A

DIGEST OF MOOHUMMUDAN LAW

ON THE

SUBJECTS TO WHICH IT IS USUALLY APPLIED BY BRITISH COURTS OF JUSTICE IN INDIA.

COMPILED AND TRANSLATED FROM

AUTHORITIES IN THE ORIGINAL ARABIC,

WITH

AN INTRODUCTION AND EXPLANATORY NOTES.

PART FIRST

CONTAINING

THE DOCTRINES OF THE HANIFEEA CODE OF JURISPRUDENCE.

SECOND EDITION,

REVISED, WITH SOME ADDITIONS TO THE TEXT, AND A SUPPLEMENT ON SALE, LOAN, AND MORTGAGE.

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INTRODUCTION.

On referring to the classification of Sir William Macnaghten, mentioned in the preface to this work, it will be seen that the cases in which the Moohummudan law has actually been applied in British India are connected with what may be termed the domestic relations of persons to each other, or with the transfer of property *inter vivos*, or from the dead to the living. The first and most important of the domestic relations is that of husband and wife; and it is treated of at adequate length in the three first books of the following work, under the three several heads of Marriage, Fosterage, and Divorce. Marriage is merely a civil contract, and differs in some other important respects from the same contract in this country. A few of these may be noticed in this place. It confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of entering into all contracts regarding it, and of suing and being sued, without his consent or concurrence, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend; and is in no respect under his legal guardianship. On the other hand, he is not liable for her debts, though he is bound to maintain her, and he may divorce her at any time, without assigning any reason. He may also have as many as four wives at one time. A practice prevails in India which operates as a considerable check on the exercise of these powers of the husband. It is usual for

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Mussulmans, even of the lowest orders, to settle very large dowers on their wives. These are seldom exacted, so long as the parties live harmoniously together; but the whole dower is payable on divorce or other dissolution of marriage, and a large part of it is usually made exigible at any time, so that a wife is enabled to hold the dower *in terrorem* over her husband; and divorce and polygamy, though perfectly allowable by the law, are thus very much in the nature of luxuries, which are confined to the rich. The degrees of consanguinity and affinity within which marriage is prohibited are nearly the same as under the Mosaic law. But under the Moohummudan law affinity may be contracted by illicit intercourse (25), as well as by marriage, and, in some instances, by irregular desires, accompanied by the sight or touch of certain parts of the person (*ib.*) To these grounds of prohibition must be added some that are peculiar to the Moohummudan law. Thus, a man may not marry a woman related to him by fosterage, a prohibition which embraces not only the foster parents, but also all persons related to them within the prohibited degrees of consanguinity and affinity (194). So also, a *Mooslim*, or man of the Mussulman religion, is prohibited from marrying an idolatress, or a fire-worshipper, though he may marry a Christian, or a Jewess (40); and a *Mooslimah*, or woman of the Mussulman religion, cannot lawfully be married to anyone who is not of her own faith (42). A difference of *Dár*, or nationality, may also be classed among the prohibitions of marriage; for, if one of a married pair should happen to change his or her nationality, the marriage between them would be at an end (183). For this and other purposes generally, nations or peoples are held to differ only as they are or are not the subjects of a Mussulman state. Among those who are not the subjects of a Mussulman state, difference of allegiance is recognised as a further difference of countries; but the effect of this distinction is confined to questions of inheritance (708). Moreover, though a Mussulman is allowed to have as many as four wives, he cannot lawfully have two women at the same time who are so related to each other by consanguinity or affinity that, if one of them were a male, marriage

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between them would be prohibited (31). This objection does not apply to his having the women in succession (32); for a Mussulman is not prohibited from marrying the sister of his deceased or divorced wife. Though fosterage is treated of in a separate book for the sake of convenience, the relation has no effect on the condition of the parties between whom it subsists, except that it prevents them from intermarrying.

The principal incidents of marriage are the wife's rights to dower and maintenance, the husband's rights to conjugal intercourse and matrimonial restraint, the legitimacy of children conceived (396), not merely born, during the subsistence of the contract, and the mutual rights of the parties to share in the property of each other at death. The last incident belongs exclusively to valid marriages (694). The right to dower is opposed to that of conjugal intercourse, and the right to maintenance opposed to that of matrimonial restraint. Hence, a woman is not obliged to surrender her person until she has received payment of so much of her dower as is immediately exigible by the terms of the contract (124), and is not entitled to maintenance except while she submits herself to personal restraint (442). Dower, though not the consideration of the contract, is yet due without any special agreement, such dower being termed 'dower of the like,' or 'the proper dower' (91). But when any dower has been specified by the contract, it supersedes the proper dower (93), which in that case comes into operation only on the failure of the specified dower. When dower is expressly mentioned in the contract, it is usual to divide it into two parts, which are termed *mooujjul*, or prompt, and *moowujjul*, or deferred; the prompt being immediately exigible, while the deferred is not payable till the dissolution of the marriage (92).

