

'' A *mutwalli* may lawfully consign the trust to another by way of a *wasiat* to take effect upon his death. But if he wish to appoint another for himself during his lifetime and whilst in health, it will not be lawful, unless the trust to him is in a general manner [*'aala sabîl-ut-t'aamîm.*] '' The powers of the *Mutwalli* (contd.).

'' According to Abû Yusuf, consignment is not necessary for the validity of a *wakf*, and therefore in cases of a khân, cemetery, reservoir, etc., neither the delivery of seisin nor the alighting of one traveller, nor the burial of one corpse, nor the drinking of one individual which [according to Mohammed] amount to delivery of seisin—is necessary. Simple testimony [as to the formal declaration of the *wakf*] is sufficient.''

'' If a man say ' this land is a *mowkoofa* or *sadahah-mowkoofa* on myself,' this is as lawful as if he had made a condition that during his lifetime he should himself eat out of it and feed others therewith. Therefore it is approved as authority that this *wakf* is valid.''

'' A man makes a *wakf* on the poor and makes a condition that he should eat out of it, saying that ' it will be lawful for me to eat of it' ; this is lawful.''

'' And if he says ' this land of mine is a *sadakah-mowkoofa* or *mowkoofa* in perpetuity for Almighty God, that so long as I am

alive its produce should be [*lit.*, remain current] for me,' and adds no more, it will be lawful. And when he dies, the *wakf* will be for the poor.''

''And if he says, 'whilst I am alive its produce will be for me, and after me for my child and child's child and their *nasl* so long as their *nasl* exist' it will be for them, and when they cease to exist it will be for the poor; this is lawful.''

''And when the *wâkif*, besides his maintenance, has made this condition that his debts should be paid out [of the produce], this condition will be lawful.''

The Ashbâh-wan-Nazâir(1) *with Hamâwi's Commentary.*

''To decide contrary to the conditions of the *wâkif* is tantamount to deciding contrary to the prescriptions of the Lawgiver, and therefore such decision will not take effect, for the jurists have held unanimously that the conditions laid down by the *wâkif* are like the prescriptions imposed by the Lawgiver [*viz.*, the Prophet].'' P. 146. [This is well worthy the consideration of our Indian Law Courts so apt to run away with their own conceptions of law and equity.]

''In the *Zakhîra* and the work of Ulalwa'lji, &c., it is stated thus, that unless the *wâkif* has so provided, the Kâzi cannot lawfully appoint a *farrâsh* for a mosque.''

''From this it is clear that it is not lawful to introduce in *wakfs* new allowances [not provided for by the *wâkif*.'']. . . . . .

''If the *wâkif* has authorised the *mutwalli* to appoint servitors in a mosque [or any such institution], he may lawfully appoint new servants, not otherwise; nor can the Kâzi authorise him to do so;'' *Hamâwi*, p. 162.

''If a man make a *wakf* on his *zurriat* [posterity] without giving the order of the generations, then all high and low will take equally;'' *Ashbâh*, p. 179.

''But if he has made a *wakf* on generations with this condition that the prior will take first and thereafter and thereafter,

(1) Calcutta Edition, 1260, A. H. The *Ashbâh-wan-Nazâir* is a celebrated work [see Morley's Dig., Introd., p. cclxxi] by Moulâna Zain-ul-'aâbidin Ibrahim (commonly known as Ibn-Nujaim) al-Misri al-Hanafi [*i.e.*, of Egypt, belonging to the Hanafi sect]. The commentary is by Moulâna Syed Ahmed bin Mohammed al-Hanafi al-Hamâwi [of Hamah], who died in Cairo on the 8th of Rajjab, 970.

[that is in succession to each other] and does not say anything more, in that case so long as there is any one of the first generation, no one of the second will take anything. When a man has made a *wakf* in favour of his children and *their* children and *their nasl*, in such a case the child, whose father has died before the *wakf*, will not be included in it, for the *wâkif* has restricted [the *wakf*] to the children of the beneficiaries, so his child who has died before could not come under the *wakf*." [This is only a question of construction and depends on the language used to indicate the intention of the *wâkif*. If the *wâkif* had said *my* children and children's children and children's children's children there could be no question as to the inclusion of the child of a predeceased child.]

"If a person make a *wakf* upon his *awlâd* and the *awlâd* of his *awlâd* and his *zurriat* [posterity] on this condition, that it should commence with the first *batn* [generation] and *thereafter* and *thereafter*, in such a case, I say there is nothing for the second generation whilst there is one of the first. If one of the second generation dies, whilst the first generation are in existence, leaving a child, that child will not participate with the second generation, when they get the benefit, as he belongs to the third generation, but he will get his share when the third generation get the benefit."

"If a person make a *wakf* on his *awlâd* and the *awlâd* of his *awlâd* and his *zurriat* and *nasl*, and give no order [in which they should take], but condition that whenever one of them dies leaving a child, the share of the deceased will go to such child,—in such a case, the distribution between a child and child's child will be equal, and accordingly what the deceased was to get will be for his child, and such child will [then] get two shares, one in his own right as participating in the *wakf* and the other the share of his parent which devolves on him."

"If a person make a *wakf* on the children of his loins, male and female, and on the male children of his children, and on their *awlâd's awlâd* and *nasl*—in such a case his male and female children and the male children of his sons and daughters will share equally and in it will be included the children of the daughters as well of the sons. If he said that the first *nasl* will be first and *thereafter* and *thereafter*, in such case the children of his loins, male and female, will take first; after them it will be for the children of

his sons and not for the children of his daughters; and then for the children of his son's children in perpetuity;" p. 180.

"If he were to make a *wakf* on his daughters and on their *awlâd* and on their *awlâd's awlâd* in such a case, the rule is that the produce will be for his daughters and for their *nasl*."

"It is not lawful to create a debt over a *wakf*, but if there arises a necessity for borrowing for the benefit of the *wakf*, such as for its repairs or for buying seed, in that case borrowing is lawful under two conditions; *first*, that it must be with the sanction of the Kâzi, and *secondly*, that it is not possible to meet the necessity by its rent, if let for a limited period. So has Ibn-Wahbân written. To have to spend on the beneficiaries is not such a necessity [as would justify borrowing], so it is stated in the *Kinia*."

"It is not necessary for the validity of a *wakf*, that the object for which the *wakf* is being created should be in existence at the time of *wakf*; therefore, if a *wakf* be made on the children of Zaid, though Zaid has no children [then], the *wakf* will [nevertheless] be valid; and until Zaid has children, such *wakf* will be expended on the poor."

"It is incumbent to observe the conditions imposed by the *wâkif*, for the jurists have declared that they are like the *Nass* [prescriptions] of the Lawgiver.....But [they may be departed from] in the following particulars:

"(1) If he has conditioned that the *Nâzir* shall never be removed, the Kâzi has still the power of removing a *Nâzir* who is unfit.

"(2) If he has conditioned that the *wakf* property should not be leased beyond a year, but there is nobody willing to take a lease for a year, or if there is greater benefit to the beneficiaries from a longer lease, the Kâzi has the power of contravening the condition laid down by the *wâkif* but not the *Nâzir*.

"(3) If the *wâkif* has conditioned that the Koran should be read over his grave, such fixing should be excluded."

According to Hamâwi, however, "most of the learned have held it to be clear that the view [expressed in the third head] is founded on the opinion of Imâm Abû Hanîfa who considered the reading of the Koran near a grave to be abominable; so according to him the *wâkif* saying that it should be read over his grave would be void. But [on this point, *viz.*, on the lawfulness or otherwise

of having the Koran read over the grave], the *Fatwa* is on the opinion of Imâm Mohammed, according to whom the reading of the Koran by the side of or over the grave is not illegal. So it is in the *Khulâsa*. Therefore the *wâkif's* condition is binding. The author's statement that it is void is weak."

"(4) If the *wâkif* has conditioned that the balance of the *wakf* income should be given to whoever begs at a particular *masjid* every day, no regard should be paid to this condition." Hamâwi says, "this is according to the *Kinia*, but he [the author] has said afterwards that it is preferable to pay a regard to this condition."

"(5) If the *wâkif* has conditioned that the beneficiaries should get fixed rations of bread and meat every day, the *kyyum* [*mutwalli*] may make them cash payments, and in another place it is stated that the beneficiaries may demand and take payments in cash."

"(6) If the allowance fixed for the imâm is not sufficient, and he is learned and pious, in that case it is lawful for the Kâzi to increase his allowance." (Hamâwi says, "he has no such power unless the imâm is learned and pious and the pay fixed by the *wâkif* is insufficient.")

"(7) If the *wâkif* has conditioned that the investment shall never be altered, if the alteration is beneficial to the *wakf*, the Kâzi may authorise its being changed. And he (the Kâzi) cannot dismiss a *mutwalli* if appointed by the *wâkif* without misfeasance. Nor can he remove a *mutwalli* upon the mere complaint of the beneficiaries (*mustahakîn*) unless they establish misfeasance against him. And so in the case of an executor."

"If the *wâkif* dismisses a *mutwalli*, if he made a condition [reserving the power of discharging and nominating], such dismissal will be valid by *consensus*. But if [he did] not [so reserve this power], it will not be valid according to Abû Yusuf. And the jurists of Balkh have adopted Abû Yusuf's rule;" P. 309.

Hamâwi says that the rule of Abû Yusuf has been held to be valid by a large body of people; and in the *Fath-ul-Kadîr* it is stated that it is most *approved* among the learned.

"The founder [of a mosque] is primarily entitled to appoint the *imâm* and *muezzin*; and his child and his people [*ashirat*, tribe, class] are better entitled than strangers."

"When two persons are appointed by the *wâkif* to do a work, they cannot act singly; but when the *wâkif* has conditioned that he and another shall have the power of altering the investment, he will have the power of doing so himself, so it is [stated] in the *Fatâwai Kâzi Khân*."

"Hisâmi has stated in his *Wâk'iât* that the Kâzi has the power of appointing a *mutwalli* without any provision [to that effect in the *wakf*], but he cannot appoint [new] servants in a mosque without such a condition."

"It is abominable to give to the *fakîr* of a *wakf* two hundred *dirhems*.....but when the *wakf* is in favour of [the *wâkif's*] indigent kindred so much may be given; so it is stated in the *Ikhtiâr*."

"When a man makes a *wakf* of a house on his two sons and on their children for ever so long as their posterity exists, and they intend residing in it, none of them has a right to do so.....for it is evident that when the *wâkif* applied the term *wakf* to the house, he devoted the rent of the house to the beneficiaries; therefore it will not be used for their residence."

Sharh-ul-Wikâya.(1)

Text [of the *Wikâya.*]—"The meaning of *wakf* [according to Abû Hanîfa] is to tie up a property, like an *'aâriat*, in the proprietorship of the *wâkif* and to devote its usufruct [upon mankind] and according to the Disciples [the meaning of *wakf* is] the tying up of the substance of a thing in the ownership of the Almighty. And according to the Disciples a *wakf* [once made] is obligatory and on this is the *Fatwa*;" P. 223.

Comment.—"There is difference of opinion with regard to the condition relating to the constitution of a house into a mosque. According to Abû Yusuf (may God's mercy, &c.), the mere declaration [of the *wâkif*] that 'I constitute this into a mosque,' is sufficient, for according to Abû Yusuf consignment is not necessary for the validity of a *wakf*. According to Mohammed, it is necessary prayers should be offered in *Jamâ'at* [assembly]. According to Abû Hanîfa the prayers of one man would be sufficient."

Text.—"And according to Abû Yusuf mere saying 'I have made this *wakf*' will extinguish the right of property."

(1) Frequently quoted by the Law Officers of the Sudder Court.

Comment.—"In other words, the mere declaration of the *wâkif* extinguishes the right of property in him and transfers it to the Almighty. Accordingly, consignment to a *mutwalli* is not necessary."

Text.—"To fix the produce of the *wakf* for one's self, and to make a condition that he may change the land of the *wakf* for another land when he likes, are valid according to Abû Yusuf."....

"According to Abû Yusuf a *wakf* is valid even though it is not expressly destined to an unfailing purpose, and when the purpose [named] has become extinct, then it will be spent on the poor."

Tahtâwi Vol. II.

Pages 569—70 (Text).

Chapter on matters connected with a wakf in favour of children.

"From the *Durrar*, etc., and from the *Mawâhib*(1) on *wakf* in favour of one's self, his child, his generation, and his descendants :—If a person fixes the usufruct for himself during his lifetime and thereafter, and thereafter, it will be lawful according to the second (Imâm Abû Yusuf) ; and on this is the *Fatwa*, &c."

COMMENTARY.

Page 570.

Chapter on matters connected with a wakf in favour of children.

And females are included because the word *walad* (one born) is derived from *wilâdat* (birth) which is found in them.—Halabi from the *Durrar*, "If there be no child born of his loins," means when the child born of his loins in whose favour the *wakf* was made dies leaving a child, the latter shall not be entitled to anything of the *wakf* property. In like manner, if, at the time of his making the *wakf*, there be a child born of his loins, as well as the child of his child, and the child born of his loins dies, the *wakf* will go to the poor and not to the child of his child. "To the poor," because the person in whose favour the *wakf* was made was no more.—*Durrar*, "It will go exclusively to the child of his son," because the child of his son shall, in the absence of the child born of his loins, be considered as the child born of his loins.—*Durrar*, "It is correct." This is the *Zâhir-ur-Rawâyèt*, and it has been adopted by Hillâl, because the children of daughters belong to the same lines as their fathers, and not to those of their mothers; the case with a son's child being just the opposite.—Halabi from the *Durrar*— "And if the words 'and the child of my child' be added.....,"

(1) By Mou'âna Burhân-ud-din Trabulasi (of Tripoli), Sâhib-i-As'aâf (the author of the *As'aâf*), placed on the same footing with the author of the *Hedâya* by d'Ohsson.

according to Allâmah Nûh (may he be immersed in the mercy of God), it purports that if the word *walad* (child), which is related to, or possessed by *ya* ('my'), the possessive pronoun of the first person, be not qualified by the word male, it would mean child born of his loins, the male and the female equally, and if it be so qualified it would mean exclusively the male child born of his loins. If a man were to say, 'I have made a *wakf* of this land of mine in favour of my child,' the produce would go to the child, male or female, born of his loins; and if he were to say, 'I have made the *wakf* in favour of my male child,' the produce would go exclusively to the male child born of his loins; and in the absence of the child born of his loins, the produce would go to the poor, and not to the child's child. This would be the case, if there be a child born of his loins at the time of his making the *wakf*. If, at the time of his making the *wakf*, there be no child born of his loins, but there be a male or female child of his son, the produce would go to him or her exclusively; and none of his posterity, save that person shall partake of the produce; and a daughter's child is not included therein; this is the *Zâhir Rawâyèt;* and according to this *Fatwa* is given. If he says 'in favour of my child, and the child of my child,' and does not qualify it by the word male, it would include the child born of his loins, and the children of his sons and daughters.—According to the correct *Rawâyèt*. They would partake of the produce, neither the child born of his loins having preference to the son's children, nor the children of the son to those of the daughter; and if he so qualifies it, it would include the male children of sons and daughters, according to the correct *Rawâyèt*.—Finis. "It is restricted to the said two," that is to say, to the child and the child's child. [But] "if he adds the third generation (and says 'in favour of my child, the child of my child, and the child of the child of my child,' it would include all his descendants"— (*Durrar*). The produce would then go to his children (descendants) so long as his posterity continues, and not to the poor, till any of his children (descendants) be alive, be he of a degree howsoever low. Because when he made mention of three generations it indicated distance, that is to say, numerousness of degrees. Hence the restriction is removed, and what remains to be taken into consideration is lineage, in the sense of the word, which includes all; because it is found in one who is the next as well as in one who is the remotest in descent. The case

with the second generation is otherwise, because it is removed by one degree only. "But in the event of his using terms denoting order——," *e.g.*, If he says in this way "nearest, then nearest," or says in favour of my child, and then in favour of the child of my child," or says, "generation after generation," it would begin from one mentioned first by the person making the *wakf*.—*Durrar*. "As, for instance, he says first of all, 'in favour of my children, using the plural form ———,' it would make the next in descent as well as the one far removed equal, but not in case of his using terms denoting order; and this will apply to what follows."

ZAILYE.

Takhrîj-ul-Hedâya.

Book on Wakf.

