

THE  
MOOHUMMUDAN LAW OF SALE,

ACCORDING TO THE HUNEEFEEA CODE :

FROM

THE FUTAWA ALUMGEEREE,  
*A Digest of the whole Law,*

PREPARED BY COMMAND OF

THE EMPEROR AURUNGZEBE ALUMGEER.

SELECTED AND TRANSLATED,

*From the Original Arabic,*

WITH

AN INTRODUCTION AND EXPLANATORY NOTES,

BY

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LONDON:  
SMITH, ELDER AND CO., 65, CORNHILL.

1850.

by the courts of justice in India, except in matters of inheritance, when both the parties to a suit are Shias, or followers of the twelve Imams. It seems, also, from the translator's remarks, that the original digest is imperfect, and would require considerable additions to render it complete.

The Moohummudans of India are chiefly Soonnees of the Huneefeea sect, though there are many Shias among them. Indeed, the lower orders of Soonnees have adopted so many of the superstitious notions and observances of the Shias, that they are Soonnees in little more than in name. They are, however, very tenacious of the name; and the Moohummudan sovereigns of India having been Soonnees of the Huneefeea sect, the Huneefeea code was accordingly the general law of the country while it remained under the sway of the Moohummudans.

The Moohummudan law may be divided into two parts, as it relates to spiritual or to temporal matters. The former comprehends the rites and ceremonies of religion; the latter, what is usually comprised under the heads of civil, criminal, and international law. Both parts of the law are obligatory on Moohummudans, even when living under a foreign dominion; but it is only the temporal law which has ever been imposed by them on persons of a different religion.

The temporal law of the Moohummudans, according to the Huneefeea code, was for six centuries the general law of the countries which now form the British territories in India. In its application to the Hindoo inhabitants, some allowance was probably made for their peculiar institutions in matters connected with their religion, such as marriage, adoption, and inheritance. But there is no reason to suppose that in matters of contract and the ordinary dealings of men with each other, the Moohummudan law was not applied to them, in the same way as it is applied in other Moohummudan countries to *Zimnees*, or non-*Mooslim* subjects. Indeed, it does not appear that the Hindoos ever had any law of sale of

their own sufficiently well defined to be applicable to the actual business of life, except in the earliest stages of society when positive law is scarcely distinguishable from moral precepts. All that now remains of a Hindoo law of sale, or at least all of it that has been translated into the English language, are a few scattered fragments, some of which bear a resemblance to parts of the Moohummudan law; and if they were not borrowed from that law, serve to indicate that it was suited to the condition of Hindoo society. I allude, in particular, to the doctrine of options or powers of cancellation in sale, which is found in both the Hindoo and Moohummudan laws, but is stated very vaguely in the former, and without the qualifications and restrictions which, under the latter, render it compatible with the ordinary conditions of a contract of sale. Sir William Jones has adverted to the meagreness of the Hindoo law of contract, and in the digest compiled under his superintendence, and translated by Mr. Colebrooke, all that is to be found on the important subject of sale are two chapters; one on "Sale without Ownership," and the other on "Rescission of Purchase and Sale," arranged under heads widely separated from, and quite unconnected with, each other.

It is probable, therefore, that if the Hindoos ever had a more perfect law of sale of their own, it fell into desuetude during their subjection to the Moohummudans, and that any attempt now to revive it would be futile. During that period, the dealings of the Hindoos, even among themselves, must have been regulated by the general law of the country, which was the Moohummudan. Long use would have familiarized them with its maxims, and from being constantly referred to or implied in their ordinary transactions, it would at length become, in a manner, a part of their customs or usage. Accordingly, we now find the Hindoos asserting their claim to rights which though originally derived from the Moohummudan law, are insisted on as the usage of the country. I may mention the right of *Shoofaa*, or

pre-emption, and the conditional sale, or mortgage, called *Bye-bil-wufa*, as two instances of rights originating in the Moohummudan law, which have been sanctioned and confirmed by decisions of the courts of justice, or regulations of the supreme government, as parts of the general usage of the country, to which all its inhabitants—Hindoo and Mussulman—are alike entitled.

It is only in cases where an appeal is made to the Moohummudan law as the usage of the country, that it can now be applied to the cases of Hindoos in civil matters, by the courts of justice in the British territories in India. It is possible, however, that it may still be referred to by the Hindoos themselves in their ordinary dealings, and it is most probably the source from whence have been derived their principal notions of right and liability connected with particular contracts. If such be the case, the Moohummudan law must afford to the judge the readiest means of ascertaining the meaning of even Hindoo parties to a contract, where it has not been sufficiently expressed, or cannot be implied from the circumstances of the case.

In the view last mentioned, the Moohummudan law must always be of great importance in the decisions of suits where the parties are Moohummudans. It has ceased to be positive law, even for them, in the courts of justice of the East India Company, except in matters which have relation to religion, marriage, or inheritance. It is, nevertheless, observed by themselves in their dealings with each other, and affords the surest standard for equitably determining their disputes. It is accordingly administered by the Company's judges, as a rule of justice, equity, and good conscience, in almost all the cases to which it is applicable, when both the parties are Moohummudans.\*

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\* In the *Principles and Precedents of Moohummudan Law*, by the late Sir W. H. MACNAGHTEN, Bart., the decided cases which have been selected as precedents are arranged under the following heads:—In-