Marriage, like other contracts, is constituted by *éejab o kubool*, or declaration and acceptance (4). But some conditions are required for its legality; and an illegal, or invalid marriage, though after consummation similar in some of its effects to one that is valid (157), does not confer any inheritable rights on either of the parties to the property of each

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other (694). This seems to be true, not only of contracts that are invalid *ab initio*, but of such also as are rendered so by subsequent acts of either of the parties, as, for instance, by the wife's having carnal intercourse, even against her will, with the son of her husband (281), which would render future intercourse with himself unlawful, and so invalidates the marriage. Where a contract is merely invalid, the legitimacy of children conceived during its subsistence is not affected (157). But when the parties are so nearly related to each other by consanguinity, affinity, or fosterage, that sexual intercourse between them is universally allowed to be unlawful, the contract is altogether futile, or void as to all its effects, according to Aboo Yoosuf and Moohummud, and in their opinion the paternity of the offspring is not established from the husband, or in other words, the children conceived during its subsistence are illegitimate (150). This distinction was denied by Aboo Huneefa, who was of opinion that in all contracts there is such a semblance of legality as saves the marriage from being utterly futile. According to him, therefore, wherever there is a subsisting contract of marriage, the children conceived under it must always be held to be the offspring of the husband (154), unless expressly repudiated by him in the solemn form known as *lián*, or imprecation. There is some reason for giving the preference to the opinion of Aboo Huneefa, particularly in India, where it was adopted by the compilers of the *Futawa Alumgeeree*, who appear to have entirely ignored the distinction between invalid and void marriages (155).

With regard to the dissolution of marriage during the lives of the parties, this is termed *firkut*, or separation; and there are thirteen different kinds of it, or ways in which it may be effected. Of these, seven require the decree of a judge, six do not (205). Separation for a change of nationality, or for apostasy from *Islam*, belong to the second class; and as soon as one of these occurrences takes place on the part of one of a married pair, the marriage between them is *ipso facto* at an end (182, 183). A change to *Islam* belongs to the first class; and when one of a married pair embraces the faith, and the other is within the jurisdiction of a

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Moohummudan judge, their marriage cannot be dissolved until *Islam* has been formally presented to, and rejected by the other (181). Invalid marriages belong to the second class ; but though the intervention of the judge is not necessary to set them aside, it is his duty to separate the parties (156) when the illegality of their connection is brought to his notice, and after consummation the marriage cannot be otherwise dissolved without a formal relinquishment by speech. This may be made by either of the parties in the presence of the other. But there is some reason to doubt whether a relinquishment pronounced by one of the parties in the absence of the other, would be valid unless communicated to the other (156).

A *firkut*, or separation, which comes from the side of the wife without any cause for it on the part of the husband (53), or, more generally, every separation of a wife from her husband for a cause not originating in him, is a cancellation of the marriage; while every separation for a cause originating in the husband is termed a *tulák*, or divorce (203). Cancellations differ from divorces in so far that, if a cancellation takes place before the marriage has been consummated, the wife is not entitled to any part of the dower ; whereas, though a divorce should take place before consummation, she is entitled to a half of the specified dower, or a present, if none has been specified (96).

Separations for causes not originating in the husband are noticed incidentally as occasion for mentioning them has occurred. Thus, separations under the option of puberty, or for inequality, or insufficiency of dower, which are separations on the side of the wife, are noticed in the fourth and fifth chapters of the first book, in connection with the subjects of guardians and equality. And separations on account of an original invalidity in the marriage, which is a cause in which both the husband and wife participate, are mentioned in the eighth chapter of the same book in connection with invalid marriages. All being cancellations of the original contract, it will be found that in none of them has the wife any right to dower, unless the marriage has been consummated (53, 67, 156).

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Separations for causes originating in the husband, or divorce in its different kinds, forms the subject of the third book. Of these there is one kind of so much more frequent occurrence than the rest, that the term *tulák* is sometimes restricted to it, and the first six chapters of the book are devoted to this kind alone. This class comprises all separations which require the use of certain appropriate language to effect them. And to distinguish them from all other separations originating in the husband, I have given them the name of Repudiation.

Repudiation, or *tulák* in this restricted sense, is either revocable or irrevocable. A revocable repudiation may be revoked at any time until the expiration of the *iddut* (287) or probationary term, usually about three months, prescribed by the law for ascertaining if a woman is pregnant; on the expiration of that term the repudiation becomes irrevocable, and divorce is complete (205). A repudiation may, however, be made at once irrevocable by the force of the peculiar expressions employed, or by pronouncing it three times. A triple repudiation is not only irrevocable, but has this further consequence, that it prevents the parties from re-marrying, until the woman has been intermediately married to another husband, and the marriage has been actually consummated (292); a consequence which in some degree accounts for the strictness with which verbal repudiations are construed.

The words by which repudiation may be given are either plain and express, or ambiguous. The former take effect by the mere force of the expressions, but unless repeated induce only a single repudiation. The latter require intention on the part of the person employing them (212); which is generally determined by the state of mind in which they are uttered (229); and the repudiation effected by them is with a few exceptions irrevocable (231).

Repudiation may not only be pronounced by the husband himself, but the power to repudiate may be committed to the wife, or to a third party. The commission is termed *Tufweez*, and is of three kinds, *Ikhtiyar*, *Amr-bu-yud*, and *Musheeut* (238).

Repudiation may also be contingent, or, as it is termed

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by Moohummudan lawyers, may be suspended on a condition (259). This being a species of *yumeen*, or oath, I have found it necessary to digress a little into the subject of *yumeen* generally, as a preliminary to the chapter on Repudiation with a Condition.

The *yumeen* is of two kinds—by God, and without God. The *yumeen* by God, or an oath in its most proper sense, may be used to confirm an affirmation, or a denial, or an engagement. The oath to confirm an affirmation has no place in Moohummudan law, as witnesses are not required to swear. The oath to confirm a denial is the defendant's oath, which will come under consideration in connection with claims in the last book. The oath to confirm an engagement, as for instance to do or refrain from something, is not legally obligatory on the swearer, though the breach of it must be expiated (261). Much less then, it would seem, is a mere promise obligatory; and I have met with several passages in the *Hidayah* or its commentaries, where a mere promise is treated as nugatory, though I have forgotten the references.