Imâm Zailye in his work called the *Takhrîj-ul-Hedâya* gives in detail the prescriptions of the Lawgiver of Islâm which form the foundation of the law relating to *wakf*. "The first tradition," he says, is as follows:—Said the Prophet, peace be on him, to Omar when he (Omar) wanted to give in charity his land, called Samâgh, "consecrate just as it is, so that it may neither be sold, nor conveyed by gift, nor inherited." I say this tradition has been cited by six Imâms. Bokhâri has cited it at the end of the *Chapter on Evidence*, Muslim and Abû Dâûd in the Book on *Wills*, Tirmizi and Ibn-i-Mâja in the Book of *Ahkâm* and Nisâi in the Book on *Wakf*; and all of them have taken it from Nâfi, who got it from the son of Omar, who said "Omar got a piece of land in Khaibar, whereupon he came to the Prophet, may peace and safety be unto him, and said, 'I have got a piece of land, a better thing than which I never got, what is your order to me about it.' The Prophet said, 'if you like you make a *wakf* of it, as it is, and bestow it in benefaction.'" Omar thereupon bestowed it in charity on his relatives, and the poor, and slaves, and in the path of God, and travellers, in a way that the land itself might not be sold, nor conveyed by gift, nor inherited, and that there would be no harm if the *mutwalli* applied the produce of the land to meritorious purposes, and fed with it his friends who were not well-to-do.—*Finis.* In a place in Bokhâri it is stated that the Prophet, peace and safety be unto him, said in this way, "consecrate it as it is, so that it may neither be sold nor conveyed by gift, but (people) may be fed with it," and that Omar Ibn-ul-Khattâb thereupon dedicated it as directed. He (Bokhâri) has also stated that it was a date-orchard. Abû Dâûd has added that Yahya, son of S'aîd, said "Abdul Hamîd, son of 'Abdullah, son of Omar Ibn-ul-Khattâb sent to him a copy of the deed of *wakf* executed [by Omar]:—'In the name of God, the most merciful. This is what is written by the slave of God, Omar, in respect of Samâgh.'

"He then stated (therein) what had passed between him (and the Prophet) in the way it has been recited by Nâfi, and said :—

'If the *mutwalli* like, he may purchase a slave with the price of its produce, to look after it.'

"It was in the hand-writing of Mutaqab, and was witnessed by Abdullah, son of Arkam."

"'In the name of God the most merciful, this is what has been willed by the slave of God, Omar, the Commander of the Faithful. If anything happen to me, the *mutwalli* of Samâgh and of that which surrounds it, *viz.*, the mounds, and of the slaves in it, and of the one hundred parts in Khaibar, the slaves there, and of the one hundred parts in Wâdi made *wakf* by Mohammed, peace and safety be on him, shall be Hafsa's, during her lifetime, and after her such member of her family as may be intelligent. They shall neither be sold nor purchased. The *mutwalli* shall feed therewith his relatives, and beggars, and those who have received no inheritance, whomsoever he may choose; and there will be no harm if the *mutwalli* should eat out of their produce, or feed others with it or redeem with it slaves.'"—*Finis.*

The word *Akala* with the long sound of the letter *a* means *fed.*

* * * * * *

Hâkim recites in his book called *Mustadrak* in the Chapter on *Fazâil* from Wâkidi, who said :—

"Omar, son of Hind, recited to me this tradition from 'Abdullah, son of Osmân, and he from Arkam, son of Abi'l Arkam Makhzumî, who said his father recited it to him from Yahya, son of Osmân, and he from Arkam(1) and he says it was handed down to him by Osmân, son of Abi'l Arkam, who said, 'I am the son of a *Sab'aa-us-salâm*, (*viz.*, of a man who embraced Islâm in the seventh year from the time Mohammed declared himself a Prophet). He had a house close to Safa. This was the house dwelt in by the Prophet, peace and safety be unto him, at the time of the promulgation of Islâm, and it was in this house that he asked people to embrace Islâm. A large number of people embraced Islâm in this house, of whom Omar Ibn-ul-Khattâb was one, and the house was therefore called 'the house of Islâm.' Arkam dedicated the said house on his child [meaning children], and the deed of *wakf* was read out.

(1) The usual process by which the authentic traditions are traced. See Morley's Dig., Introd., p. ccxxviii.

"'In the name of God the most merciful. This relates to how Arkam disposed of the usufruct of his property, which lies close to Safa, that is to say, he has bestowed it in charity(1) upon his child [children], together with the place where it lies, *viz.*, its environs, so that it may neither be sold nor inherited.'"

"This was witnessed by Hishâm, son of 'Aâs, and by the slave of Hishâm, the son of 'Aâs. This house all along continued to be a permanent *sadakah* [*wakf*], his descendants living in it, letting it out on rent, and they alone appropriating its proceeds. And none raised any question."

* * * * * *

"Ibrâhim of Hari says in his book *Gharîb-ul-Hadîs* that he learnt from Abû Bakr son of Abû Sh'aibah, he from Hafîs, son of Ghyâs, he from Hishâm, son of 'Urwa, and he from his father, that Zubair, son of 'Awwâm, made a *wakf* of his house in favour of one of his daughters who was *mardudah*. He says *mardudah* means a woman who has been divorced, and *fâkid* a woman whose husband is dead."

* * * * * *

"It is stated in the *Khilâfiât* of Baihaki, that Abû Bakr 'Abdullah, son of Zubair Humaidi, said:—

'Abû Bakr bestowed in charity [meaning *wakf*] on his child [meaning children] his house at Mecca, which (charity) does up to this day continue; and Omar bestowed in charity on his children the usufruct of his property, which lies close to Marwa and Saniya; and this (*wakf*) does up to this day continue; and Ali bestowed in charity on his children, his land in Egypt, and his property in Medîna, which does up to this day continue; and S'aad, son of Abî Wakkâs bestowed in charity on his children his houses in Medîna and in Egypt, which does up to this day continue; and Osmân bestowed Rûma in charity, which does up to this day continue; and 'Amr, son of 'Aâs, bestowed on his children in charity *Wahat* in Tâif, as well as his houses in Mecca and Medîna, which *wakf* does up to this day continue.

* * * * * *

The fourth tradition.—.....The Prophet, peace and safety be unto him, used to appropriate (the proceeds of) the things bestowed by him in charity. Muzayyif says it (*charity*)

(1) May also be translated "dedicated it."

means *wakf*.....Ibn Ali Shaiba writes in his book *Musannaf*, in the chapter in which he has cited the traditions on the strength of which he opposes Abû Hanîfa, that Ibn 'Utaibah (Atbah) recited to him a tradition from Ibn Tâûs, and he, from his father, who said—

"I have been informed by Hajar of Mar [a Companion of the Prophet] with regard to the property bestowed in charity by the Prophet of God, may peace and safety be on him, that this (the Prophet's) family used to appropriate the proceeds thereof lawfully and not unlawfully."—*Finis.*

The fifth tradition.—The Prophet, peace be to him, said—

"The thing with which a man maintains himself is a charity."

The author adds Miqdâm, son of M'aadi Karab, and Khuzri, and Jâbir, and Abi Imâma have also quoted this tradition. As regards the tradition narrated by Miqdâm, Ibn Mâja has recited it, in the *Chapter on wakf*, from Ismâîl, son of 'Ayâshi, he from Buhair, son of S'aad, he from Khâlid, son of Miqdâm, he from Miqdâm, son of M'aadi Karab, and he from the Prophet, peace and safety be unto him, who said :—

"Of the things earned by a man nothing is better than what he earns by the labour of his hands. What a man spends for himself or for his family, children and servants is charity on his part."—*Finis.*

Nisâi recites this in his book *Ashrat-un-nissa* from Bakia and he from Buhair with these words—

"That with which you feed yourself is a charity on your part, that with which you feed your wife is a charity on your part, that with which you feed your children is a charity on your part, and that with which you feed your servants is a charity on your part."—*Finis.*

As regards the tradition narrated by Khuzri, Ibn Habbân has recited it in the first Chapter of the first part of his book "*Sâhih*," from the *Dirâj* of Abi Samah, that Abû'l Haisam recited to him the tradition from Abi S'aid Khuzri, and he from the Prophet, may peace and safety be on him, who said :—"If a man earns something lawfully, and therewith feeds and clothes himself, and others of the creatures of God ; this is a *zakât* (charity) on his part."—*Finis.* Hâkim has also recited this in his book *Mutadrak* in the Chapter on *Atunah.*

* * * * * *

Muslim recites in his *Sâhîh* in the Chapter on *Zakât* from Abi Zubair, and he from Jâbir who said that the Prophet said to a man "Begin with yourself. Give charity to yourself, and if there be anything left, give it to your wife, then to your relatives, and then so on and so on."—*Finis.* The *Ashâb Sunan* [the authors of the works on the Prophet's ordinances] recite from Mughaira and he from Abû Huraira, that the Messenger of God said "Give charity." A man thereupon said, "I have got one dinâr." The Prophet said "Give it in charity (*sadakah*) to yourself." He said, "I have got another dinâr." The Prophet said, Give it in charity (*sadakah*) to your wife." He said, "I have got another dinâr." The Prophet said, "Give it in charity (*sadakah*) to your children." He said, "I have got another dinâr." The Prophet said, "Give that in charity to your servants." He said, "I have got another dinâr." The Prophet said, "You know better how to dispose of it."—*Finis.* Ibn Hâbân has recited this in his *Sâhîh*, and Hâkim in his *Mustadrak*, and they have declared the authorities on which it is based to be correct.

Zakhîrat-ul-Fatâwa.

Page 449.

It is laid down in the *Ajnâs* of Nâtiki that if a man makes a *wakf*, and lays down in it with respect to himself that he would, during his lifetime, eat out of it, and feed those whom he likes, that after him, it would go to his child, his child's child, and to his posterity, for ever, so long as it may continue, and that upon its becoming extinct, it would go to the poor; this is valid according to Abû Yusuf, may the mercy of God be on him, and this is not a *wasiat* (disposition by way of a will) in favour of his child, the child eating out of a property belonging to God, the Most High. Do you not see that when a man makes a *wakf* in favour of his children, and their children so long as their posterity may continue, and gives it afterwards to the poor, it is valid? Now, this case is just like it.

Khazânat ul Muftiin.

If one says, "I make a *wakf* of this land of mine in favour of my child and afterwards in favour of the poor," the income thereof will go to his child and his child's child till they be dead, and none of them be alive, and even if the third generation be forthcoming, the income will go to the poor, and not to the third generation. If he says, "In favour of my child, my child's child and the child of my child's child," making mention of three generations, the income will be spent on his descendants for ever, so long as his posterity continues, and not on the poor till any of his descendants be alive, be he of a degree howsoever low. The result of this is that when the person making the *wakf* makes mention of three generations, the *wakf* will be in their favour, as well as in favour of those lower than them, the next and the remotest being equal, excepting when he, at the time of making the *wakf*, says "the next shall be the next," or says "in favour of my child, and after them in favour of my child's child," or says, "generation after generation," in which case, it shall begin with him with whom the person making the *wakf* has commenced.

SADAKAH OR CHARITY.

Mishkât-ul-Masâbîh.(1)

"The Apostle of God said, 'Every good act, is charity; and verily it is of the number of good acts, to meet your brother with an open countenance, and to pour water from your own bag into his vessel.'"

From Abu Dhar—"The Apostle of God said, your smiling in your brothers' face is charity, and your exhorting mankind to virtuous deeds is alms; and your prohibiting the forbidden, is alms; and your shewing a man the road, in the land in which they lose it, is charity for you; and your assisting the blind, is charity for you; and your removing stones, thorns and bones, which are inconvenient to man, is alms for you.'"

From Abû Huraira and Hâshim-bin-Hizâm—"The Prophet said, 'The best of alms is a thing from which is left sufficient for a man's sustenance and his family; and begin by bestowing on those you have affection for.'"

From Ibn-Mas'ûd—"The Apostle of God said, 'when a Mussulman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children."

Abû Huraira—"The Apostle of God said, 'There is one dinâr which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is, the greatest dinâr in point of reward, which you gave to your family."

Thawbân—"The Apostle of God said, 'The most excellent dinâr which a man bestows, is that which he bestows, upon his own family; and a dinâr spent upon quadrupeds, in the road of God,

---

(1) *Mishkât-ul-Masábîh.* Capt. Mathew's Translation, Vol. I, p. 447 & pp. 453-456.

For the authority of the work see Morley's Dig., Introd., p. cclviii, and the Translator's Preface.

which is combating for the faith, and a dinâr which a man bestows upon his friends, in the road of God.' "

Umm-Salmah—" I said to the Prophet, is there any good tidings for me of rewards, for my bestowing on the sons of Abû-Salmah ? His sons are no other than mine. The Prophet said ' then give to them ; and for you are the rewards of what you bestow upon them.' "

Zainab, wife of ' Abdullah bin-Mas'ûd says—" The Apostle of God said, ' Give alms, O, assemblage of woman ! although it be your ornaments.' " She said, " then I returned from His Highness' presence, when I heard this, to ' Abdullah, my husband ; and I said, ' verily thou art a poor man ; and verily the Prophet has ordered me to give alms, therefore go to His Highness and ask him, if it is sufficient for me to give to thee and thy children ; and if it should be so, I will perform it, and lay out upon you ; and if it is not sufficient, I shall expend on others." Then ' Abdullah said, " Do you go and ask ; do not trouble me." " Then I went to the Prophet ; and behold ! I saw a woman of the Assistants,(1) at the Prophet's door, whose necessity was like mine ; that is, that woman had also come to ask about this matter : and verily there was so much awe and fear in approaching His Highness that no person could go to him without his permission. Then Bilâl came out to us from the Prophet ; and we said to him, ' Go to His Highness and inform him that there are two women at the door, and they ask thee, is it not sufficient for them to bestow on their husbands, and on orphans (2) who are under their protection, but do not inform him who we are ; that is, do not tell him our names.' Then Bilâl went in to the Prophet and asked him about this matter. He said, ' who are they?' Billâl said, ' one of them is of the Assistants, and the other Zainab. Then the Prophet said, ' which of the Zainabs is it ? ' Bilâl said ' Zainab, wife of ' Abdullah bin-Mas'ûd.' Then the Prophet said, ' it is sufficient for them to give to their husbands and the orphans ; and for them are two rewards ; one for their kindred, and another for alms.' "

Sulaiman bin-'Aâmir—" The Apostle of God said, ' Giving alms to the poor has the reward of one alms ; but that given to

(1) Ansâr, the people of Medina who assisted the Prophet.
(2) Meaning the motherless children of their husbands.

kindred has two rewards; one, the reward of alms; the other the reward of relationship.'"

Abû Huraira said, a man came to His Highness, and said, 'I have got one dinâr.' He said, 'expend it upon yourself.' The man said, 'I have got another dinâr.' The Prophet said, 'expend that upon your children.' The man said, 'I have got another dinâr.' He said, 'expend it upon your relation, your wife, father and mother.' He said, 'I have got one other dinâr.' The Prophet said, 'extend that upon your servants.' The man said, 'I have got another dinâr.' He said, 'you know best the condition of the person most worthy of it; and who ever you know to be so, give it?'"

HANAFÎ LAW RELATING TO WAKF.

Bahr-ur-Râik.(1)

"In law, according to Abû Hanîfa, the meaning of *wakf* is the tying-up of the substance of a thing in the ownership of the *wâkif* and the devotion of its usufruct. According to the Disciples it means the tying-up of property in the ownership of Almighty God and the devotion of its usufruct to purposes of benefit to His creatures. In the *Fath* [*ul-Kadîr*] further explanation is added *viz.*, that the *wâkif* may give the usufruct to whomsoever he likes."

"And in the *Zakhîra* it is laid down that a consecration in favour of the affluent is *kurbat*, [an act of approach to god]."

"The motive of *wakf* is to obtain the affection of the living in this world, and to approach the Lord of Lords (may his name be glorified) in the next."

"Its conditions are the same as in acts of mere bounty, *viz.*, that is, the *wâkif* must be sane, *bâligh* (adult) it must be operative at once and not suspensive."

"There are twenty-six express words by which it may be constituted :—

(1) This land is a permanent *sadakah-mowkoofa* on the poor or on anybody, and on this there is no difference.

(2) This is *sadakah-mowkoofa ;* Abû Yusuf, Hillâl, and all others are agreed thereon.

(3) This is *hubs* and *sadakah.*

(4) This is *sadakah-muharrama.* Both these are like the second.

(5) This is *mowkoofa.* According to Abû Hanîfa and Abû Yusuf this word by itself constitutes a *wakf* and implies its final destination for the poor..... And Sadr-ush-Shâhîd has laid down that the *Fatwa* is thereon and the *Mashâikh* of Balkh have given *Fatwa* according to Abû Yusuf's rule, and it is customary with us all to decide according to the rule of Abû Yusuf.

(1) A work of great authority ; see Morley's Dig., Introd., p cclxx, frequently quoted in the Sudder Dewanny Adawlut cases ; see specially 1 Sel. R., p. 17.