The *yumeen* without God is the *shurt o juza*, or condition and consequence, and it is constituted by the use of the conditional particles if, when, &c.: as when a man has said to his wife, 'If thou enterest the mansion thou art repudiated. To make a good *yumeen* of this kind, the condition must be something in the future that may or may not happen, that is, though possible, not certain; and there must be nothing to prevent the consequence from taking effect immediately on the occurrence of the condition. If the condition is actually in existence, there is no *yumeen*, but an acceleration of the consequence. Thus, when a man has said to his wife, 'If there is a heaven above us, thou art repudiated,' repudiation takes place on the instant (268). Again, if the condition is impossible, there is no *yumeen*, but here the consequence never takes place. Thus, when a man has said to his wife, 'If a camel enter the eye of a needle, thou art repudiated,' there is no repudiation (*ib.*) To secure the following of the consequence on the occurrence of the condition, it is necessary that the power to induce the consequence should continue in

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force up to the time of the occurrence. Thus, if a man should say to his wife, 'If thou enterest the mansion thou art repudiated,' and his power to repudiate were entirely exhausted before the occurrence took place, there would be no repudiation (267). Further, it is necessary that the consequence should be an act that may legally be made dependent on a condition, for if it is not so there is no *yumeen*. Agency, or a licence to trade, is not such an act (260); nor is gift (515); nor is *wukf*, or appropriation (564); nor *rujât*, or retention of a repudiated wife (289). In short, it is stated generally in the *Inayah* that the *yumeen* by *shurt* and *juza* is restricted to emancipation, repudiation, and *zihar*, which is only another kind of repudiation (260). And the *Futawa Alumgeeree* so far agrees with this that the only applications of it given in that digest are to emancipation and repudiation. A contingent gift is void (549), and as bequest is in the nature of a gift deferred till the death of the testator (624), it may perhaps be inferred that a bequest in the same circumstances, and indeed any other act that cannot be legally made dependent on a condition, would, if so made, be void also.

The rules for the proper construction of the *shurt* and *juza*, which are grammatical rather than legal, form the subject of the fourth chapter of the third book. The remaining chapters of the book are occupied with *rujât*, or the retention of a repudiated wife, and the means of again legalizing her to her husband; *eela*, *khoolâ*, *zihar*, and impotency, which are the other kinds of divorce for causes proceeding from the husband; *iddut*, or the probationary period already alluded to, during which it is unlawful for a divorced woman or a widow to enter into another marriage; and *hidad*, or the behaviour in respect of adorning her person, which is becoming to her during that period.

Next to the relation between husband and wife is the relation of parent and child. But as the legal constitution of this relation, or parentage, is founded on the relation of master and slave, as well as on that of husband and wife, slavery comes next in order after marriage, and forms the subject of the fourth book. Domestic service, as distinguishable from the

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general contract of hiring, is hardly known to the Moohummudan law, except in the form of slavery; and I have thought it right to go a little further into the subject than was absolutely necessary as a basis of parentage, though I have not entered into detail to the extent that would have been required if the Indian Legislature had not passed an Act by which slavery has been abolished in almost everything but name. Like sale, it is constantly referred to in treating of other branches of the law; and this circumstance has rendered some explanation of its origin and general conditions almost unavoidable. Parentage, or the constitution of the relation between parent and child, is treated of in the fifth book; and what else relates to them will be found under the heads of guardians in chapter fourth of the first book, maintenance in the sixth book, and the powers of executors in the tenth book. The period of minority is so short under the Moohummudan law, being terminated by puberty in both sexes, that there is not so much to be said of the relation between guardian and ward in Mussulman as in other countries, for instance in England, where minority continues till the age of twenty-one years complete. Of guardians there seem to be two kinds—the lineal and the testamentary guardian. The powers and duties of the former are limited to the marriage of his ward, and those of the latter to the care of his person and property. The testamentary guardian does not appear to be distinguished from the ordinary executor, and some mention of his powers and duties will accordingly be found in the eighth chapter of the tenth book. No executor has authority to contract a minor in marriage, unless he happens to be the lineal guardian also (47). Under the general head of maintenance will be found the duties in that respect of husbands to their wives, parents to their children, masters to their slaves, and relatives within the prohibited degrees to each other. This book includes all that appeared to me to be necessary on the first branch of our subject, or the law of domestic relations.

With regard to the second branch, or the law relating to the transfer of property, property may be transferred *inter vivos* by sale or gift, and from the dead to the living by testate and intestate succession; while it may be settled, without transfer,

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for charitable and other purposes, by *wukf* or appropriation. Sale has been so fully treated of in the volume before mentioned, that anything further on the subject in this work might be deemed superfluous; and it was entirely omitted in the first Edition. But, for the reasons mentioned in the Preface, a Supplement containing some brief notice of the subject has been added to this edition. Consequent on sale, and in immediate connection with it, is pre-emption,—a right so congenial to the habits of the people of India, that it is constantly asserted by Hindoos as well as Moohummudans, and has been recognized by British courts of justice in India, as part of the customary law of the country. It has, accordingly, been treated of at considerable length in the seventh book, before proceeding to the other modes of transfer. These follow in the eighth, ninth, tenth, and eleventh books respectively.

Gift, which is the first in the list, is defined to be 'the conferring of a right of property without an exchange' (515). This may be done either by actual transfer, which is termed *tumleek*, or by extinction of the donor's right, which is termed *iskat* (516). When gift operates by way of transfer, it is not complete without possession, and is in general resumable. When it operates by way of extinction of right, it does not even require acceptance (531), and cannot be resumed (536). For perfect possession, it is necessary that it be taken with the permission of the donor, either express or implied (521), and that the subject of the gift be separated from and emptied of the property and rights of the donor (520). When the gift is of a thing that may be divided without impairing any of its uses, it is further necessary that the subject of it should not be *mooshâa*, or confused with the property of another, by being held in co-partnership with the donor or a third party (523). When an undivided share of a thing, as a half, or a third, or a fourth, is the subject of gift, there is confusion, both on the side of the donor and of the donee, and the gift is unlawful or invalid without any difference of opinion. When two or more persons are jointly possessed of a thing that is susceptible of partition, and combine in making a gift of the whole of it to one person, there is confusion only on the side of the donors, and all are agreed that the gift is

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lawful. Where, again, one person being the proprietor of the whole of a thing makes a gift of it to two or more persons, either equally, or a half to one and a third to another, &c., there is confusion on the side of the donees only, and though the gift is valid according to the two disciples, it is invalid according to Aboo Huneefa. But it is expressly said that the gift is not void, and that it avails to the establishment of property in the donees by possession (524). If so, it would seem that when anything has occurred to prevent the revocation of the gift, it cannot be resumed. The death of the donor is a circumstance that has that effect (534). Yet a gift of the kind last described was set aside by the Sudder Dewanny Adawlut of Calcutta (*Reports*, vol. iv., p. 210), though it had never been revoked by the donor, and she was then dead. There is some reason, however, for thinking that the decision was founded on imperfect information as to the law, since no allusion was made in the *futwa* of the law officers to the distinction above mentioned, nor to any difference of opinion between Aboo Huneefa and his disciples on the point.

Before delivery any gift may be revoked, but after delivery gifts to relatives within the prohibited degrees, or between husband and wife, do not admit of revocation (533, 534). Other gifts may in general be revoked, unless there is some special cause to prevent it. Of the causes that prevent the revocation of gifts, one in particular may be noticed, because it has given a name to a device for effecting a gift of *mooshâà*, or an undivided share in property susceptible of partition. It consists in giving an *iwuz* or exchange for the gift. This may be entirely an afterthought, or may have been stipulated for in the first transaction (541); which in that case is termed a *heba ba shurt ool iwuz* (543), or a gift with a condition for an *iwuz* or exchange. In both cases the *iwuz* is itself a gift, and is valid only when it is something that can lawfully be made the subject of gift. Up to possession, too, the *iwuz* may be revoked, but after that, neither the original gift nor the *iwuz* or exchange for it is resumable. In the second case, there is a further effect, which is that, after possession of the

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iwuz, the two transactions combine, and form an exchange of property for property, which is a sale (*ib.*) But if the exchange is in the original transaction, as when one thing is given in exchange for another, there is a sale from the beginning, as sale may be contracted by the word *give* as well as by the word *sell*. And the transaction, which is termed *heba-bil-iwuz*, has thus become a device in India for giving effect to the gift of *mooshâá* in a thing susceptible of partition (122), which may be lawfully sold, though it cannot be made the subject of gift.

It has been already remarked, that a gift cannot be contingent or suspended on a condition, but it may be made subject to a condition. The original word *shurt*, which is the same in both cases, is thus employed in two distinct senses in the Moohummudan law. In the one it corresponds to the *conditio*, in the other to the *modus* of the civil law. The distinction between them is, that in the first case the condition being essentially future, as already observed, the act, which is made dependent on it, is necessarily suspended until the occurrence of the condition, while in the second case the act, which is made subject to the condition, takes effect immediately, with an obligation on the person benefited by it to fulfil the condition. A condition in this sense may be *fasid*, that is, invalid or illegal, or it may not be so. Any condition inconsistent with the nature of the transaction to which it is annexed, is clearly invalid, as, for instance, a condition in sale or gift of any advantage to the subject of the contract, when there is a person entitled to assert it. But the effect of the illegal condition on the two contracts is different. In the case of sale the contract is overpowered by the condition, and invalidated by it (*M. L. S.*, 199); while in the case of gift, the contract throws off the condition, and remains unaffected by it, the condition itself being void (546). In like manner, marriage is unaffected by an invalid condition, the condition being inoperative (19). If the condition is not invalid, it would seem that it must be observed in gift (547), and probably also in other transactions. What are valid or invalid conditions, must be ascertained from a consideration of the particular transactions to which they are

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attached. But perhaps it may be safe to say, generally, that wherever a condition is inconsistent with something that is requisite to the validity of a transaction to which it is attached, it must itself be invalid, and that where there is no such inconsistency, the condition will generally be valid. What are these requisites will be found in the first or leading chapter of the different books of the following work; and what conditions are valid will also in general be found in some of the subsequent chapters of each book. It may be observed, that what is requisite to a contract or its validity is also termed *shurt*, or condition. This is a third meaning of the word as it occurs in the following pages. And there is even a fourth sense in which the word is employed in Moohummudan law; all deeds or legal documents, such as bills of sale, bonds, &c., being termed *shuroot*, which is a plural of the word *shurt*.