(6) This is *mowkoofa* on a *fakîr*.

(7) This is *mahboosa*.

(8) This is *hubs*.

If both these expressions in the language of the place imply permanent appropriation, then it is obligatory as if he had said *mowkoofa* or *wakf*.

(9) If he says 'this is for a *sabîl* (path),' if the customary meaning of the word is permanent dedication, it will be so, otherwise he will be asked as to his meaning. If he says he meant *wakf*, in that case it will be *wakf*. If he says he meant a *sadakah*, then it will be a mere votive offering.

(10) 'I have made this for the indigent.'

If the customary sense of these words is *wakf*, it will be *wakf*. If not, he will be asked as to his intention, if he says he meant *wakf*, in that case it will be *wakf*, if he says he meant a *sadakah*, then it will be a votive offering.

(11) *Muharrama*.

(12) His mere saying *wakf*. And this is correct. And among the people of Hijâz(1) it is universal. It is equivalent to saying *hubsun mowkoofun*.

(13) And it is like saying shortly, *mowkoofatun*.

(14) His saying 'I have made the fruit of my vine trees *wakf*.' This will be *wakf* [of the trees] whether there are grapes on the trees or not.

(15) His saying 'I have constituted the usufruct [of this property] in this way.'

(16) His saying 'this is *mowkoofa* for Almighty God,' it is equivalent to saying *sadakah-mowkoofa*. All this is stated fully in the *Fath-ul-Kadîr*. And in the *Bazâzia*, it is laid down that a *wakf* created by the mere word *wakf* or *mowkoofa* is valid.

(17) If he says 'this is *mowkoofa* on *wajjah-ul-khair*, good purpose, or *wajjah-ul-ihsân*, benevolent purpose,' it will be a *wakf* for the poor.

(18) If he says 'this is *sadakah-mowkoofa* for my *hajj* or for my' *umra*,' it will be a lawful *wakf*.

(19) If he says 'this is *sadakah*, it will not be sold,' it will be a votive offering, but if he add 'it will not be given in gift, and

(1) The part of Arabia where Mecca and Medina are situated.

inheritance will not apply to it,' in that case it will be a *wakf* for the poor.

(20) If he says 'you buy out of the produce of this house every month ten *dirhems* worth of bread and give it to the needy,' the house will be *wakf*."

[The rest are unimportant.]

"There is no difference as to the validity of a *wakf*. The only difference is as to when it becomes obligatory and binding. Abû Hanîfa says it becomes binding on the decree of the Judge [and that], until then it is revocable. The Disciples hold it becomes binding at once, and cannot be sold or given or inherited..... All the jurists have adopted the rule of the Disciples and the *Fatwa* is thereon. And in the *Fath-[ul-Kadîr]* it is laid down that it is correct, and on that is the *consensus* of the universality of the Companions of the Prophet..... According to Abû Yusuf, a *wakf* is like the emancipation [of a slave] and becomes operative and binding by the mere declaration of the *wâkif*. Mohammed says it becomes binding after delivery of *seisin* to the *mutwalli* and separation and mention of perpetuity."

"If the person making a *wakf* reserves the income thereof for himself, or appoints himself the *mutwalli*, it will be valid, that is to say, if he lays down this condition at the time of making the *wakf*, the condition will be good. The first, however, is valid according to Abû Yusuf, and invalid according to the analogy of what Mohammed says, because he [Mohammed] makes the delivery [of the *wakf* property] to the *mutwalli*, a condition. It is also said that they differ as to the delivery of possession and division being necessary conditions for *wakf*. It is also said that this difference is a new point altogether. The difference being in the case where the person making a *wakf* makes the condition that a portion shall be enjoyed by himself during his lifetime, and after him, by the poor; and in the case where he makes the condition that the whole shall be enjoyed by himself during his lifetime, and after him, by the poor."(1)

"The reason for what Mohammed says is, that a *wakf* is valid when any one is made owner of a property in the manner herein before described by me. Hence the condition under which the whole or a part is enjoyed by one [making the *wakf*] makes it

(1) That is, there is a difference in both cases.

[the *wakf*] invalid, for it cannot be realised how one can make himself the owner. It would be just like a conditional charity, and the reservation of a portion of the site of a mosque for one's self."

"Abû Yusuf relies on what has been related regarding the Prophet, peace and safety be on him, *viz.*, that he used to eat out of his *sadakah*, which is understood as *sadakah-mowkoofa*, but it is not lawful to eat out of it, unless there be a condition to that effect; hence the above shows the validity of the condition. Besides, *wakf* is the depriving of one's self of a property, and dedicating it to God, the Most High, in the manner stated above with the object of [illegible], drawing near to God. Hence, if a man reserves a part or the whole for himself, he takes for himself a thing belonging to God, and not a thing belonging to himself; and this is lawful. It is just as a man builds a house for the reception of travellers and strangers, or constructs reservoirs to keep therein water for the use of the travellers, or converts a piece of land into a burial-ground, and makes the condition that he also should put up, or drink, or be interred there. Besides, the object of [the person making a *wakf*] is to do a pious act, and making provision for himself is such. Said the Prophet, peace be on him, 'Provision made by a man for himself is a charity.' It is stated in the *Fath-ul-Kadîr*, 'Preference is given to what Abû Yusuf says.' Sadr-us-Shâhîd says, *Fatwa* is given according to what Abû Yusuf says. We also give *Fatwa* in accordance with what Abû Yusuf says, in order to encourage people to make *wakf*. The *Mashâikh* (jurists) of Balkh have also adopted the same view; and this is what appears from the *Hedâya*, because it gives the arguments in its support and does not refute them. In a case of reservation for one's self, if a man says that the debts due by him should be paid from the income of it [the *wakf* property]; and in like manner, if he says that in the event of his dying in debt, his obligation should be paid off first with the income of this *wakf* property and that the remainder should be spent in the way of God; in each of these cases the *wakf* shall be valid. In the Book of *Wakf* by Khassâf, it is stated, 'if one makes this condition that he would apply the usufruct of the said *wakf* property for the maintenance of himself and his children, servants, and family, and if the produce thereof comes [into his hands] and he sells it, and takes it into his custody the price of the same, and then dies before spending it, to whom shall it go, whether to his

heirs, or to those in whose favour the *wakf* was made? It is said, 'It shall go to his heirs, because the usufruct (as conditioned by him) belonged to him, and he had obtained it. But this does not specify the part they each should get, whether one half, or a fourth, [*viz.*, the whole of the usufruct which came into his hands would be for them jointly].' And such also will be the case if any one says, 'If so-and-so, meaning the person making the *wakf*, dies, one part, say out of ten parts, shall every year be taken out of the usufruct of this *wakf* property, and be spent in the performance of the *hajj* for his benefit, in doing penance for the oaths broken by him, and in such and such acts, naming several things,' or if he says, 'So many *dirhems* shall every year be taken out of this property given in charity, for being spent for such and such purposes, and the remainder in such and such acts as he (the *mutwalli*] considers proper.'—*Finis.* It is stated in the *Hâwi*, 'This rule of Abû Yusuf has been adopted for the *Fatwa*, in order to encourage people to make *wakf* and increase benefaction.' From this difference of opinion it may also be inferred that if any one were to make a *wakf* in favour of his male and female slaves, it would be invalid according to Mohammed and valid according to Abû Yusuf, in the same way as the condition for one's own benefit. Some have drawn the same inference also from the above as to the enjoyment of the usufruct by *mudabbars* and *umm-ul-walads*.(1) This, however, is weak; *and what is correct is this, that it* (the enjoyment of usufruct by *mudabbars*, etc.,) is lawful, both the authorities agreeing in it. Mohammed argues that inasmuch as they (the *mudabbars* and *umm-ul-walads*) shall become free upon the death of the man, a *wakf* in their favour shall be just like a *wakf* in favour of strangers; and it (freedom) is found in them during his lifetime in anticipation of what would be the case after his death. What is said in the *Hedâya* and *Mujtaba* as to their really differing on the said point, is weak."

"All our *Mashâikh* have adopted the rule of Abû Yusuf..... So that what is written in the *Khânieh* (*Fatâwai Kâzi Khân*) that 'if a person were to make a *wakf* on himself, and on so-and-so, half of it would be valid, *viz.*, the share of the other,—and the share of himself would be void, or if he were to say that it is a *wakf* for himself and

(1) *Mudabbar* is a conditionally enfranchised bondsman; *amin-ul-walad* is a bondswoman who has borne a child to her master and has thus obtained her freedom.

then for so-and-so, or if he were to say, that it is a *wakf* for so-and-so, and then on himself, half would be valid, and the other half would be invalid,' is a matter for surprise. How did the author come to say this? It must be an interpolation. You must know that whatever conditions a *wâkif* has laid down must be given effect to." . . . . . .

Wakf on descendants valid without difference.

"*There is absolutely no difference* [*as to the validity*] *when a man makes the condition that the usufruct shall be for his children, so that when he makes a wakf in favour of his children, it includes both the male and female, but if he restricts to the male, it would exclude the female children.* * * * * * *And when he mentions the third generation, nothing of the usufruct will be spent on the poor, so long as any of his descendants, however remote, is in existence.*".....

"In the *Tâtâr-Khânièh* it is stated that when a *wakf* is in favour of a specified and known class or people whose number is capable of limitation [or ascertainment], if they appoint a *mutwalli* without taking the opinion of the Kâzi it will be valid if they are people of judgment. The ancients say that it is preferable to place the matter before the Kâzi, but all modern jurists say it is preferable not to do so.....our masters and modern *Mashâikhs* are agreed that it is better such people should appoint their own *mutwalli*.

Tahtâwi.

Page 528.

Text of the *Durr-ul-Mukhtâr.*—" According to both [Mohammed and Abû Yusuf,] it [*wakf*] means the detention of a thing in the ownership of Almighty God, and the application of the usufruct thereof for whomsoever he [the person making the *wakf*] likes, though that person may be rich. Consequently the *wakf* would be binding, he [the person making the *wakf*] not being competent to annul it, and it, [the *wakf*] not being heritable. And on this is the *Fatwa ;* Ibn Kamâl and Ibn Shahnah. Its object is to make one's self beloved in this world, and to obtain in the next the reward [of God], that is to say, if it is made by a person possessing the capacity to form an intention [*niat*], because it (making a *wakf*) is *mubâh* [lawful], inasmuch as it is valid even if made by an infidel, and sometimes it is *wâjib* [obligatory] on account of a vow." *Comment* of Tahtâwi :—" The author has added the words ' *lau fil jumlati*' (if in any sense or at any time) admitting [or accepting] what is said in the *Fath-ul-Kadîr*. Ibn Kamâl has adopted the same opinion. The *Fath-ul-Kadîr* says ' or spending the usufruct thereof for whomsoever he likes,' for the reason that a *wakf* is valid even if made in favour of the rich, without any intention of *kurbat* [an approach to God]. Such *wakf*, although its ulti ate purpose must be for *kurbat* and permanency, will be a *wakf* even before the rich are cut off and even if there be no mention of giving alms to the poor, just in the same way as a *wakf* for the poor and for defraying the expenses of a mosque. This addition makes the definition comprehensive. The inference to be drawn from the [above] statement is that the object of making a *wakf* is doing a benefaction in any sense or at any time. This also appears from what is said in the *Muhît*, where it is stated that if a *wakf* be made *exclusively* restricted to the rich it will not be valid, as there is no *kurbat*, the case being quite different when it is last of all destined for the poor, for there is *kurbat* on the whole."

Page 529.

Text.—"Abû Yusuf considers the word [*Mowkoofa,*] only as sufficient. Shahîd says 'I also give *Fatwa* in accordance with the same having regard to customary practice.'" *Comment :*—"The author says 'the word [*Mowkoofa*] &c.' He [Abû Yusuf] says when a *wakf* is constituted by this word [alone], it is for the poor, and when it conveys a particular mode of application, *viz.*, a dedication for the poor, it necessarily becomes permanent, because the poor can never be extinct, *Bahr-ul-Râik.* He says [further]:—"Sadr-us-Shahîd says, 'and I also give *Fatwa* in accordance with the same.'" And the *Mashâikhs* [Jurists] of Balkh have also given *Fatwa* in accordance with it. *Fatwa* is given according to Abû Yusuf, who says a *wakf* shall be valid by the use of this word alone, though no mention be made of permanency or of the object in whose favour it is made."

The ancient lawyers generally discountenanced as a superstition the reading of the Koran over the grave of a deceased person. The practice, however, has now become universal and has received the sanction of modern jurists, who base their approval, as has already been pointed out, on a *dictum* of Imâm Mohammed ; see p. 634.

The non-Moslem subjects of a Mahommedan State are called *zimmis* or *ahl-ul-zimma ;* from the fact that they, on their side, have sworn allegiance to the head of the State and have received from him, as the chief representative of the Moslem nation, the pledge of protection and security for their person and property, and for the free enjoyment of their civil rights.

A non-Moslem subject of a non-Moslem State entering a Moslem country under a *guarantee of protection or âmân* was called a *mustâmin.*

That guarantee might be special, extended to him personally or might be *general,* under a treaty with his sovereign extending to all the subjects of that particular State. A special *âmân* can be given by any Moslem whatever his position to an alien arriving on Moslem soil, but such protection would be restricted in its duration ; a *special âmân* granted by the State would extend to the entire period of the *mustâmin's* stay in the country.

Wakfnamah in *Doe dem. Jaun Beebee* v. *Abdollah Barber* (Fulton's Reports, p. 345).

"Praise unto God, the bestower of grace and support, and blessings on Mohammed, the chief of the prophets, his descendants and companions, who are perfect and united, after which I, the declarant, Masummat Goonda Bibee, wife of the late Sheikh Culloo Khansamah, inhabitant of Mawza Colinga in Dehu Berjee, one of the Mahullas of the town of Calcutta, being sound in body and mind, competent to perform all legal acts, of my own free will, without aversion or compulsion, make the following binding and lawful declaration :—

"Whereas different spots of ryotty land, and land in my own occupation purchased by me without the participation of others as appears by the vouchers granted by the vendors that sold the same unto me, and property formerly belonging to my husband, received by me as my marriage portion, all which landed property is duly defined by pottahs and bills of sale, and well-known limits, are held by me in my own exclusive possession, under my proprietary right thereto, free from the participation of others, and old rights included therein, or otherwise appertaining thereto, both great and small, I hereby grant and dispose of the same, as a pious donation to please God, who is above all, on the following conditions :

"1st.—Whereas the aforesaid lands, subject to rent, are situated in the town of Calcutta, I will appropriate as much of the produce thereof as is required by my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to hereditable and charitable purpose, and my several relatives, that is, my grandson and grand-daughter and daughter-in-law, and daughter's son and daughter's daughter, who are now receiving maintenance living together, united in meals shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque, and salary of the Mowuzzin, Khatib, and other expenses connected therewith, in the seasons of Ramazaun Mobarek, and the Eed, shall be defrayed from the produce, and the person who is hereafter appointed *mutwalli*, will enjoy the same powers as I myself possess.

"2nd.—I will continue *mutwalli* as long as I live, and on my decease my daughter's son Abdollah, son of Sheikh Joomun, inhabitant of Calcutta, will become *mutwalli*, after the said Abdollah, one from among my relations who is the most fit and possesses integrity, temperance, intelligence, and respectability and appears most deserving.

"3rd.—After my decease, neither my heirs nor the *mutwalli* will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner whatsoever. The income which is expended in hereditable, charitable and benevolent purposes, shall be disbursed under my own control and direction.

"These few words are, therefore, written by way of a voucher of a pious donation, to serve as a binding and decisive document when occasion requires. [A specification of the lands comprised in the above pious donation then followed.]

"Written on Thursday, the last of the month of March of the year 1832 of the Christian era, corresponding with the 19th of the month of Phalgoon, of the year 1283, Bengal style, corresponding with the 27th of the month of Ramazaun Mobarek, of the year 1247, of the Hegira."

GENERAL INDEX.

AARIAT—
adriat, 34 *et seq.* 111, 195. *note.*
difference between—and gift, *ib.*
a kind of bailment, 744, 747.
definition of, 747.
conditions essential to, *ib.*
its legal effect, 748.
bailee liable, when, *ib.*

ACCEPTANCE
of gifts, *see* Gifts.

ACKNOWLEDGMENT—
of *wakf*, see *Wakf* of a debt, *see* Debt.

ACTS—
Act XX of 1863, 109, 549, 550.
——XX of 1863, ss. 4—7, 549, 550.
——XX of 1863, s. 18, 551, 551*n*.
——IX of 1872, ss. 14, 15 and 16, 47*n*.
——IX of 1875, s. 3, 43.
——XIV of 1882, s. 539, 551, 554.
——IV of 1882 (the Transfer of Property Act), 34*n*., 41, 137.