The next head after gift under this branch of our subject is *wukf*, or appropriation. The original word means, literally, *stoppage*, or *detention*, but, as defined in law, it is 'a devoting or appropriating of the profits, or usufruct, of property, in charity on the poor, or other good objects' (557). The property itself is supposed to remain vested in the appropriator, according to one opinion (*ib.*), while, by another, though the appropriator's right abates, it is supposed to abate in favour of Almighty God, and does not pass to a human substitute (558). Appropriation may be constituted by words *inter vivos*, or by bequest. But when it is constituted by bequest, the property which is the subject of it must not exceed one third of the testator's estate, unless the excess is assented to by the heirs (558). The proper subjects of appropriation are lands, houses, and shops, or immoveable property generally, and any moveables that may be attached to it. Moveables, with a few exceptions, cannot by themselves be made the subjects of appropriation (570). With regard to its objects, two conditions are required. There must be some connection between them and the appropriator; and they must be of such a nature that, taken together, they can never fail. The poor are held to answer both these

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conditions, because they are supposed to be connected with everybody, and because 'there will always be poor in the land.' According to Aboo Huneefa and Moohummud, it is necessary that a perpetual succession of objects should be mentioned in the act of appropriation. But this was not required by Aboo Yoosuf, who held that the poor are always to be implied when other objects fail. And his opinion has been preferred, and is said to be valid (566).

One class of appropriations I have designated by the name of 'settlements,' to distinguish them from 'endowments;' which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children, kindred, or neighbours. Thus, a man may settle his land 'on himself, and *after* him, on such an one, and *then* upon the poor;' or he may settle it 'upon himself, and upon such an one' (576). In the former case, the parties indicated take in succession; in the latter, they take simultaneously. Nor does it make any difference, though some of them should follow the others in the order of nature. Thus, if one should say, 'My land is settled on my child, and child of my child,' the two generations participate in the produce (580). So, also, if he should say, 'upon my child, and child of my child, and child of the child of my child,' the produce is to be expended on his children for ever, so long as there are any descendants; the nearer and more remote being alike, unless the appropriator has said, 'The nearer is nearer,' or, 'on my child, then after on the child of my child,' or, 'generation after generation' (580). There is, however, a distinction between the two cases, which it is proper to notice. In the first, where only two generations are mentioned, 'none below them are included,' while in the second, where three generations are mentioned, the produce is to be expended on his children for ever, so long as there are any descendants. A similar consequence seems to follow where the settlement is 'on children;' for there it is said that 'all generations are included on account of the general character of the name' (581) But there is this distinction between the last case and the other two cases, that in the latter, the participation is

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simultaneous, unless there are words of succession, while, in the case of a settlement 'on children,' the whole is to the first generation, while any remains, and so on to the second, third, and fourth, apparently though no words of succession should be employed.

With regard to testate succession, a person cannot dispose of more than a third of his property by will when he has any heir. When he has none besides the public treasury, he may dispose of the whole. To the extent of a third, the heirs have an inchoate interest in his estate from the commencement of any disease that terminates in death. It follows, therefore, that any gratuitous act of a sick person which affects his property, is not valid beyond a third of his whole estate unless he recovers from his illness, or the excess is allowed by his heirs (551). Marriage is not a gratuitous act, and may be contracted in death-illness. But in that case the dower must not exceed the proper dower (651, 694). In like manner a man may repudiate his wife irrevocably during his death-illness (279). But she is entitled to her share of his property at death, unless he survives the expiration of her *iddut* (280). So, also, any act of one of a married pair that invalidates their marriage, is treated as an evasion of the other's right of inheritance, if done in death-illness, and without the other's instigation or participation (281). Acknowledgment of debt is not a gratuitous act; and though a debt should rest on no better foundation than a death-bed acknowledgment, it is valid as against heirs and legatees, but is postponed to debts of health and debts of sickness that have been incurred for known and sufficient reasons, or can be established by other evidence than such acknowledgment (694).

Bequests are valid as far as a third of the testator's property, whether made orally or in writing; and the presence of witnesses is not required in either case as a necessary formality. They are constituted by the words, 'I have bequeathed,' or by any other words commonly used for the purpose (623); but are not completed so as to vest an interest in the legatee without his acceptance after the death of the testator (624). Any person who is free, sane,

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and adult, whether man or woman, is competent to make a bequest (627). And it may be added that a married woman is equally competent to do so with one that is unmarried. So also a bequest may be made to anyone, even to a child in the womb (627). But a bequest to a slave is a bequest to his master (367); and a bequest to an heir of the testator, or to one who becomes his slayer, though only by misadventure, is not valid without the assent of the heirs expressed after the testator's death (625). The individual or individuals to whom a bequest is made may be specially indicated, as by name or otherwise, or only referred to by a general description. In the former case it is necessary that they be in existence at the time of the bequest; in the latter case it is sufficient if they are in existence at the time of the testator's death. Thus, a bequest to a child in the womb is valid only if he is born within six months from the time of the bequest (627); while a bequest to 'the sons of such an one,' who has no son at the time of the bequest, is valid, and takes effect in favour of any who are subsequently born to him before the death of the testator (646).

Anything that is property may be the subject of bequest, though it does not actually belong to the testator, or even if it is not in existence at the time of making his will (624). And the substance of a thing may be bequeathed to one person, and its usufruct, as the produce of land, or the service of a slave, may be bequeathed to another (664), or the usufruct alone may be bequeathed (663), while the substance passes to the heirs. The usufruct may be bequeathed for a limited time, or indefinitely; and when the bequest of it is indefinite, the legatee is entitled to its enjoyment during his life, though the profits should exceed a third of the testator's property (665). Of one kind of usufruct, that is of produce, a bequest may be made to unknown persons, as to the poor generally (667); but it does not appear that any succession of poor persons is intended. And though it is said that an usufruct of any kind may be bequeathed for ever in the manner of a *wukf* or appropriation (652), it is explained to be for the legatee's lifetime. There is therefore nothing to show that, by words of bequest, the usufruct of things, any

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more than their substance, can be granted beyond the lives of persons in existence at the time of the testator's death. I say by words of bequest, because there seems to be no doubt that it may be effected by words of *wukf*, or appropriation, occurring in a will; for it is expressly said that *wukf* or appropriation may be suspended or made dependent upon death, as, when a person has said, 'when I die I have appropriated my mansion to such a purpose,' and that the appropriation is valid and obligatory on the heirs (558). It may, however, be observed in passing, that this is not inconsistent with what has been said before, that emancipation and repudiation are the only acts that can be suspended on a condition; for here, properly speaking, there is no suspension, in the legal sense of the word, the condition (death) being an event that must certainly happen.

An executor may be appointed by words of bequest or agency, and acceptance seems to be necessary in both cases (623, 632). But it is not necessary that the acceptance should be after the testator's death, as in the case of an ordinary bequest; for the acceptance may be during his life (676). If an executor sells any part of the testator's property, after his death, that is equivalent to acceptance. And an executor who has once accepted cannot withdraw from the office after the testator's death (677); though he may be relieved of it by the judge, if he believes himself unfit or over-burdened with business (678), and he may be removed by the judge for malversation (680).

An executor may take possession of the whole of his testator's rights and property, and of the property of any other persons that was in deposit with him at the time of his death (684). He may also exact and receive payment of debts due to him (*ib.*), give directions for his funeral (681), and pay debts and legacies. But if he pays a debt without proof, or pays one creditor in preference to another without the authority of the judge, he is responsible to the other creditors (690); though he may sell a part of the estate to a creditor in exchange for his debt (691). For the payment of debts and legacies an executor may sell the whole of his testator's moveable property, and also so much of the *akár*,

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or immoveable property, as may be required for the purpose. According to Aboo Huneefa, he may sell the surplus of the immoveable property also; but on that point there was a difference of opinion between him and his disciples (690). Yet it would seem that if he actually makes sale of *akār* for the payment of debts, the sale is lawful, though he should have other property in his hands adequate to the purpose (688). The executor may also do whatever is further required for the conservation of his testator's property. But with the powers before mentioned, his proper functions as executor cease. Still he is the representative of his testator, and may do in that capacity with respect to the remainder of the property after payment of debts and legacies, which now belongs to his heirs, whatever the testator himself might have done with respect to the property of the same persons had he been alive. In this way the powers of a father's executor exceed those of a mother's, or any other relative's; and while the powers of a father's executor appear to extend over the whole property of the heirs, whether derived from the father or not, those of a mother's executor seem to be restricted to the property derived from her (689). When there are two or more executors, one cannot take possession of the property or deposits of the deceased, or receive payment of his debts, or apparently dispose of any part of his property beyond the purchase of what may be necessary for his funeral, without the concurrence of the other, though he may make delivery of specific bequests, and pay debts out of assets of the same description as the debts (681). And if one of them should happen to die, his powers do not pass to the survivor, who is incompetent to act alone without the authority of the judge (682).

Of the rules regarding intestate succession or inheritance it is proper to observe, in the first place, that they make no distinction between moveable and immoveable property, and do not recognise the rights of representation and primogeniture. So that a person who would be an heir of another if he survived him, does not transmit any right to his own heirs or representatives, if he dies before the other. But a preference is so far allowed to the male

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over the female sex, that the share of a male is usually double that of a female in the same circumstances (697).

There are three kinds of heirs; *zuvoo'l furaiz*, or sharers, *usubát*, or agnates, and *zuvoo'l urham*, or uterine relatives. The sharers and agnates commonly succeed together; but, as it is only the surplus after satisfying the shares that passes to the agnates, they have been from that circumstance styled 'residuaries.' In like manner, as it is only when there is neither sharer nor residuary, that there is any room for the succession of the uterine relatives, they have been from that circumstance styled 'distant kindred.' It is so seldom that the distant kindred can have any interest in a succession, that they may be left out of consideration in this place.

The sharers are twelve in number; of whom four are males, viz., the husband, the father, the grandfather, and the half-brother by the mother; and eight are females, viz., the wife, the daughter, son's daughter, the mother, the grandmother, the full sister, and the half sister on the father or the mother's side (696). The shares or portions of the estate to which these parties may be respectively entitled, are given in detail in the second chapter of the eleventh book. The residuaries are of two kinds; by descent, and for special cause. The former, of whom only it is necessary to take notice in this place, are the residuary in his own right, the residuary by another, and the residuary with another (701). The first, who is by far the most important, is defined to be 'every male into whose line of relation to the deceased no female enters;' and residuaries of this kind are, first, the lineal descendants, or sons and sons' sons how low soever, then the lineal ascendants, or father and father's fathers how high soever; and, finally, the lineal collaterals and their descendants in the same way, and without any apparent limit (702), the full blood being always preferred to the half; but the half if nearer in degree being preferred to the full when more remote (701).

Of the heirs before mentioned, that is, the sharers and the residuaries by descent, there is an inner circle imme-

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diately connected with the deceased, who are never entirely excluded from the succession, though their portions are liable to reduction in some cases. These are the husband or wife, the father, mother, son, and daughter (705). Of heirs beyond the circle, the grandfather and grandmother are merely substitutes for the father and mother (696, 698), and the remainder are entirely excluded whenever there is a relative within the circle, through whom they are connected with the deceased, or one nearer in degree to him than themselves. These rules, however, are subject to some qualification (703).