ADMINISTRATOR—*See* Executor.

AKD—
its validity depends upon what, 42.
every legal act, under the Mahommedan Law, *ib.*
of idiots, lunatics and persons *non compos mentis*, 43 *et seq.*

AKHBARIS—
doctrine of the, 30.

ALIEN—
wakf in favour of an invalid, 276.
a *musta'min* may will away property to a Moslem or a *Zimmi*, when, 626.

ALIENATION—
of *wakf* property illegal, as a general rule, 482 *et seq.*
a burial-ground cannot be alienated, 488.
lands in which there are tombs cannot be sold in execution of a decree, *ib.*

ALIENATION—*contd.*
a heritable estate burdened with a trust may be alienated subject to the trust, 486.
when the purchaser of *wakf* property is entitled to remove erections or to compensation after the sale has been set aside, 491.
private—of *wakf* lands, illegal, 485.
wakf lands cannot be transferred by sale or gift, 486.
wakf lands cannot be mortgaged, 470, 485, 488, 489.
when may the *mutwalli* pledge *wakf* lands, 470, 488.
a house appropriated for the residence of certain persons cannot be partitioned, 475.

ALLOTMENT—
of the share of a legatee by the executor, 678.

AL-UMRA—
a grant to a person conveys a life-estate or—only, 143.
determined by the death of the grantor, 145, 146.
determined by the death of the donee, when, *ib.*
See Estates.

ANNUITY—
bequest of an, 652, *et seq.*

APPROPRIATION—See *Wakf*.

AQUEDUCTS—*See* Cisterns.

ASNA ASHARIAS OR *IMAMIAS*, 12.
sub-divisions of, *ib.*

ASSENT—
to a legacy must be free and voluntary, 593.
voluntary—given by the heir during the last illness of the testator, irrevocable, *ib.*

B

BAILMENT—
definition of, under Mahommedan Law, 744, 747.
four kinds of, *ib.*
See *Adriat* and *Ijara*.

BEQUEST—
definition of, 570, 571, 639.
construction of, 633.
constitution of, 570, 571, 639, 654.
conditional or contingent, *ib.*
its legal effect, 646.
what words do and do not constitute, 639.
——Shâfeï doctrine, 707.
ambiguous, how determined under the Shiah Law, 640.
a legatee may reject part, and accept the remainder of a—, 645.
void without acceptance, express or implied, by the legatee according to all the schools, 645.
period within which acceptance of—must be made, Hânafî doctrine, 645.
——(Shiah Law), 645.
——(Shâfeï Doctrines), 644.
what are lawful objects for, 593, 597, *et seq.*, 600.
what may be the subject of—Shâfeï Doctrines, 702 *et seq.*, 708.
[illegible] movable or immovable over which the right of property may be exercised or which may be transferred or exchanged, or a fractional share thereof, or the usufruct of a thing may be the subject of—, 631.
remains valid and operative, though the subject-matter may have undergone a change or improvement, *ib.*
the legatee bears any loss or deterioration to the subject-matter of—, *ib.*
of a lawful object void, if subject to the condition that the legatee should commit an unlawful act, 632.
must be for a person or object actually or constructively in existence at the time of the disposition, 600.
not valid beyond a third of the testator's estate unless assented to by the heirs, 632.
——(Shiah Law), *ib.*
——(Hanafî Law), *ib.*
——(Shâfeï Doctrines), 704.
in excess of the disposable third will be reduced to the third, when the heirs do not consent (Hanafî Law), 611.
——(Shiah Law), 614.
——(Shâfeï Law), 704.
not reducible to the third by the acknowledgment of a debt (Hanafî Law), 624.
acknowledgment not founded upon an actual prior consideration, 624.
effect of acknowledgment by a sick person, 624, 629, *note*.
when there are no heirs, valid as to the whole, 593.

BEQUEST—*contd.*
when two or more legacies exceed the disposable third, whether specific or indeterminate, the legatees take in what proportion, 609 *et seq.*
to an heir invalid without the consent of the others, according to all the schools, 589 *et seq.*
(Mâliki and Shâfeï Laws), 593.
to an heir valid to a third without the consent of the other heirs (Shiah Law), 592.
of the third to a stranger valid without the consent of the heirs (Hanafî Law), 589.
to a relative not entitled to a share in the inheritance, 591, 592, 604.
in favour of one's *as'har* (Hanafî Law), 607.
to one's kindred (Hanafî Law), 601, 604.
to one's kindred (Shiah Law), *ib.*
to the nearest of kin (Hanafî Law), 605.
in favour of one's relations (*akriba*), 607 *et seq.*
ditto (Shâfeï Law), 707.
in favour of the relatives of a stranger (Hanafî Law), 605.
" to the relations " of a certain person (Shâfeï Law), 707.
to the orphan, the blind, or the people of a particular race or locality, 605, 608.
in favour of the heir of *A* and *A* dies leaving several heirs (Hanafî Law), 606.
to a particular family (Hanafî Law), 606, 609.
in favour of learned men (Shâfeï Law), 707.
to a certain class (Shâfeï Law), *ib.*
to several persons or to a class (Shiah Law), 614.
to one's neighbour, 601, 605, 606, 607.
ditto (Hanafî Law), 606 *et seq.*
ditto (Shâfeï Law), 707.
to an unborn child lawful according to all the schools, 599, 601 *et seq.*, 702.
to an unborn child becomes void if still-born or born after six months from the date thereof (Hanafî Law), 599, 600.
void, if still-born (Shiah Law), 600.
to a child in the womb (Shâfeï Law), 579, 590.
to the poor (Hanafî Law), 601.
——(Shiah Law), 602.
——(Shâfeï Law), 707.
to the Holy Shrine of Kaaba or any mosque, 601, 602
for the support of a mosque (Shâfeï Law), 703.

BEQUEST—(*contd.*)
for the support of a Christian Church or a synagogue (Shâfeï Law), 702.
for *Sabîl-illah* or in the way of God, 601, 603.
——(Shiah Law), 602, 603.
for good or charitable purposes, 601, 603.
for the children of one's heir, lawful, 601, 604.
to the children (*awlâd*) of the race of a particular person (Hanafi Law), 609.
for the payment of debts, 601, 605, 704.
for the emancipation of slaves, lawful, 601, 605, 705.
in favour of soldiers and "the unhappy," 604, 606.
effect of acknowledgment in death-illness, *note*, 629, 630.
by a person in death-illness, 575 *et seq.*
under the (Hanafi Law), 576.
——(Shiah Law), 577, 578.
——(Shâfeï Law), 705.
in favour of a strange woman by a sick person who subsequently marries her and then dies (Hanafi Law), 579. 629. *note.*
by a father in death-illness to a son who at the time was a non-Moslem (Hanafi Law), *ib.*
to a son, who is a slave, by his father in death-illness (Hanafi Law), 580.
the death of the legatee in the lifetime of the testator does not cause a lapse (Shiah Law), 614.
——does cause a lapse (Hanafi Law), 614 *et seq.*
to an alien infidel invalid according to all the schools, 594.
to an alien who is not a *mustâmin*, 626.
by an alien who is *mustâmin*, to a Moslem or a *Zimmi*, *ib.*
to an apostate invalid, 598.
to a non-Moslem not an alien, lawful, 597 *et seq.*
to a non-Moslem, whether an alien or not, invalid according to the Shâfeï Law, 597.
to a person who causes the death of the testator, 587 *et seq.*
to a slave (Shâfeï Law), 702, 703.
by a slave, 573, 702.
by an insane person, 574, 575.
of a third by way of *mushâa* (Shiah Law), 621.
to two or more persons in excess of the third, distribution of, 610 *et seq.*
in an indefinite form, 611.
of the share of the testator's son or daughter, 612 *et seq.*

BEQUEST—(*contd.*)
of the third to *A* and *Z*, and *A* is dead at the time of the—615, 615, *note.*
a joint—to *A* and his heir, 619.
to two persons jointly, one of whom becomes disqualified by the failure of a condition (Hanafi Law), 616.
in favour of existing objects or persons and one of them ceases to exist at the time of the *wasiat* (Hanafi Law), 616.
by a wife of half of her property to a stranger, 617.
by a husband of all his property to a stranger, where the widow will not consent, 617.
of a third to the sons of a particular person, 617.
of a third to one's *umm-i-wolad*, and to *fakirs* and *miskins* (Hanafi Law), 618.
to a stranger and his heir (Hanafi Law), 619.
of things of different qualities, one of which is lost (Hanafi Law), 619.
an increase of the subject of a—in the lifetime of the testator forms part of the testator's assets; but an increase after death and partition or distribution of assets belongs to the legatee (Hanafi Law), *ib.*
a separable increase to the subject of—(Hanafi Law), 620.
assent of heirs to—(Shiah Law), 620.
specific—(Shiah Law), 621.
repugnant to each other (Shiah Law), *ib.*
in terms applicable to several things the heirs have the right of selection (Shiah Law), 622.
of the services of a slave or of any thing of a usufructuary nature (Shiah Law), 621.
of the portion of an heir (Shiah Law), 622, 623.
to the poor of property, situated in different places (Shiah Law), 623.
of a mansion which falls down (Shiah Law), 624.
of a fixed sum to *A* and the poor (Shiah Law), *ib.*
for religious purposes by a Christian (Hanafi Law), 625, 626.
by a Jew (Hanafi Law), 626, 627.
by *Zimmis*, of four kinds (Hanafi Law), 627, 628.
by a *Zimmi* in excess of the third in favour of a stranger, or heir invalid (Hanafi Law), 626, 628.
of property to a Mussulman or *Zimmi* by a *mustâmin* valid (Hanafi Law), 625, 628.
of specific sum of money and the testator leaves actual property and outstanding debts, 633.

BEQUEST—(*contd.*)
when two legacies are given to the same person (Mâliki and Hanafi Laws), *ib.*
in general and special terms, 633.
of a son's share to a grand-child, 635.
for the performance of religious duties, and pious purposes and works, how carried into effect (Hanafi Law), 636.
for the performance of certain duties some of which were obligatory on the testator and others merely discretionary, how carried into effect (Shiah Law), 636.
for a pilgrimage on behalf of the testator (Shâfeï Law), 708.
usufructuary—lawful, 646, 708.
effect of a usufructuary—, 646.
an usufructuary—may be for a limited period or in perpetuity, *ib.*
an usufructuary—for an indefinite period is regarded in perpetuity, *ib.*
if the subject of the—falls within the third of the testator's estate, the usufruct will be given to the legatee, 647.
if the subject of the—does not fall within the third, the legatee will get the benefit of the portion covered by the third, *ib.*
when the legatee dies before the expiration of the term of the—it reverts to the heirs, *ib.*
of the service or produce of a slave, 650.
of the usufruct of a slave (Shâfeï Law), 708.
of the occupancy or produce of a house, 647, 648, 649.
of the produce of a garden or land, 650.
of the service of a slave, the produce or occupancy of a house or garden (Shiah Law), 654.
of principal and accessory to different persons, 652.
of an annuity, 652 *et seq.*
revocation of—may be made at any time, 641.
——may be express or implied, *ib.*
four modes of revocation, 642 *et seq.*
——how made (Shiah Law), 645.
——(Shâfeï Law), 708.
a mere change in, does not amount to a revocation (Hanafi Law), 642.
when a subsequent—of the same thing is a revocation of the first (Hanafi Law), *ib.*
something to another person makes the second legatee a partner with the first (Hanafi Law), 643.
pledging the subject of a—not necessarily a revocation of it (Hanafi Law), *ib.*
BEQUEST—(*concld.*)
of a mansion or land, what is, and what is not, a revocation of it (Hanafi Law), *ib.*
revoked by the sale and gift of the subject of (Mâliki and Shâfeï Laws), 644, 708.
legal effect of a, 646.

C

CALIPHATE, 7, 8 *et seq.*

CARAVANSERAI—
dedication of, how made, 405.
in the use of a—no distinction between the rich and poor, *ib.*

CEMETERY—
dedication of, how made, 405.
when a body buried in the ground may be lawfully exhumed, 406.
khiraj abates from land converted into, 406.
land converted into a—may be sold when overflown by water and unfit for the burial of the dead, 406.
land for a—may be sold, when, 406, 411.
cannot be alienated or partitioned, 406.

CESTUI QUI TRUST—
may not of his own motion change the nature of the endowment, 418.
cannot hypothecate *wakf* property, 470.
cannot grant a lease for a long period (Mâliki Law), 542.
not entitled to partition, 366, 753.
the poor are the ultimate beneficiaries of a *wakf*, when no others have been specified, 211, 414.
conditions relating to, 506 *et seq.*

CHOSE-IN-ACTION—
may be the subject of gift, 64, 73, 74, 96, 177.
assignment of, not invalid under Shiah Law, 177.

CHRISTIAN—
may will his house for religious purposes, 625, 626.

CISTERNS—
dedication of—and wells how made, 405.
in the use of—no distinction between the rich and poor, *ib.*
the *wakf* on a reservoir in ruins and not needed may be spent on another reservoir, 410.
the materials of a well or reservoir may be used for building another, when, *ib.*

CIVIL PROCEDURE CODE, s. 527, 199.

COMMODATUM—See *Áárial*, 747.

COMPULSION OR *IKRAH*—
doctrine of, 47 *et seq.*

CONSIDERATION—See *Ewaz*.

CONSTRUCTION—
rules as to the interpretation of bequests and devises (Hanafi Law), [illegible]

CONTRACT—
requisites for a valid—42 *et seq.*
of minors, 42.
of idiots and lunatics, 43.
of a person drunk at the time of entering into the—will be set aside, 45.
obtained by fraud or imposition or contrivance from a person under the influence of liquor set aside, when, 44.
of imbeciles, valid unless obtained by fraud, 45.
mere imbecility or *safáhat*, no inhibition to a—, *ib.*
by a bondsman or slave not valid, unless ratified by his master, 46.
made under duress or undue influence valid if subsequently ratified, *ib.*
infancy, slavery, and *junun*, three causes of inhibition to, according to the *Hedáya*, 43.
voidable, if obtained by duress or *ikrah*, 46.

CREDITOR—
gifts in fraud of, void, 51, 52, *note.*
may recover debts from the heirs after partition, 683.
whether discharge by a—must be accepted by his debtor, 74, 168, 170.
rights of, as regards *wakfs* by debtors, 206 *et seq.*

CYPRES DOCTRINE—
applicable to *wakf*, 403, 412
ditto, *wakfs* for a good or charitable purpose or for an object of general utility which has failed, 511, 512.

D

DARGAHS—
meaning of, 443.

DEATH-ILLNESS—
death-illness (*marz-ul-mout*).
——, definition of, 54.
——applicable not only to diseases which actually cause death, but also to those which are likely to result in death and cause an apprehension of death (Hanafi Law), 56.

DEATH-ILLNESS—(*contd.*)
——(Shâfeï Law), 705.
a malady of long continuance is an illness which has lasted for a year and there is no immediate apprehension of death, *ib.*
gift by a person in—invalid (Mâliki Law), 54.
——, valid as to the whole, if possession is given to the donee in the lifetime of the donor; but subject to the rules governing testamentary dispositions if the donor dies without delivery of possession (Shiah Law), 54, 60.
valid, as to a third (Hanafi Law), 56.
gift by a person suffering from a malady of long continuance, provided he be of sound mind, and there be no immediate apprehension of death, is valid, 57.
——, if donee be an heir, not valid without the consent of the other heirs, 57.
gift in lieu of dower-debt by a woman in—, 63.
capacity of a person in—to make a will, 574 *et seq.*
a person in—cannot dispose by will more than a third (Shâfeï Law), 705.
effect of a bequest made in a—, 578, 706.
wakf in—valid to a third without the consent of the heirs (Shiah Law), 499, *note*, 501.
acknowledgment of debts in favour of a strange woman, *note*, 629.
——of a son, 630 *note.*
gifts in, *see* Gifts.

DEBT—
acknowledgment of—prevents the reduction of legacies to the disposable third, 624.
——by a sick person in favour of a strange woman, 579, 580. *note*, 629,
——by a sick person in favour of his son, 580, 629, *note.*
acknowledgment of—due to a non-Moslem son, 580.
——of—due to his son who is a slave, 580.
——in death-illness of a—, the amount being unknown, 581.
——difference between it and a gratuitous disposition in death-illness or contemplation of death, 579.
payment of—by executors, 691, *et seq.*
gift of a—to a debtor valid (Hanafi Law), 65, 74, 168
——(Shiah Law), 65, 73, 186. *et seq.*
——(Shâfeï Law), 189.