When the persons who are entitled to participate in the deceased's succession have been ascertained, the estate is to be divided into so many equal parts as will admit of each person taking his share in a proportionate number of the parts without a fraction. The number of parts into which the estate must be divided, is termed the extractor or divisor of the case. The shares are expressed in fractions, and the denominator of the fraction by which each share is expressed, is the extractor of that share, when it stands alone. But when there are several shares, the lowest sum divisible without a fraction by all the shares is the extractor (718). This rule may suffice when there is only one person entitled to each portion; but when there are several persons entitled to the same portion, it must be equally divided between them, and for that purpose the original extractor must be multiplied by the number of persons, and the product will be the extractor of the case (719). Or, if there is a common measure between the number of parts in which the portion is expressed, and the persons among whom they are to be divided, the original extractor must be multiplied by the quotient of the number of persons divided by the common measure, in order that the fractions may be kept in their lowest terms. The details of these operations are given in the eighth chapter on the computations of shares, in the eleventh book. But a few examples may be given in this place, and they will further serve to illustrate the manner in which the residuaries of different kinds combine with the sharers, and an

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estate is distributed when there are heirs of different descriptions entitled to participate in it.

Thus, let us suppose, in the first place, that the deceased has left a husband, a daughter, and a father. In such a case the share of the husband is reduced to a fourth (699), that of the daughter is a half (697), that of the father a sixth (696), and the extractor being twelve (718), the estate is to be divided into that number of parts. The husband takes a fourth or three of the parts, the daughter a half or six of them, and the father a sixth or two of them, as a sharer; and since there is no son, the father is the 'residuary in his own right,' and takes the remaining share in that capacity. Next, let us suppose that the heirs are the same parties, with the addition of a son. That circumstance does not further affect the husband or the father; but if the daughter's share remained the same as before, the son would have only one share, while the law requires that he shall have double the share of a daughter (697). To meet this exigency, the share of the daughter is merged in or added to the residue, which thus becomes seven parts of the whole. But seven cannot be equally divided without a fraction in the requisite proportions between the son and daughter; and the original extractor twelve must be raised to thirty-six (12×3), which will be found to divide equally among them all. The husband takes his fourth or nine parts (3×3), the father his sixth or six parts (2×3), and the residue or twenty-one parts is divided between the son and daughter, in the proportion of two to one, or fourteen parts to the former, and seven to the latter. The daughter in this case is an example of the 'residuary by another,' being made a residuary by the male who is parallel to her (703). Let us now vary the case by leaving out the father and the son, and substituting for them a brother and sister. The original division into twelve parts will now suffice. The husband and daughter take their shares, or three and six parts respectively, as in the first case, and the remaining three are divisible without a fraction in the due proportion between the brother and sister, the former taking two, and the latter one of them. Once more let us

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again vary the case, by putting a paternal uncle in the place of the brother, and leaving all the other parties as before. Here the paternal uncle is the 'residuary in his own right,' but sisters (full, or half by the father,) are residuaries with daughters or son's daughters (703); and when there are residuaries of different kinds, a preference is given to the residuary who is nearer in blood to the deceased (704). The paternal uncle is accordingly excluded, and the three shares, which in the last case were divided between the brother and sister, are now taken by the sister alone, who is thus an example of 'the residuary with another' (703).

Of the impediments to inheritance, it is only necessary to observe in this place, that the 'difference of religion,' which is one of them, may be original or supervenient. If supervenient, and occasioned by apostasy from the Mussulman faith, it is, perhaps, merged in the higher disqualification (710), and so removed in India by an act of the local legislature (711). But if original, the disqualification is left untouched by that act; and, though an apostate in that country may not be prevented from inheriting to his Mussulman relatives, the benefit would not extend to his children, who, if brought up in his new faith, must, it would seem, be excluded by difference of religion.

Before leaving the subject of inheritance, I may remark that this digest is not intended to supersede the treatise on the same subject alluded to in the early part of this introduction, except in so far as regards the powers of executors and parentage. These matters are more fully treated in the present than in the former work. But as regards inheritance, the former enters more into details than the present, and is, therefore, better adapted to beginners; while, for scholars, it has the further advantage of being accompanied by extracts from the original authorities. The law as stated in both is substantially the same. But it is derived from different sources; the *Sirajiyyah*, and its commentary the *Shureefeea*, on which the former treatise is exclusively founded, never being once quoted, so far as I recollect, in the book of inheritance, contained in the *Futawa Alumgeeree*, from which

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alone my selections on that subject in the present work have been taken.

The twelfth book on the subject of claims and judicial matters completes the work. I have endeavoured to confine myself to so much of the Moohummudan system of procedure as seemed to be necessary for elucidating other parts of the law. More would have been out of place in a work of this kind, as the Moohummudan law of procedure has long been superseded both at the presidency towns and in the *Moofussul*.

Evidence holds a doubtful place between substantive law and procedure. In some cases it seems clearly to belong to substantive law; as, for instance, in the law of parentage, where the testimony of one female witness is sufficient to establish the maternity of a child, or in the English law of treason, where two witnesses are required to each overt act. But cases of this kind are in the nature of exceptions; and whenever a rule is of general application, it seems to belong more rightly to the branch of procedure than to that of substantive law. This distinction, however, has not always been observed. I have therefore found it necessary, when treating of parentage, to digress a little into the general law of evidence, though with the exception of the single case of maternity, the rules which are there referred to are all of general application.

To the book of claims I have appended some examples of judicial proceedings, which are apparently the forms that were in use in India in the reign of the Emperor Aurungzebe Alumgeer. They not only serve to illustrate the law of procedure, including that of evidence, but also show that both were in actual operation at that time. A brief summary of the whole, though at the risk of repeating what has been said elsewhere, may not be an improper conclusion to these remarks, as serving to explain some allusions that are of frequent occurrence throughout the work, and will meet the reader very early in his progress.