DEBT—(*contd.*)
——by the creditor to his debtor equivalent to a discharge or release, and is complete without acceptance, 74, 169, 170, 186.
——to the debtor entitles him to recover from his creditor any *mâl* pledged for it, 171.
——to a person other than the debtor, valid when, *ib.*
——invalid (Shâfeʿi Law), 189.
——to the principal debtor, its effect as regards him and his surety, 169.
gift of—to the surety, incomplete without acceptance, 168.
——irrevocable when once the debtor has consented to the discharge, 172.
gift of—or release from a—cannot be subject to the option of a stipulation, 168.
contingent gift of—to a debtor, 171.
gift of—upon a condition which is immediately fulfilled, valid, 171.
dower-debt, *see* Dower.

DISPOSITION—
of property, by a Mahommedan, governed by Mahommedan Law, 33—36.
of property, two kinds of, 34.
of property, by way of gift, *see* Gift.
testamentary power of, *see* Will.
difference between—of property *inter vivos* and bequests, 502.
made in death-illness, *see* Gifts, *Wakf*, Wills.
inter vivos, legal, although a larger share be given thereby to one heir than to another, 39.
conditions necessary for the validity of any, 42 *et seq.*
of property, by a minor, 42.
of property by a person *non compos mentis*, 43 *et seq.*
of property by a slave, 46.

DISTRIBUTION—
of the income of a *wakf* when *per stirpes*, 361.
——when *per capita*, 361.
——of produce when the proportions in which males and females are to take are not mentioned, 359.

DONEE—*See* Gifts.

DONOR—*See* Gifts.

DOWER—
gift of, by the mother to her infant child, valid, 174.
——obtained by a husband by force or fraud, invalid, *ib.*
——in exchange for something else, *ib.*

DOWER—(*contd.*)
——by a woman in labour to her husband invalid if the woman dies during the *nifas*, 61.
gift in lieu of dower-debt in death-illness not governed by the Mahommedan Law relating to gifts, 63.
gift of—by a woman to her deceased husband's estate, valid, 174.
——in death-illness, 174.

DRUNKENNESS—
invalidates a gift or contract, when, 44, 45.

E.

EMANCIPATION—
a slave may be emancipated by a *mustâmin* while living, 625, 626.

ENDOWMENT—See *Wakf*.

ESCHEAT—
none to the *Bait-ul-mâl* or public treasury, according to the Shiahs, 10.
to the spiritual Imam, *ib.*
to the spiritual Imam's representative, the Mujtahid, 11.

ESTATES—
limited estates recognized by the Shiah Law, 142 *et seq.*
——(Mâliki Law), 540.
hubs, 143.
estate for life or *al-umra*, *ib.*
right of habitation or *as-sukna*, *ib.*
enjoyment of the usufruct for a fixed period or *ar-rukba*, *ib.*
life-estates take effect as a *hiba* (Hanafi Law), 140.
no special words for formula necessary for their creation, 143, 181.
determined by death of grantor or grantee, 143, 144.
are revocable, 144.
a succession of life-estates are valid, 146.
in a grant to *A* and his children generally or to his children's children the terms "generation after generation, line after line," are words of description, not of limitation, 180.
a grant to *A* and his children generally or to his children "generation after generation, line after line," conveys a fee simple, 146, 180.
a grant to *A* and "his successors," under the Shiah Law passes only a life estate to *A*, 180.
a grant to *A* for life valid, a grant to *A* for life with remainder to another *in esse* valid (Shiah Law), 181.
See Gifts.

EVIDENCE—
when there is a dispute as to the delivery of a gift burden of proof is upon which party (under the Shiah Law), 185.
admissible to explain the meaning of words in a *wakf*, 427, 498*n*.
of reputation may establish a *wakf*, 474 *et seq.*

EWAZ—
two kinds of, may be stipulated for at time of the contract of gift or subsequent to it, 158.
(subsequent to the gift) its conditions, *ib.*
——nature of, 159.
stipulated for in the gift, effect of, 160.
for a gift bars revocation, *ib.*
may be revoked by the donee when, *ib.*
——illustrations of, 160.

EXECUTOR—
definition of, 662.
also the personal representative of the testator, *ib.*
three kinds of, *ib.*
difference in the position of an—under the English Law and that of an—under Mahommedan Law, 662, *note.*
appointment of, may be general, special, 656.
——how made, 664.
——(Shâfeï Law), 710, 711.
——complete, takes effect upon acceptance, 663.
acceptance of the office of the—may be by word or deed and may take place in the testator's lifetime or after his death (Hanafi and Shiah Law), 663, 664.
cannot renounce his office after acceptance, 664.
who may be appointed, 656 *et seq.*, 710.
qualifications requisite in an—(Shaih Law), 661.
when none appointed who may administer, 689, 690, 696.
wasi or guardian may be appointed for every person over whom the *patria potestas* of the Mahommedan Law can be exercised, 697.
may be appointed, when the father is wasting the estate of his infant child, 674.
wasi in the lifetime of the grandfather (Hanafi Law), 696.
may not be appointed in the lifetime of the grandfather (Shiah Law), *ib.*
slave of another cannot be, without the consent of his master, 661.
an alien infidel cannot be, 658.

EXECUTOR—(*contd.*)
but a *Zimmi* or non-Moslem fellow-subject may be appointed, *ib.*
a minor cannot be appointed—, but if appointed, he should be removed by the Judge, 657.
when one of the executors is a minor, the adult—may alone act until the minor attains puberty, 658.
for special purposes (Hanafi Law), 697.
cannot appoint by will an—to the original testator (Shâfeï Law), 710.
one of two executors may not act alone, excepting under special circumstances (Hanafi Law), 667, 669, 670 *et seq.*, 675, *note.*
——(Shiah Law), 669.
——may not act alone when both have been appointed by the Kâzi, 666.
——may act alone when his co-executor is absent in a distant town, 668.
——may not act alone (Shâfeï Law), 711.
when one of two executors dies, appointing his co-executor his own—, the latter can act singly, 671.
the—of an—, the—and representative of the original testator (Hanafi Law), 671, 672.
——, (Shiah Law), 673.
a derivative—, powers of (Hanafi Law), 671, 697.
——(Shiah Law), 673, 702.
on the death of one of two executors the Kâzi must appoint another in his place, 675.
the powers of executors appointed in general terms or jointly (Shiah Law), 669.
for special purposes (Hanafi Law), 697.
effect of the ratification of an—by his co-executor, 668.
effect of a direction that the—should consult another, 670.
when an—may entrust the testator's estate to his own—(Shiah Law) 673.
powers of, when absolute, 676.
——when all the heirs are minors, 678.
powers when some of the heirs are adults and absent, 678.
the powers of, to pledge the property of an infant, 683.
powers of, when appointed by the mother or other relative, 577, 690, 692.
partition by, among heirs and legatees, 678.
——among heirs when they are all minors, unlawful, 679.

EXECUTOR—(*contd.*)
sale by, of testator's property lawful, when, 680 *et seq.*
——of orphan's property to himself or his own to the orphan invalid, 681, 682, *note.*
——when there are no debts or legacies, 683, *et seq.*
——when there are debts and legacies, 687, 688.
——for payment of debts when, lawful, 693.
may allow customary credit on a sale of goods, 686.
cannot trade on his own account with the goods of an infant, 686.
may let out infant's property, when, 686.
——not mortgage without the leave of the Kâzi, *ib.*
——sell or pledge chattels for the maintenance of infants, *ib.*
payment of debts by, 692 *et seq.*
must not spend at the testator's funeral more than is customary, 687.
cannot enter into a contract of marriage on behalf of a minor (Shâfeï Law), 710.
——borrow from funds in his hands belonging to an infant, 688.
——take anything beyond his fixed allowance, 689.
——bind the testator's estate by the acknowledgment of a debt or the right to a share in it, *ib.*
can repay himself any expense incurred on behalf of the infant or estate, 692.
liable for a debt contracted on behalf of a minor without necessity, 680.
——for payment of debts without sufficient proof and a Judge's order, 692.
——for loss when property is delivered to an infant and lost, 687.
——for loss arising out of a sale or purchase on behalf of an infant, *ib.*
——for loss or destruction of the testator's property, when (Shiah Law), 693, 694.
also trustee or *mutwalli* of a *wakf*, when, 460.
guardian of an infant, when, 690.
——grandchildren, when, *ib.*
the Kâzi may appoint an administrator when the executor is absent, 676.
what class of executors may be removed by the Judge, 661.
a *Zimmi* the Judge, 657.
an—unfit or incapable of, to discharge his duties should be removed, 657, 658.
——insane, or dishonest, should be removed, 657.
EXECUTOR—(*concld.*)
may be removed, without his knowledge or consent, 665.
must be removed for notorious bad conduct (Shâfeï Law), 710.
a minor may be removed by the Kâzi, 656.
difference between the acts of a minor—and those of a non-Moslem or slave—, 660.

FEE SIMPLE—
what words will create an estate in, 144, 145.

FIDUCIARY RELATIONSHIP—
the doctrines of the English Courts of Equity applicable to cases of, 47.

FOSTERAGE—
relationship arising out of, no bar to the revocation of the gift, 153, 154.

G

GIFT (or *Hiba*)—
its object in Mahommedan Law, 39.
definition of, 34, 40.
——in the Transfer of Property Act, 34 *note.*
——(Hanafi Law), 38.
——(Mâliki Law), *ib.*
——(Shiah Law), *ib.*
——(Shâfeï Law), 189.
of two kinds, 33, 158, 159.
sadakah, meaning of, 154, 155, 189, 213.
gratuitous, meaning of (Shiah Law), 215.
distinction between *hiba* and *aâriat* or commodatum, 33 *et seq.*
——a gift which is *bâtil* (void), and a gift which is *ghair mukammul* (incomplete), 105, 106.
——a conditional—and a—with a condition, 133, 165.
conditional gifts, which are made dependent for their operation upon the occurrence of certain contingencies, void according to all the schools, 133.
with a condition—is valid whilst the condition is void (Hanafi Law), 134.
both condition and—valid, if condition is subsidiary to the—(Shiah Law), *ib.*
of land subject to a condition that the donee should give the produce thereof to the donor for his support, if the land be culturable and not waste,—valid and condition void (Hanafi Law), 134.

GIFTS—(*contd.*)
both—and condition valid (Shiah Law), *ib.*
of the *corpus* with a reservation of a life interest in the proceeds, valid, *ib.*
of a thing lost, "when recovered" bad, 140.
of an enforceable right, valid, 140, 166.
with an option to the donee to accept or not, option must be exercised at the place when the—is made, 140.
with an option to the donor to revoke at pleasure,—valid, option void, 140.
on condition that donor have an option,—valid, option void, 140.
a— is not void for an invalid condition, 140.
——(Hanafi Law), 140.
examples of contingent gifts, 167.
indefinite words of, must be limited by the purpose of the—, 120 *note.*
may be made verbally or in writing, 38, 41, 110.
Transfer of Property Act leaves untouched these provisions of the Mahommedan Law, 41.
constitution of—no formality nor special publicity necessary for, 110.
——what words are sufficient for 111 *et seq.*
requisites for the validity of, 38 *et seq.*, 112.
——(Shiah Law), 59, 116.
——(Shâfeï Law), 122.
seisin, necessary for the validity of, 112 *et seq.*
inoperative, without actual or constructive seisin or *ikbaz*, 113.
seisin how to be effected, 117.
delivery of—, seisin, when necessary, 113.
authority to take possession sufficient to complete, 113, 114.
ability or power of donee to take possession sufficient to validate a—, *ib.*
delivery of possession unnecessary when donee already in possession of the subject-matter of, 121.
——(Shiah Law), 114.
possession of the donee must be with the consent of the donor (Hanafi Law), 114, 115.
——(Shiah Law), *ib.*
donee entitled to possession of, when, 120 *note.*
invalid, validated by possession, 100, 113.
when the character of the possession is changed, the—will be valid although it remains in the possession of the donor, 113.
See Further Seisin.

GIFTS—(*contd.*)
Conditions relating to the donor—
that the donor be not an infant, 38.
——be not an idiot, a lunatic, or a person *non compos mentis*, 43, 44.
——be not so drunk as to lose his reason and understanding, 45.
that he be free, 46.
——has not made the—through *ikrâh* (compulsion), 46, 48.
——be the owner of the subject-matter of the—, 50.
by an insolvent or in fraud of creditors void, 50—53.
a married woman is not barred by marriage from making a—, 53, 54.
by a death in death-illness, *see* DEATH-ILLNESS.
may be made to any person in existence, 63, 64.
to a child *en ventre sa mère* valid, if the child is born within six months from date of gift, 64.
to an unborn child valid (Shiah Law), 64.
Shiah Law relating to summary of, 175—188.
the Shiah and Hanafi schools with respect to, the principal features of difference between, 175 *et seq*
umra or life-grant, takes effect as a *hiba* (Hanafi Law), 140.
mere grant of the usufruct in a thing, is an *ârîat*, ib.
limited estates recognised by the Shiah Law, 143, 144.
no special words necessary for creating *hubs al-umra*, *as-sukna* or *arrukba*, 140 *et seq.*
a grant of *sukna* in general terms does not empower the grantee to transfer his right to another, 145.
——the usufruct for a fixed period or limited estate, its effect, 144, also *note.*
an indefinite period may be revoked at the will of the grantor, *ib.*
to a person and "those whom he leaves surviving" conveys a life-estate only, 145, 146.
grant to A and his *akab* conveys a life-estate, 145.
——in favour of definite individuals without specification of time effect of (Shiah Law), 146.
a succession of life-estates valid (Shiah Law), *ib.*
grant to *A* and his heirs generation after generation or to *A* and his descendants conveys an absolute estate (Shiah Law), 146 *et seq.*
what may be the subject-matter of, 64 *et seq.*
——(Hanafi Law), 76.
——(Shâfeï Law), 189.
of a larger share to an heir, lawful (*Alamgiri*), 37, 38.

GIFTS—(*contd.*)
of incorporeal rights and choses-in-action, valid, 64.
of Government Securities, valid, 65, 66.
of Mâlikana rights, valid, 66.
of lands in the occupation of tenants, valid, 66, 70 *et seq.*
of lands in possession of an usurper, its effect, 68, 69.
of lands in the possession of a mortgagee, its effect, 69.
of *Mushâa* (Hanafi Law), 76, 77 *et seq.*
——(Shâfeï Law), 76.
——(Shiah Law), 76, 77 *et seq.*
——possession validates, 79, *et seq.*
actual possession not necessary, authority to take possession sufficient, 89, 90.
——in a thing incapable of partition valid (Hanafi Law), 77, 91.
——in a thing capable of partition, invalid unless partition be made before delivery (Hanafi Law), 77 *et seq.*
rendered valid by means of the doctrine of *tahlil*, 106.
——illustrations of the doctrine of *tahlil*, 106 *et seq.*
of a mansion on which there are effects of the donor, 83, 84.
of *shâgil* or thing which occupies another is lawful; but gifts of *mushghûl* or thing occupied is unlawful, 84.
of a thing rendered void, if right be established in part thereof, 84.
of a share in the profits by one partner to another, lawful, 86.
of specific share in zemindaries paying revenue separately, valid as the doctrine of *Mushâa* does not apply to such, 91 *et seq.*
of undivided joint property (*hiba bil-mushâa*) is not void, but only invalid and possession remedies defect, 89.
in such a—the quantity must be known or specified, 93.
of (*muafi*) share to two persons held valid, 94.
of a share in joint property by one co-sharer to another, valid, 97, 98.
of property jointly to two donees with power to make parties among themselves or to take possession, valid, 98.
jointly to an adult and a minor, the latter being in the custody of the former, or two sons, one adult and the other minor, invalid on the ground of *Shuyuú*, 99, 105.
device to evade the operation of the principles of *Shuyuú*, 105.
of a moiety of a house, how validly made, 106.
GIFTS—(*contd.*)
by *tahlil*, 106, *et esq.*
to two persons jointly valid (Shiah Law), 176.
of immovable property when made in writing subject to the Stamp and Registration Acts, 110.
may be made to any person in existence, 63, 64.
to a child *en ventre sa mere* invalid, when, 64.
to a child by a parent lawful, 133.
——at circumcision, *ib.*
to a minor by father or grandfather valid, 172.
to minors,-what seisin necessary for its completion (Shiah Law), 173.
to an infant by a stranger, seisin may be taken by whom, 173.
when may an infant himself take possession of a—to himself, 173.
to a minor son by his parent, acceptance unnecessary, when, 173.
of a child's property invalid even for a consideration, 174.
for a fixed consideration lawful (Shâfeï Law). 189, 191.
for an unfixed consideration void (Shâfeï Law), *ib.*
of debts, *see* Debt.
of dower, *see* Dower.
in the way of God, see *Sadakah*.
the thing in which a present is delivered, is considered part of the present (Shâfeï Law), 189.
of property among children in equal shares without distinction of sex, lawful (Shâfeï Law), 190.
when the donor or donee dies before completion of, who is entitled to it (Shâfeï Law), *ib.*
to an orphan, who may take possession on his behalf, 131.
to an infant wife, who entitled to possession, 132.
to a person, *non compos mentis*, who entitled to possession, 132.
to a *latîk* or foundling, who entitled to possession, 132.
in *jahaz* to a bride, taken to the house of the husband, 132.
revocation, *see* Revocation.
presents to a bride, 132.
when a house is once given to an infant, and the donor purchases another house with the proceeds thereof, the latter is the property of the minor, 133.
jointly to two donees, one of whom is a minor, 99 *et seq.*
to one child, in exclusion of the others legal but sinful, 172.
to one or more children in preference to the others by father, lawful, 184.
to *A* without words of limitation, *A* takes absolutely (Hanafi Law), 140.