The procedure in Moohummudan courts of justice is very simple. The parties appear in person before the judge, and

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the plaintiff states his case orally (737). This must be done in such terms as sufficiently to indicate the subject of claim, the cause of liability, and, if the cause be complicated, the conditions which are necessary to its validity (740). If the statement is satisfactory on these points, the claim is pronounced to be valid, and the defendant must answer by yea or nay. If it is not valid, he is not obliged to answer (738). If the defendant denies the claim, the judge then says to the plaintiff, 'Have you any proofs?' If he says 'No,' he is told that he is entitled to the oath of the defendant; and if he require it, the defendant is called upon to confirm his denial by his oath, with the alternative of judgment being pronounced against him if he refuse (744). If the plaintiff has witnesses he produces them, and requests that they may be examined. Whereupon, the judge directs their evidence to be taken down on separate slips of paper. After which the depositions are read to the witnesses by an officer termed the *Sahib-Mujlis*, or associate of the judge, and they are required to repeat the words of testimony *verbatim* after the judge himself. When this has been done, the proceedings are reduced to writing in the form of a *muhzur* (764). After this, if the judge is satisfied that the witnesses are just or righteous persons, he accepts their testimony, and then gives the defendant an opportunity of offering any *dufâ* or plea he may have in avoidance of the claim, such as satisfaction or release. If he has none, judgment is pronounced against him; and the whole proceedings, including a repetition of the *muhzur*, are recorded in what is termed a *sijil* (766).

When the defendant has a plea in avoidance the same course is to be followed. The parties now, as it were, change places, and the defendant is termed the claimant, and the plaintiff the defendant in avoidance. The plea must be consistent with the denial, or it will be rejected (730). If admitted, the plaintiff must answer by yea or nay; and if the answer is in the negative, the defendant must prove his plea; or, in default of proof, he may call on the plaintiff to confirm his denial by his oath, under the penalty of judgment being given against him if he refuse. The proceedings are reduced to writing as before in the form of a *muhzur* and *sijil* in

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avoidance (768, 769), in the same way as on the original claim. The case does not always stop here; for the plaintiff may reply, and then the same course is to be followed as on the original claim and avoidance.

Such appears to have been the ordinary course of judicial proceedings in India while the country was subject to Mussulman rule. But it might have been shortened by the defendant's adducing his plea in avoidance at once, instead of first denying the claim. This would, of course, render proof on the original claim unnecessary, and confine proceedings to the plea. Sometimes the answer might raise a new issue, and each party might tender proof (760, 761). Here a question would arise, whose proof, or rather whose issue, should be preferred. Some rules for determining the preference will be found in the sixth chapter of the twelfth book. In these cases 'the word' is said to be 'with' the other party, or, as his word may require to be supported by his oath, 'the word and oath' are said to be 'with him' (759).

All evidence, according to the Moohummudan law, must be positive and direct to the point at issue; and in all but a few cases, it is necessary that the witnesses should have actually seen what they attest (418). In these exceptional cases, they are allowed to give their testimony, if they have been informed of the facts to which they testify by trustworthy persons (428), or have seen other collateral facts from which those in question may be legally inferred (424). But in all cases they must make the evidence their own, by positively asserting the fact in issue, and must refrain from saying that they testify to it because they have been informed of it, or because they have seen the other facts from which their inference is drawn; statements, either of which would vitiate the testimony, and oblige the judge to reject it (429). Further, it is required that the witnesses shall be what the law terms just or righteous persons, and free from bias by interest or relationship. They are not sworn (417), nor subjected to cross-examination. But if the character of a witness is objected to, it must be carefully investigated by the judge, and certified to by professional purgators; though if not objected to, the mere profession of the Mussulman faith is usually deemed to be a sufficient warranty

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of character. To be a Mooslim is essential to the character of justice or righteousness. Hence, none but Mooslims can be received as witnesses against a Mooslim (420) ; though there is a relaxation of the general rule in the case of unbelievers, who, being in this respect all of one religion in the eye of the law, are freely received as witnesses for or against each other. It is further necessary that there should in general be at least two male, or one male and two female, witnesses to the fact in dispute (421), and that their testimony should agree in words as well as meaning; that is, that they should concur in attesting the same thing in the same or synonymous language (420). Finally, evidence is received only to the affirmative of each issue, whether the claim, the avoidance, or the reply. The judge is thus relieved from the perplexity of having to decide between conflicting testimonies. But when the evidence has all the characteristics required by law, it is absolutely binding on the judge, who must receive and act upon the assertion of the witnesses, in the same way as a judge in England is bound to do on the verdict of a jury (417).

These are the leading principles of what was the law of evidence in India for centuries before any part of it passed under British rule. Their effects may still, I think, be traced in the testimony which forms the common staple of *Moofussul* evidence. It is usually direct to the point at issue; and the witnesses, on either side, agree with each other in stating the facts nearly in the same words, and with only such trifling variations as may be required to account for their different means of knowledge. Being bare of circumstances, the evidence presents few points for contradiction, and is rarely shaken in cross-examination. Yet it is very generally believed to be false, and little or no credit is ever given to it by the judges. Its character, however, seems never to change, and is probably the same at the present day as it has always been since the establishment of English courts of justice in India. How shall we account for this? Few facts admit of direct proof, and the people of India know little or nothing of circumstantial evidence, by which alone the deficiencies of positive evidence can be legitimately supplied.

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But any number of witnesses can easily be found to any fact that it is necessary to establish, provided that no regard is had to their character, and an oath is the only test of truth. This appears to me to be the rationale of the whole matter, though I cannot pursue the subject farther here, as it is foreign to the purpose of this Introduction. But I beg respectfully to offer what has been said for the consideration of those who, as legislators or judges, may have anything to do with the administration of justice in India.

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