GIFT—(*concld*).
life-grants, 179 *et seq.*
by way of *rukba* invalid according to all schools of Sunni Law, 175.
in death-illness, *see* Death-illness.
of a chose-in-action, *see* Chose-in-action.

H

HEIRS—
who is an heir, 591.
bequests to, *see* Bequest.
wakf on, see *Wakf*.

HIBA—*See* Gift.
hiba-ba-shart-ul-ewaz or gift with a condition of exchange, its requisites and effect, 158 *et seq.*
——the effect of *shart* (condition) attached to the gift, 164.
gift and release do not admit of the option of a stipulation, 164.
hiba-bil-mushâa or gift of an undivided joint property is not void, but invalid only and possession remedies the defect, 77.
——in such a gift quantity must be specified, 93.
hiba-bil-ewaz or gift for an *ewaz* or consideration, irrevocable, 100.
——a sale in all its legal incidents, 163.
——seisin not necessary, 163 *note*.

HUBS—
definition of, 143.

I

IJARA—
definition, 744.
common bailee, what is a, 747.
——liable for loss of deposit, when, *ib.*
particular bailee, what is a—, *ib.*
——liability of, governed by contract, *ib.*
surgeon or farrier, acting agreeably to customary practice, not liable in case of accident, *ib.*
gratuitous bailee responsible for ordinary care, *ib.*
tenant is liable for the stipulated rent or, when none fixed, for the customary rent, 744.
when the contract of bailment is unqualified or absolute, bailee at liberty to give the use of the deposit to any person, 745.
otherwise, when contract is special, and bailee is liable for any loss in consequence of any deviation from the terms thereof, 745, 746.

IKBAZ—*See* Seisin.

IKRAH OR COMPULSION—
doctrine of, explained, 46 *et seq.*

IKRAH OR COMPULSION—(*concld.*)
not confined to actual duress or restraint or even threats, but extends to all cases where a person is deprived of his free will, 49.
conditions that constitute complete, 48, 49.

IMAMATE—
doctrine of, 5.
distinctive features of difference between the Sunnis and Shiahs, 5, 6.

IMAMIAS OR ASNA 'AASHARIAS, 12.

IMBECILITY—
invalidates gifts and contracts, 42—46.

INFANTS—*See* Minors.

INHERITANCE—
females take smaller shares than sons, 39.
the children of a daughter excluded from the—in preference to brother's sons, *ib.*
where ground is appropriated for the erection of a mosque, it cannot be inherited by any person, 404.
a synagogue built by a Jew descends to his heirs on his death, 626.
a church built by a Christian goes to his heirs on his death, *ib.*

INNS—*See* Caravanserai.

INVESTMENT—
alteration of, *wakf* property, 421 *et seq.*
the proceeds of *wakf* property may be invested in dirhems and dinars, 432.
proceeds of *wakf* property may be invested in Government securities, *ib.*
wakf property may be sold and proceeds invested in other property with the sanction of the Kâzi, 434 *et seq.*

ITJIHAD, 27.
three degrees of, recognised by Sunnis, *ib.*

J

JEW—
A—may will his house for religious purposes, 626, 627.

JURISPRUDENCE—
Islâmic, its position, 4, 5.
Islâmic—founded on the Koran, not sayings of the Prophet, 5.
Islâmic—compared with other systems of—, *ib.*
Sunni, elements of, 9.
Shiah, elements of—, 8, 10, 26, 8, 9, 11, 13, 30.

JURISTS—
Sunni—, classification of, into 7 classes by D'Ohsson, *note* II. 30.

K

KAZI—
duties of, when there is a conflict of opinion and no written law to guide him, 15, 16.
may remove a *mutwalli* who is a slave or a *Zimmi*, 446.
may remove a *mutwalli* for breach of trust, misfeasance and the like causes, 462, 463, 465.
may appoint a substitute when the *mutwalli* is under a temporary disqualification, 454.
sanction of, necessary for the appointment of *mutwalli*, when, 461, 464.
——necessary to enable a *mutwalli* to retire from his office, 453.
may appoint trustee, when, 445, 446, 450.
——an outsider *mutwalli*, although the members of the *wâkif's* family be living, 451 *et seq.*
——a co-*mutwalli*, when beneficial, 446.
——authorise a longer lease than that provided for by the *wâkif*, 477, 479.
may sanction the mortgage of *wakf* property or a charge on it, 470.
may sanction a debt for the repairs of *wakf* property, 470, 471.
has power to fix and increase the allowances of the *mutwalli* and other servants of the *wakf*, 469.
cannot be deprived of his power of interference in the management of a *wakf*, 462.

L

LAND—
dedicated for a pious purpose may be sold, when, 406, 408.
dedicated for a cemetery may be sold, when, *ib.*

LAPSE—
the death of a legatee causes the legacy to—under the Hanafi Law, not under the Shiah Law, 614.

LAW—
lex loci, none in India, 1.
in India chiefly personal, *ib.*
personal, restricted to Mahommedans and Hindus, 2, 3, 4.
of Mussulmans relating to inheritance and dispositions of property preserved by the Legislature, 1, 2, 3.
Mahommedan—applicable to other matters besides inheritance, marriage and caste, 2, 3.

LAW—(*contd.*)
Mahommedan—founded essentially on the Koran, 5, 8.
no distinction between ancestral and self-acquired property under Mahommedan—, 1.
rights of owners absolute over both kinds of property, during life and restricted to a third to a disposition by will, *ib.*

LEASE—
granted by *mutwalli* not cancelled by his death, 481.
the lessee of *wakf* property may plant trees or make erections, 481.
of *wakf* property may not be granted to a relative of the *mutwalli* without reserving a rent higher than the proper customary rent, 482.
neither *cestui qui trust* nor *mutwalli* can grant a—of *wakf* property for a long period (Mâliki Law), 542.

LEASES—
in the absence of any provision in the *wakfnama*, the *mutwalli* may grant a lease of land for what periods, 477 *et seq.*
of a house for not more than one year, 477, 478.
of culturable land for not more than three years, 479.
the Judge may authorize the grant of a lease for any term advantageous to the *wakf*, 479, 480.
the *mutwalli* must reserve the proper customary rent, 477.

LEGATEE—
allotment of the share of a—by the executor, 678.
death of—causes the legacy to lapse under the Hanafi Law, but not under the Shiah Law, 614, *see* Bequest.

LUNGAR-KHANEH—
meaning of, 391, *note.*
material of a—may be sold, when and for what purpose, 409.

M

MAJORITY—
three ages of, under Act IX of 1875, 42, 43.
the age of—under the Mahommedan Law, *ib.*

MARRIAGE—
Mahommedan Law to be observed by the Judges in suits relating to—and caste, and all religious usages and institutions, 1—4.
during—a married woman may make any disposition as if a *femme sole*, 53, 54.

MARRIAGE—(*contd.*)
no bar to a married woman making a gift, *ib.*
relationship arising out of—no bar to the revocation of a gift, 153.

MARZ UL-MOUT—*See* Death-illness.

MINORITY—*See* Majority; *see* Minor.

MINORS—
effect of disposition of property by —, 42.
gifts to—when complete, 123 *et seq.*
——when acceptance or possession unnecessary, *ib.*
present to—when property of the —, 133.
gift of dower-debt to—when valid, 131, 132.
gift to an infant wife, 130, 132.
presents to an infant bride when property of the bride, 132.
sadakah to—by father of a thing in his possession valid, 124.
gift of the property of—invalid even for a consideration, 133.
when a house is given to a minor and with the proceeds thereof another is purchased by the donor, the latter belongs to the minor, 133.
may not be appointed *mutwalli*, 445, 466.
may not be appointed executor, 644, 657.
may be removed, *ib.*
acts of a minor executor, *ib.*
may be appointed trustee of a *wakf*, 445, 644.
capacity of an infant to make a will, *see* Will.
who is the guardian of an infant, 674 *et seq.*

MORTGAGE—
of *wakf* property may be made with the sanction of the Kâzi, 471, 483, 484, 488.
the mortgagee in possession liable for damages where—is made without such sanction, *ib.*
of *wakf* lands illegal, 480, 485, 488.

MOSQUES—
a mosque belongs to no particular sect, 399.
musalla, meaning of, 393.
constitution of a *wakf* for, how made, 393 *et seq.*, and 751, 753, 754.
——once offering up prayers sufficient, 395, 751.
——consignment to a *mutwalli* sufficient, 396.
what may be the subject of *wakfs* for, *et seq.*, and 396, 751.
place where the *namâz-id* or *namâz-i-janaza* is usually performed, subject to the same rules as—, 397.
will in favour of a mosque valid (Shâfeï Law), 703.
the public do not acquire any right in a private mosque, without special permission, 394.
right of the *Ahl-i-mahulla*, or people of the locality to enlarge or reconstruct or improve, 397, 408.
room in a private residence set apart for family prayers not a *wakf*, 398.
dedication of rooms in a building as a mosque valid, when, *ib.*
when the purpose of a *wakf* fails, the income may be applied to kindred objects, 403, 411.
when there are two or more *wakfs* attached to a mosque, the income of one may be applied for the benefit of the other, when, 404.
the *wakf* on a masjid which is in ruins and not needed, may be spent on another masjid, 411, 412.
a ruined mosque may be sold for what purposes, 408.
the materials of a ruined mosque may be applied to another mosque, 403, 409.
Mookoof-alaihim, see *wakf*, its objects.

MUFTI—(Jurisconsult and Judge) duties of, 15, 16.

MUJTAHIDS, 27.
imâms, 23, 24.
three orders of, 27, 28.
position in jurisprudence of the first order of, *ib.*
——second order of, *ib.*
——third order of, *ib.*

MUSHAA—
definition of (Hanafi Law), 78.
gift of, *see* Gift.

MUSTAMIN—
may bequeath property to a Mussalman or *Zimmi*, 626, 628.
may emancipate his slave, 628.
will in favour of a—, resident in a Mussulman country, 628, 629.

MUTAZALAS—
doctrines of the school of, 12.

MUTWALLI—
appointment of, sanction of the Judge necessary for, when appointment made by beneficiaries, 447 *et seq.*
who may appoint, when the *wâkif* has made no appointment, 450.
last—may appoint his successor when 450.

MUTWALLI—(*contd.*)
appointment of, by the congregation, 461.
who may appoint the *muezzin* and *imâm* to a mosque, 465, 468.
qualifications for the office of, puberty (*bulugh*), and understanding (*akl*), 445, 446.
appointment of a minor as—, *ib.*
——freedom and Islâm not necessary qualifications, 446.
qualifications and duties of (Shâfeï Law), 547.
who may be appointed, 763 *et seq.*
women may be, 442.
but not, if the—is also the superior of a religious establishment, 443.
——a *wâkif* may appoint himself or any other person, 442, 763 *et seq.*, 663.
——when a class is specified, the person answering to the description, 460.
——preference must be given to the members of the *wâkif's* family over strangers for the office of, 451, 759, 760, 763, 765.
a stranger may be appointed, when, 451, 453.
which of a class may be appointed, where intelligence and excellence are required, 466.
may be removed for breach of trust, misfeasance and the "like causes," 462, 463, 763.
——by the *wâkif*, only when he has deserved the right to do so, 462.
must observe the conditions in the *wakfnamah*, 513, 545, 752, 766, 768.
——keep clear distinct accounts, 471.
——ascertain the practice of his predecessor in office, when the directions of the *wâkif* cannot be ascertained, 472, 473.
cannot resign the office without the permission of the Kâzi, 453, 754.
may assign his office or appoint another (*kaim mokam*) or a deputy when his powers are general, 455, 465, 642.
liable for loss sustained through his wilful neglect, 463.
liable personally for debts contracted for the *wakf*, unless they are authorised or for necessaries, 471.
may not increase or decrease the allowance or salaries without power from *wâkif* or sanction of the Kâzi, 459, 469.
——pay salaries, which are due to the heirs of a deceased imâm and others, 468.
——pay the allowance of a student who has been absent, when, 464, 468.

MUTWALLI—(*concld.*)
——pay himself out of the income of the *wakf* property, advances made for the protection of its interests, 471.
the salary of, how fixed, 469.
the *wâkif*, when—, may take the allowance reserved for the trustee (Shiah Law), 521.
may employ the income of the *wakf* for what purposes, 467 *et seq.*
——not contract debts for the *wakf* unless authorised or for necessaries or with the sanction of the Kâzi, 470, 471, 472.
——mortgage *wakf* property with the sanction of the Kâzi, 470, 484, 485, 489, 758.
——erect buildings on the *wakf* lands, 472.
grant leases of *wakf* lands, for what period, 477 *et seq.*, *see* Lease.
——reward the finder, if poor, of a treasure trove belonging to the *wakf*, 472.
can sell *wakf* property only when the power of sale is expressly reserved, 434, 468 *et seq.*
may purchase property out of the *wakf* funds and may sell or exchange the same, 468.
liable for incumbrances on the *wakf* property, 759.
when may he take allowance, 759.
effect of acknowledgment by, that another person is—instead of himself, 470, see *Sadakah*, and *Wakf*.
See Appendix.

N

NAZIR—
the supervisor of a *wakf*, 467.
as supervisor may not spend any portion of *wakf* money, *ib.*
his duties as supervisor, *ib.*

NON COMPOS MENTIS—
four classes of persons according to Lord Coke, 44, 45.
who may take possession of a gift on behalf of a person, 132.
capacity of a lunatic to make a will, 574, 575.
will of an idiot, 574, 575.
an insane person may not be appointed an executor, 656.

O

ORPHAN—
request in favour of, 608.
sale of property of, by executor, 682.

OUT OF POCKET—
the *mutwalli* may recoup himself for necessary expenses out of the income of the *wakf*, 471.
the executor may recoup himself for expenses incurred on behalf of the infant or the estate, 692.

P

PARENT—
the power of father to pledge the property of a minor, 683.
a father may sell his infant children's property, when, 682.

PARTITION—
cestui qui trust not entitled to, of trust property, 366.
by a Judge of the testator's estate, 679.
by an executor among heirs, 679.

PLEDGE—
the power of a father or executor to pledge the property of a minor, 683.

PERPETUITY—
implied by the mention of three generations in a *wakf*, 353, 357.
usufructuary bequests may be made in perpetuity, 646, 708.
no rule against perpetuities under the Mahommedan Law, 646.
See *Wakf* and Bequest.

PERSONAL REPRESENTATIVE—
the executor is also the—of the testator, 662.
See Executor.

POSSESSION—*See* Seisin.

POWERS—
of the executor, *see* Executor.
——*mutwalli*, see *Mutwalli*.
——*Wâkif*, see *Wâkif* and *Wakf*.

PRE-EMPTION—
introduced into India by the Mahommedans, 712.
the Sunni Mahommedan Law of—in force in India either territorially or by custom, 717, 737.
definition of, 712.
its origin, *ib*.
applicable only to immovable property which has not descended by right of inheritance (Hanafi Law), *ib*.
——(Shiah Law), 741.
does not apply to leases in perpetuity (Hanafi Law), 714.
right of—comes into operation upon the completion of the transfer of property for consideration (Hanafi Law), 712, 714.
——comes into operation upon completion of the contract (Shiah Law), 616.
——arises in what cases (Hanafi Law), 714, 715.
——how evaded (Hanafi Law), 715, 716, 720, 735.
——(Shiah Law), 742.
——may be expressly or impliedly relinquished or waived (Hanafi Law), 733.
——(Shiah Law), 739.
——may be relinquished by guardian on behalf of a minor (Hanafi Law), 735.
——relinquishment of by guardian does not bind a minor (Shiah Law), 738.
——once relinquished, cannot be asserted again (Hanafi Law), 716.
——may be asserted, if relinquished upon wrong information (Hanafi Law), 735.
——rendered void by operation of law (Hanafi Law), 733
——may be claimed by three classes of persons (Hanafi Law), 717.
——by what persons (Shiah Law), 737, 738.
——heritable (Shiah Law), 734, 741.
Hanafi Law—
right of—is in the owner of a servient tenement in respect of the dominant tenement, 718.
——of joint owner of a part of a property is superior to that of one whose property is adjacent, 719.
——in whom, when a building situate in a private lane contains several houses and one of these houses is owned by two persons, one of whom sells his share to an outsider, *ib*.
——in whom in respect of a house owned by two persons and situate in a street which is not a thoroughfare, 719.
——of a person having a right of way superior to that of one having only a right of water, 719.
——between neighbours, *ib*.
——in whom, when relinquished or waived by a person having a preferential right, 720.
——where several persons claim, and some of them are absent, *ib*.
——extends to agricultural estates and is not merely confined to urban properties or small plots of land, 721, 722.
——a neighbour cannot claim, in respect of a share in villages or large estates, but a co-sharer can, 722.
——held by the Calcutta Court not to exist where a Mahommedan

PRE-EMPTION—(*contd.*)
co-owner sells his share to a Hindu, *ib.*
——held otherwise by the Allahabad High Court, *ib.*
——formalities requisite for the exercise of, 723 *et seq.*
Talab-i-Mowasibat or immediate demand must be made immediately on receipt of the news of the sale, 723, 724.
——after sale, 724.
——may be made in any words which imply a claim, *ib.*
presence of witnesses unnecessary at the first *Talab*, 724.
"*Talab-i-istish-hâd*" or "demand by invocation of witnesses" must be made either on the premises or property sold, or in the presence of the vendor or vendee, *ib.*
——must be made within a reasonable time and without unreasonable delay after the first demand, 725.
——how made, *ib.*
——may be made by the claimant personally or through an agent, 726.
both *Talabs* or demands must be performed wherever customary, *ib.*
both *Talabs* may be performed at the same time, *ib.*
the pre-emptor must offer to pay the same price as the purchaser and to take the property on the same terms, *ib.*
under Mahommedan Law there is no period of limitation within which the pre-emptor whose claim has not been acceded to, may prefer his claim (*Talb-i-tâmlik*) in Court, 728.
Limitation Act provides a period of one year for it, *ib.*
pre-emptor must tender the price to the purchaser or deposit it in Court after decree within the time specified, 730.
when the right of pre-emptor on a particular property is decreed in favour of two persons and one of them relinquishes his right after decree, 730, 731.
purchaser entitled to retain the property until payment, 730.
the pre-emptor must pay for improvements to the purchaser, 727, 731, 732.
——entitled to deduction in the price for deterioration in value caused by the purchaser, 732.
——to resign his claim or to pay a proportionate price for the site where the purchaser has wilfully pulled down buildings or structures, *ib.*
PRE-EMPTION—(*contd.*)
——must take the site at the full price where buildings are destroyed by inundation or fire, *ib.*
——may avoid intermediate dealings by the purchaser, 732, 733.
when purchased property to consist of several houses in a street in which there is no thoroughfare and the pre-emptor wishes to take one of them, the rights of the latter, 734.
when purchased property consists of several parts, each separate and distinct from the other, the rights of the pre-emptor, *ib.*

Shiah Law—
pre-emptor must pay the contract price to the purchaser, 738.
——must take the whole property or abandon it, he cannot split up the contract in his favour, *ib.*
——must prefer his claim as soon as he is informed of the contract, 739.
——must prosecute his claim with due diligence, *ib.*
——may prefer his claim personally or by agent, 738.
——is not affected by the dealings of the purchaser with the property, 740.
——rights of, when loss or damage is caused by act of the purchaser, *ib.*
——with respect to improvements, *ib.*

PRIVATE JUDGMENT—
consecrated by the Prophet, 25.
opinion of Shâfeï on, 24.
——Mâlik, on, 24, 25.
——Ibn Hanbal, on, 24, 25.
——Ibn Khaldûn, on, 25, 26.
——early Hanafî jurists, on, 26.

PROCEDURE—
on special rules of, for establishing a *wakf* or right to a share therein under the Mahommedan Law, 548, 552.
every Mahommedan has the right to sue the *mutwalli* to establish a *wakf*, and his right to a share in its benefits under the Mahommedan Law, 552 *et seq.*
leave to sue the *mutwalli* of a *wakf*, *et seq.*
leave to sue the *mutwalli* necessary when the trust is for a public charitable or religious purpose, 558.
leave to sue the *mutwalli* unnecessary in the case of a private trust, 561, 562.
when may one or more *mutwalli* sue without joining the others in respect of the *wakf* estate, *ib.*

PROCEDURE—(*contd.*)
some of the *muttalli* or *cestui qui trustent* may sue on behalf of the others with the leave of the Kâzi, *ib.*
when some of several *mutwallis* are unwilling to join in suit to recover alleged trust property, 563.
the *cestui qui trust* may sue the *mutwalli* for waste or misapplication of trust property, 564 *et seq.*
some of several *mutwallis* may maintain or defend a suit on behalf of the others, under the Mahommedan Law, 562 *et seq.*

PROPERTY—
disposition of, as between Mahommedans, governed by Mahommedan Law, 1, 2, 3.
disposition of, valid and effective, only when the owner divests himself in his lifetime of all Property rights therein, 2.
whether ancestral or self-acquired, right of owner absolute during lifetime, 1.
no distinction between ancestral and self-acquired, under Mahommedan Law, *ib.*

PROPHET—
binding effect of the oral precepts of, 8.
the five traditions of the prophet with commentaries, *see* App., 766, 768.

PURCHASER—
when purchaser of *wakf* property is entitled to remove erections or to compensation after the sale has been set aside, 491.

R

RATIFICATION—
effect of—of the acts of one executor by his co-executor, 672, 673.

REGULATION—
Regulation XIX of 1810, 548, 549*n*, 550.

REVOCATION—
express withdrawal of power of—, does not destroy it, 152, 156.
of gift, abominable but valid (Hanafi Law), 150.
——must be made in appropriate terms (Hanafi Law), 152.
——may be made in what terms (Shâfeï Law), 190.
——effect of, 151.
——under a Judge's decree, 151, 156.
——by mutual consent, 151.
——without a Judge's decree or mutual consent, 151, 154.

REVOCATION—(*contd.*)
of gift, as a general rule invalid (Shâfeï and Mâliki Laws), 149.
——invalid, under what circumstances under the Hanafi Law, 152, 153.
——Shiah Law, 150, 184.
——by parents to children when invalid (Shâfeï and Mâliki Laws), 149.
——(Shiah Law), 184.
——to a blood-relation within the prohibited degree, invalid (Hanafi Law), 150, 151, 153, 154.
——to relations, when invalid (Shiah Law), 184.
illustrations of revocable and irrevocable gifts, 152 *et seq.*
of gift of a debt to the debtor invalid (Hanafi Law), 154.
——affinity or fosterage, no bar to (Hanafi Law), 154.
——marriage, a bar to (Hanafi Law), 153.
of gift acceptance of consideration, a bar to (Hanafi Law), 156.
contract to sell or pledge the subject of a gift does not amount to (Hanafi Law), 152.
an increase to the subject of a gift when a bar to (Hanafi Law), 152, 153.
of gift of an undivided portion, valid (Hanafi Law), 156.
——by way of *sadakah*, invalid (Hanafi Law), 154.
of conditional gift, when invalid (Shiah Law), 186.
after, the increase or accretion to a gift belongs to whom (Shiah Law), *ib.*
after, the liability of the donor with respect to the subject of gift, 154.
after, donee not liable for loss or injury (Shiah Law), 185.
when there is an express stipulation that there should be no consideration, in whom is the right of (Shâfeï Law), 190.
if the consideration is obligatory, the donor may revoke the gift upon non-payment (Shâfeï Law), *ib.*
of wills and bequests, *see* Will and Bequest.

S

SADAKAH—
definition, 154, 213, 216, 772—774.
misconstruction of the work, 330.
by a mariz not effective without possession, 59, 60.
gifts by way of, seisin with respect to, 154.
irrevocable after delivery of possession, 149, 154, 530.

SADAKAH—(contd.)
difference between it and *Hiba*, 155.
examples of, 214 *et seq.*, see *Wakf*.

SAJJADANASHIN—
its meaning, 443.
who may be appointed, 443, 444.
an infant may not be appointed, as a general rule, 444.

SALE—
of the subject of a bequest, revocation under the Shâfeï and Mâliki Laws, 644, 709.
of *wakf* property, the Kâzi may direct a—, 434, 435.
of *wakf* property, 482, 483.
of *wakf* property (Shiah Law), 529, 742.
of *wakf* property (Mâliki Law), 542.
effect of a, by the executor, of the testator's property, 676, 680, 681.
by an executor to himself of property belonging to a minor heir, 681, 682.
effect of, by father of infant's property, 682.
in death-illness, valid to a third, 63.
of the subject of a gift after delivery of seisin void (Shiah Law), 237.
of the subject of a gift when something has been given in exchange for it, void (Shiah Law), 128.
of subject of a gift valid, if gift is illegal (Shiah Law), *ib.*

SEISIN—
what is, under Mahommedan Law, 90 *et seq.*
validates an imperfect gift, 66 *et seq.*, 89.
subject discussed by the Bombay High Court, 115.
how effected, 90, 118, 110, 122, 500.
delivery of—, necessary to the validity of a gift, 90 *et seq.*
——*wakf* (Shiah Law), 474.
——(Mâliki Law), 112, 540.
its nature (Shiah Law), 474, 493 *et seq.*
when it should take place (Mâliki Law), 540.
delivery of, unnecessary when, 115, 116, 121.
——power to take possession equivalent to, 90, 113.
——unnecessary when there is on the part of a father or guardian a real and *bônâ fide* intention to make a gift to his minor son or ward, 113.
——unnecessary when donee is already in possession of the subject of a gift, 123.
of the donee, must be with the permission of the donor (Hanafi Law), 114, 115.

SEISIN—(*contd.*)
of the donee (Shiah Law), 145, 146.
in the case of a gift by a husband to his wife, what is a sufficient delivery of—, 116.
——gift would not be invalid if husband continued in possession of rents and profits after the date of gifts, if it could be inferred he was doing so as his wife's manager, 116, 117, 118.
continued possession unnecessary after compliance with the technical requirement of delivery of—, 119.
for the completion of a gift of immovable property by delivery and possession whether formal entry necessary, *ib.*
who entitled to, when a gift is made to a wife, infant, foundling, orphan or person *non compos mentis*, 124, 133.
minor may take possession of a gift, when, 132.
delivery of, or possession not necessary in regard to the validity of a *wakf* (Hanafi Law), 237 *et seq.*
delivery of possession is necessary but constructive transfer is also sufficient (Shiah Law), 395, 498, 499.
Kabz-ul-kâmil or complete possession, 90.
actual, apparently unnecessary to complete *hiba* of a *mushâa*, 90.

SETTLEMENT—
voluntary, in fraud of creditors or made by a person in insolvent circumstances, void, 50.
——not void because made by a person in debt, 51—51 *note*.
——, principles applicable, to, 168.

SHIAHS—
sub-sections of, 11.
——difference between them, *ib.*
text-books and authorities of, 30 *et seq.*

SHUYUU—
renders a gift invalid, not void (Hanafi Law), 105, 106.
in order to invalidate a gift must be in existence at the time of the gift, must not be supervenient and must be such as is recognised by law, 88, 106.
device to evade the operation of the principle of (Hanafi Law), 106.

SLAVE—
capacity of a, to make a will, 573, 702, 586.
may be appointed trustee, 446.
——executor, when, 446, 661 662.

STATUTES—
13 Eliz., Cap. VI, 3, 51.
27 Eliz., Cap. IV, 3, 53.
21 Geo. III, Cap. 71, s. 17, 2.

SUFIS—
meaning of, 448.

SUITS—*See* Procedure.

SUKNA—
under a grant of, in general terms, the grantee cannot transfer his rights, 145.
a grant of—to *A* and his children, 145.

SUNNIS—
divided into 4 schools, 13, 14.
——chief differences between them, 14.
doctrine of, based upon tradition, 9.
their sources of Law, 9.
their principal text-books and authorities, 16, *et seq.*

SUPERVISOR OR *NAZIR*—
has no power to spend any portion of the *wakf* money, 467.

SURETY—*See* Debt.

T

TAHLIL—
a device to give validity to a gift invalid on the ground of indefiniteness, 87, 88.
examples of gift by, 87—89.

TESTATOR—
capacity of, *see* Will.
must possess a disposing mind, 574.

TENANCY—
in common in *wakf*, 380.

TRADITIONS—
the five traditions of the Prophet with commentaries, *see* App., 766, 768.

TOWLIAT—
law relating to, *see* Trustee.
Transfer of Property Act, section 53, serves to illustrate the principle of Hanafi Law, 51.
——not to affect rule of Mahommedan Law, 53.

TRUSTEE—
wâkif or settlor may appoint himself *mutwalli* or trustee, 441, 442, 527.
executor, when, 449.
appointment of, does not cease on the death of the *wâkif* when no time is mentioned as to its duration; 448, 450.

TRUSTEE—(*contd.*)
appointment of, contrary to the terms of the *wakf* or the conditions laid down by the *wâkif*, is invalid, 459.
appointment of, sanction of the Judge necessary for, when appointment made by beneficiaries (Kâzi Khân), *ib.*
——the right of, in whom, 441 *et seq.*
——primarily, with the *wâkif*, 442 *et seq.*, 447.
who may appoint, when the *wâkif* has made no appointment, 442, 445.
——when the power of appointment is given to the children of the *wâkif*, some of whom are minors, 145.
——in the absence of any provision in the trust deed as to the mode of succession or of any evidence of usage, 445.

U

USULI—
doctrine of, 12.

W

WAKF—
its origin, 192.
definition of (Hanafi Law), 194, 751, 757, 765—769, 775.
——by Abû Haniifa, 195.
——by Abû Yusuf, 195.
——by Abû Yusuf recognised as law, *ib.*
——(Shiah Law), 493, 497, 750.
——(Mâliki Law), 531.
classification of, 193, 275, 754.
legal effect (Hanafi Law), 757.
testamentary, revocable, 212, 279, 387, 388.
discretionary, lawful, 377.
the three legal effects of (Mâliki Law), 541, 543.
exceptions to (Mâliki Law), 542.
summary of accepted principles regarding—, 239 *et seq.*
constitution of (Hanafi Law), 217, 754.
——(Shiah Law), 486, 750.
——(Mâliki Law), 538 *et seq.*
——(Shâfeï Law), 544.
to be valid need not be "solely to the worship of God," 274.
no essential formality or express phrase or term requisite for, 217, 227, 493, 530, 757.
where a—is expressly created, the introduction of words of gift does not change its character, 494.
established by evidence, 497.
words and expressions by which it is completed, 217—227, 236, 493, 775.

WAKF—(contd.)
the words, not necessary, 220, 221, 222.
——, sufficient by itself, 223, 234, 755.
—— '*Sadakah*' necessary, 225, 226.
effect and meaning of the word *Sadakah* combined with—, or its derivatives, 225.
legal effect of, 227 *et seq.*, 541.
declaration extinguishes the right of the *wâkif* in the property and makes it irrevocably inalienable and non-heritable, 227, 231, 235.
takes effect upon declaration just like the emancipation of a slave, 231.
conditions, relating to the settlor, 196, *see* also Appendix, 750 *et seq.*
——, relating to the *wâkif* (Shiah Law), 505, *see* also Appendix, 750 *et seq.*
——capacity of the *wâkif* (Mâliki Law), 531.
——a non-Moslem may make a—if he fulfils the necessary conditions (Mâliki Law), 532.
——a non-Moslem cannot make a—for a mosque (Mâliki Law), 531.
Islâm not a necessary condition, 200.
by an apostate, 201.
the subject-matter of the—must be the property of the *wâkif* or settlor at the time of making it, 201, 504.
some consequence of this condition, 201, 202.
qualifications of this condition, *ib.*
the entire subject-matter of the—need not be in the actual possession of the settlor at the time of the appropriation, 202.
property need not be entirely free from the right of others, 203.
——that the *wâkif* is under no inhibition, 205 *et seq.*
effect of, 205.
right of creditors as regards *wakfs* by their debtors, 206 *et seq.*
a transfer of property for consideration, 211.
by a person suffering from mortal illness, 211.
testamentary, revocable, 212.
that the *wâkif* is not *mariz*, or suffering from mortal illness, 211.
how may be constituted, 217.
established by evidence, 217.
when object need not be mentioned, 218.
by expressions other than, and its synonyms, 219, 224, 225.
how intention is to be gathered; 219.
express words unnecessary where intention clear, 220.

WAKF—(contd).
word *wakf* sufficient b itself, 223, 224.
conditions relating to the subject-matter of (Hanafi Law), 227 *et seq.*
four conditions relating to the subject of a *wakf* (Shiah Law), 503, 750.
perpetuity (*abad*) or the intention to dedicate property permanently, express or implied, but its mention is not necessary at the time of dedication, 228 *et seq.*, 232, 727, 762.
this rule binding in India, 232.
dedication need not be for a continuing object or one that will not fail, 231, 235.
'*Wakf*,' '*Sadakah*' and equivalent terms imply perpetuity, 232, 235.
result of authorities, 234, 235.
perpetuity not necessary (Mâliki Law), 541.
mention of three generations or the use of a general term, as a rule equivalent to perpetuity, 357
——the subject of the—must not be uncertain, 243.
must not depend upon a contingency which may or may not occur, 243.
examples of a contingent, *ib.*
must not depend upon a contingency (Shiah Law), 513, 515.
invalid, when dependent on a contingency that may never happen (Shâfeï Law), 545.
four conditions relating to the *cestui qui trust* (Shiah Law), 506, 507.
four essential requisites for validity of (Shiah Law), 513, 750 *et seq.*
two conditions necessary (Mâliki Law), 538.
delivery of possession or seisin unnecessary, 237 *et seq.*, 762, 771.
otherwise under Shiah Law, 395 *et seq.*, 515.
when seisin should be taken (Mâliki Law), 538, 539.
——acceptance necessary for completion of (Shâfeï Law), 545.
——the ultimate object must be one that cannot fail, 414, 757.
not subject to the right of private ownership (Shâfeï Law), 547.
invalid, without an object (Shâfeï Law), 545.
the conditions in the *wakfnamah* must be observed, 428—431.
condition in a—that *mutwalli* must not let the—lands, nor appoint his successor by will, valid, 425, 426.
with reservation of the income and profits thereof to the *wâkif*, 423, 787.

WAKF—(contd.)
with reservation of power to exchange or sell, 422, 434, 758 769 *sei eq.*
——power once made it cannot be exercised again unless such intention is expressed, 423, 426.
——power to exclude from or add to the number of the beneficiaries or alter their interest therein, 426.
——power to exclude any person from the benefit thereof (Shiah Law), 526.
wâkif may exclude what persons from the benefit of the (Mâliki Law), 532, 533.
the *wâkif* may declare the order under which the beneficiaries are to take (Mâliki Law), 532, 533.
a deed of trust with a provision excluding the operation of Mahommedan Law treated as a—, 437, 438.
no condition in a, will deprive the Kâzi of his power of interference in the management of a—, 428, 759.
contradictory provisions in a *wakfnamah*, 437, 438.
with discretion to the trustees, 377.
upon one's self (Hanafi Law), 763, 766.
how far the *wâkif* may reserve for himself any interest in the trust property (Shiah Law), 572 *et seq.*
with a condition that the *wâkif's* debts should be paid out of the income of the (Shiah Law), 518, 519.
with a condition that the property should return to the *wâkif* in case of necessity (Shiah Law), 526.
with an option on the part of the *wâkif*, 433.
created conditionally, 434.
conditions in a *wâkif* must be observed (Shâfeï Law), 434, 547.
the *wâkif* may reserve for himself the administration of the (Hanafi Law), 763.
——(Shâfeï Law), 547.
rules relating to the application of *wakf* in the absence of express provisions in the *wakfnamah* (Mâliki Law), 534 *et seq.*
with a provision that the right of representation should be admitted (Mâliki Law), 534.
——that application should be *per captita* (Mâliki Law), *ib.*
——that division be according to sex (Mâliki Law), *ib.*
men and women take equally when their shares are not fixed, 535.
a superior line excludes a lower line in the same branch (Mâliki Law), 535.
when one of the beneficiaries dies without issue, the shares devolve upon whom (Mâliki Law), 538.
by a person in death-illness, *see* Death-illness.
what may be the subject-matter of a (Hanafi Law), 246 *et seq.*, 756.
both movables and immovables (Hanafi and Shiah Laws), 181.
——(Shiah Law), 503, 751, 752.
what may or may not be the subject of a (Shâfeï Law), 544.
——be the subject of a (Mâliki Law), 538, 539.
Government Securities, shares in Companies, debentures and other stock, may be subjects of a valid, 255.
everything that forms the subject of business transactions or which is customary in any particular locality to make—of, 255, 504.
immovable property may be the subject of a (Mâliki Law), 538.
movable property lawful (Mâliki Law), *ib.*
——of every kind except aliments or odoriferous plants lawful (Shâfeï Law), 544.
dirhems and dinars (actual money), valid, 183, 504, 762.
of money (Hanafi Law), 756, 257, 762.
a *dayn* or thing indeterminate or of profits, 504.
things capable of being weighed or measured, 256, 762.
of books, 256.
warm clothing for the poor, *ib.*
copper and other utensils, *ib.*
buildings without the land upon which it is erected, 265, 266.
what is included in the—of a mansion, 267.
——land, *ib.*
buildings and trees included in a —of land, *ib.*
——but not the fruits on the trees nor a growing crop, *ib.*
right of water or way and mills included in a—of land, 268.
in a—of land or house the boundaries need not be specifically set forth, *ib.*
partible *mushâa*, *ib.*
of *mushâa* lawful (Hanafi Law), 762.
——*mushâa* or an undivided share (Shiah Law), 505, 750.
——lawful (Shâfeï Law), 544.
a moiety of a *hammam*, valid, 269.
in death-illness, *see* Death-illness.
property in the joint possession of two or more persons, 269.
land subject to a lease or mortgage, 266, 270.
iktaât (*jagirs*), may be subject of—when, 271.

WAKF—(contd.)
public lands by the Sultan for the public benefit, valid, 271, 272.
in favour of his children invalid, *ib.*
from the *Bait-ul-mâl* for the public benefit valid, 271.
of a mansion for *ghâzis*, 405.
——pilgrims, *ib.*
erection on—lands by the *mutwalli* or any other person, 472, 481, 491.
leases of—property, *see* Leases.
a fractional share of a particular property may be made (Mâliki Law), 539.
future property may be the subject of (Mâliki Law), *ib.*
Moukoof Alaihim or for what persons and objects a—may be made, 273 *et seq.*
by a man on himself, his children (Hanafi Law), 765, 766.
on a person, his children, and after them to the poor (Hanafi Law), 766.
——children (Hanafi Law), 755, 759, 767.
——children's children (Hanafi Law), 755, 759, 760.
——descendants or posterity (Shiah Law), 751, 752.
——(Hanafi Law), 761, 767, 770.
——the poor (Hanafi Law), 765.
——neighbours (Shiah Law), 751.
——an apostate invalid (Hanafi Law), 756.
in favour of non-existing and existing objects (Hanafi Law), 768.
——(Shiah Law), 750, 751.
——a child *en ventre sa mère* (Shiah Law), 507, 751.
may be for the benefit of any person or class of persons, or for any object of piety or charity according to all the schools, 273.
for digging graves for the poor and providing shrouds valid, 439.
——sinful purposes invalid (Shiah Law), 509.
——an unlawful purpose invalid (Shâfeï Law), 544.
——payment of the debts of the *wâkif* or for other purposes beneficial to him, 284, 504.
——an indeterminate object, invalid (Shiah Law), 512, 751.
——a good or charitable purpose generally (Shiah Law), 508, 509, 510, 511, 528.
——a masjid (Shiah Law), 527, 528, 751, 753.
——which becomes ruined (Shiah Law), 510, 529, 752.
——mosques and matters connected therewith, *see* Mosques.
——a cemetery, *see* Cemetery.
——aqueducts, wells, cisterns, *see* Cisterns.

WAKF—(contd.)
of a road or way, *see* Way.
application of the income of a—, 415 *et seq.*
——of immovable property, 416.
——for Madrasa or mosque, 416.
——for students, 419.
——of books, *ib.*
——of a building, 419, 420.
when there are two *wakfs* for the same purpose, the income of one may be applied for the other, when, 404.
for *maslahat* that has ceased to exist how applied (Shiah Law), 510, 511, 629.
——masjid or reservoir, which is in ruins and not needed, may be spent on another masjid or reservoir, 410, 411.
on one's self, children, etc., see *Sadakah.*
when the Kâzi may order the sale of the—property, 418, 434.
——may a—property be sold, 418, 419.
——(Shiah Law), 529.
——(Mâliki Law), 541.
alienation of—property, *see* Alienation.
reversion to the nearest relatives of the founders when the—fails (Shâfei Law), 545.
formally created by a person *sui juris* without any reason to suppose fraud or undue influence will not be set aside, 199.
irrevocable when all conditions are complied with (Shiah Law), 500, 751.
cannot be altered when, once made (Mâliki Law), 541.
for 'the affluent first and then the indigent,' include, 275.
——'the affluent and the indigent' alike include, *ib.*
——the poor exclusively, *ib.*
in favour of the *wâkif* himself (Hanafi Law), 281.
——(Shiah Law), 518 *et seq.*, 751, 758.
——first and then for other objects (Hanafi Law), 277 *et seq.*, 282, 341.
——(Shiah Law), 523, 751.
——and his children and *nasl*, 282, 284 *et seq.*
difference of opinion as to the validity of the reservation in favour of the *wâkif*, 287, 288.
——in favour of *wâkif's* posterity, valid according to all the schools, 278.
——(Hanafi Law), 278, 284 *et seq.*, 343, 358, 362 *et seq.*, 759, 766, 767.
——(Shiah Law), 520, 751 *et seq.*
——result of Arabic authorities, 285 *et seq.*
——held invalid by the High Courts in India, *ib.*

WAKF—(contd.)
difference of rulings discussed, 285 *et seq.*
——in favour of children and the poor, 358.
——in favour of children and their children (Hanafi Law), 357 *et seq.*
——(Shiah Law), 519, 529.
——(Shâfeï Law), 546.
——in favour of strangers, 277.
——in favour of Sufis, 443.
in favour of heirs during death-illness, 277, 387 *et seq.*
on sons of A except those residing abroad, 366.
——to the exclusion of daughters (Mâliki Law), 532, 533.
in favour of consanguine and uterine brothers, 365.
on wife and children, 358.
——lineal descendants, 358, 362.
——one's own kindred or *akriba*, 277, 369 *et seq.*.
——kindred residing in a particular place, 377.
——the orphans of one's kindred, 376.
——who is an orphan, *ib.*
——the nearest of *karâbat*, 372, 373.
——relations generally (Shiah Law), 513.
——one's poor kindred, 373.
——(Hanafi Law), 386.
——the poor (Shiah Law), 509.
——the poor, children may participate in the—if they become poor, 358.
——neighbours, 277, 377.
——(Shiah Law), 510, *see* App. 752.
for *al* or *jins*, 359.
——the people of one's *bait* or house, *ib.*
on *al*, *jins*, *akab*, *karabâldar*, *zu-karâbat*, *arkân* and *ansâb*, 359, 360.
for those who are *sâleh* (pious), 371.
——persons described by a particular relationship (Shiah Law), 510.
on students, may be made. 419.
for Shiahs (Shiah Law), 510.
——*momins* generally (Shiah Law), 509.
——Moslems generally (Shiah Law), 509, *see* App. 751.
——*a harbi* or alien enemy invalid (Shiah Law), 508.
——*masâlih*, valid (Shiah Law), 508 *et seq.*
——an apostate invalid (Shâfeï Law), 544.
——a person for a fixed period or for life with an ultimate trust for the poor, valid (Shiah Law), 522, 523,
in favour of non-existing and existing objects (Shiah Law), 507, *see* App., 751..

WAKF—(concld.)
in favour of (Hanafi Law), 412 *et seq.*
——(Mâliki Law), 532.
——children lawful, 357 *et seq.*
——a child *en ventre sa mère*, invalid (Shâfeï Law), 544.
——(Shiah Law), 751.
for persons between whom and the *wâkif* there are ties of patronage (Shâfeï Law), 546.
——two persons and the poor (Shâfeï Law), *ib.*
——a person incapable of taking possession invalid (Shâfeï Law), 545.
in death-illness, *see* Death-illness.

WAKIF—
evidence admissible to explain the settlor's meaning, when there is any ambiguity, 427, 397.
——inadmissible to alter or modify the intention of the—when his language is clear, 427.
where words are capable of two constructions, the one most consistent with the settlor's intention must be adopted, *ib.*
the intention of the—must be scrupulously regarded in carrying out the trust, 427.
the powers of the—, 421 *et seq.*
the—may reserve the management of the *wakf* for himself during life, 421.
——the power of exchange or of sale, 421 *et seq.*
such power once exercised cannot be exercised a second time, unless such intention clear, 423.
the—may reserve the right to give the produce to whosoever he pleases, 423.
——at time of dedication the power to add to or exclude from the number of beneficiaries or alter their interest in the *wakf*, 426.
——the right to remove the *mutwalli* of a *wakf*, 426.
cannot deprive the Kâzi of his powers of interference in the management of the *wakf*, 428.

WAKFNAMAH—
waknamah in *Doe dem Jaun Bebee* v. *Abdoollah Barber*, *see* App. 793.

WASIAT—*See* Bequests.

WAY—
dedication of a road or—how made, 406.
leading to a mosque may be repaired with the funds of the mosque, when it becomes dilapidated, 411.

WELLS—*See* Cisterns.

WILL—
definition of, 470, 639.
lawful under Mahommedan Law, 568.
nuncupative wills valid under Mahommedan Law, 569, 654.
constitution of, 570—572, 707.
may be made verbally or in writing, 570, 639.
may be made by signs, 571.
may be conditional or contingent, 572.
distinction between a contingent—in writing and one made verbally, *ib.*
distinction between disposition by—and that *inter vivos*, 500, 571, 572.
who may make a, 573 *et seq.*
who (Shâfeï Law), 702.
difference of religion between testator and legatee no incapacity, 479.
capacity of a slave to make a, 573, 702.
——of an insane person, 573, 574.
bequest by an insane person or a *Mokâtib* or a *mazoon* is void, 573.
a disposing mind, what is meant by, 574.
capacity of a person suffering from death-illness (Hanafi Law), *ib.*
capacity of a person in death-illness (Shiah Law), 577.
——(Shâfeï Law), 705.
effect of testamentary disposition by a person in death-illness, 578 *et seq.*, 705, 706.
distinction between a gratuitous disposition on death-bed and the acknowledgment of a liability, 579.
capacity of an infant (Shiah Law), 582
——(Hanafi Law), 582 *et seq.*
——(Mâliki and Shâfeï Laws), 582.
——of infants, difference between the Hanafi and Shâfeï Laws, 583.
——of a person condemned to death for an offence, 585.
——of a Moslem who subsequently becomes an apostate, *ib.*
by a Moslem in favour of an alien infidel, unlawful, 594.
of an insolvent person, 586.
——(Shiah Law), *ib.*
of a non-Moslem subject, 625 *et seq.*
by *Zimmi* for secular purposes, valid according to all the schools, 625.
——*Zimmi*, for four kinds of purposes which are not secular, 625, 627.
by *Zimmi* residing in Mussulmaan territory in favour of a hostile infidel, invalid, 629.
——Mussulman or *Zimmi* in favour of a *musta'min*, resident in Mahommedan territory valid, 628, 629.
may be made for any lawful purpose, 587, 702, 703, 708.
a person may will away his entire property when there are no heirs, 593.
in favour of an alien infidel according to all the schools, 594.
revocation of, may be made at any time, 461.
——may be expressed or implied, *ib.*
——four modes of (Hanafi and Shiah Laws), 462 *et seq.*
——(Shâfeï Law), 709.

WOMEN—
may be appointed executor, 656, 710.
——appointed trustee, 442, 443.
when appointed trustee, may appoint a substitute, 443.
may not be appointed trustee when the trustee has to perform religious duties in connection with the *wakf*, 443.
cannot be appointed *sajjáda-nashín*, 443.
capacity of—to make wills, *wakfs* and gifts, *see* Will. *Wakf* and Gift.

Z

ZIMMI—
will of a, 625 *et seq.*
the secular purposes for which he may lawfully make a will, 625, 626.
the four purposes which are not secular, 627.
cannot bequeath more than a third of his estate to a stranger or heir, 626, 629.
may will in favour of an infidel of a different persuasion, 626, 629.
while resident in Mahommedan territory, may not will in favour of an hostile infidel, 529.
may make a will in favour of a *musta'min* resident in Mahommedan territory, 626, 628, 629.