CHAPTER – V

ADOPTION UNDER MUSLIM LAW

Islam emerged in Arabia when the Iran-age civilization was breathing its last. Islam gave the concept that Almighty, the Creator of the universe was supreme and man was his deputy on earth.¹ There is a story that Zaid was Prophet Mohammed’s freedman and adopted son. Prophet Mohammed had seen and admired Zaid’s wife Zainab and her husband at once offered to divorce her. Prophet Mohammed’s marriage with Zainab occasioned much scandal among his contemporaries.²

During the time when this event took place, the Arabs used to consider their adopted children in the same light as real children of their body. Koran³ the chapter on confederates, Prophet Mohammed forbid this practice and thus legalised his marriage with Zainab, the divorced wife of his freedman Zaid who was also his adopted son.

Excerpts⁴ from the Holy Quran is as follows:

Allah has not made. Call them by after
For any man two hearts Their fathers: that is
In his breast: nor has Juster in the Sight of Allah
He made your wives whom But if ye know not
Ye divorce by Zihar Their father’s names,
Your mothers: nor has He (then they are)
Made your adopted sons Your Brothers in faith.
Your sons. Such is (only)
Your (manner of) Speech
By your mouths. But, Allah

¹ Asha Bajpai, Adoption Law and Justice to the Child, Pub. NLSIU, 1996, p. 32.
² The Holy Quran, Revised and Edited by the Presidency of Islamic researches, FTA, Call of guidance, p. 1238.
³ In Surat XXXIII (Medinah),
Tells (you) the Truth, and He
Shows the (right) Way.

The Commentary to this Surat states that:

If a man called another’s son “his son”, it might create complications with natural and normal relationships if taken too literally. It is pointed out that it is only a facon de parler in men’s mouths, and should not be taken literally. The truth is the truth and cannot be altered by man’s adopting "sons". “Adoption” in the technical sense is not allowed in Muslim Law. Those who have been “wives of your sons proceeding from your loins” are within the prohibited Degrees of marriage: (iv. 23:) but this does not apply to “adopted” sons.

There are certain Quranic injunctions relating to orphans:

“Whatever ye spend that is good is for parents and kindred and orphans and those in want and for wayfarers and whatever ye do that is good. Allah knoweth it well.” ⁶

“Concerning orphans it says, “the best thing to do is what is for their good.” ⁷

“To Orphans restore their property (when they reach their age) nor substitute (your) worthless things for (their) good ones and devour not their substance (by mixing it up) with your own for this is indeed a great sin.” ⁸

“To those weak of understanding make not over your property which Allah hath made a means of support for you but feed and

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⁴ Ibid.
⁶ Baqara 2/213.
⁷ 220 Quoran
⁸ Nisaa 4/2 Quoran
clothe them herewith and speak to them words of kindness and justice.”

“Stand firm for Justice to Orphans.”

Hedaya contains very elaborate instructions for the faithful. In the books of the Hedaya, pertaining to the laws relating to the rights of destitute children it is said:

“Lakeet” in its primitive sense signifies anything lifted from the ground: the term is chiefly used to denote an infant abandoned by some person in the highway. In the language of law, it signifies a child abandoned by those to whom it properly belongs, from a fear of poverty, or in order to avoid detection in whoredom. The child is termed Lakeet, for this reason, that it is eventually lifted from the ground, wherefore this term is figuratively applied, even to the property, which may happen to be found upon it. The person who takes up the foundling is termed the Maltakit or ‘taken up’. The taking up of a foundling is laudable and generous, as it may tend to preserve his life. This is where the finder sees no immediate reason to suppose that if the child be not taken up it may perish, but where he sees reason to apprehend that it may otherwise perish, the taking of it up is incumbent. A foundling is free, because freedom is a quality originally inherent, in man) and the Mussalman territory in which the infant is found, is a territory of freeman whence it is also free, moreover freeman, in a Mussalman territory abound more than slaves whence the founding is free, as the smaller number is a dependant of the greater.

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9 5: Quoran
10 127: Quoran
11 Hedaya (guide) was translated from the original Arabic by four Maulvis or Mohemmedan lawyers and from Persian into English by Charles Hamilton by order of Warren Hastings when he was Governor General of India.
"The maintenance of a foundling is to be defrayed from the public treasury, because it is so recorded from Omar, and, also because, where the foundling dies without heirs, his estate goes to the public treasury, and as that is the property of the Mussalman community, his maintenance must be furnished from this property, since as the advantage results to the community, the loss also falls upon the community."\textsuperscript{13}

Abdullah Yusuf\textsuperscript{14} states that:

"What is aimed is to destroy the superstition of erecting false relationships to the detriment or loss of true blood relations.... Even if a man deliberately calls another his son or father out of politeness or affection, God is oft-Returning, most merciful."

Reading the Surat XXXIII along with the commentary and the verses in the Koran and Hedaya relating to orphans, it appears that the prohibition of adoption under Muslim Law was perhaps on the following counts:

I. Form of society prevalent at the time when Surat XXXIII was revealed and subsequently applied.

II. The entire purpose seemed to be to prevent false insinuations being cast on true blood relationships.

III. To protect the moral dignity of women whose probity could be questioned in every case of adoption. This point can be further substantiated by the fact that there were many intra-family and inter-clan marriages prevalent among the society as it existed then.

IV. Quran tacitly recognises the fact that "truth" cannot be altered by men’s adopting "sons" and if a man calls another his son, God is merciful.

\textsuperscript{13} Commentary on Sura XXXIII by Abdullah Yusuf.

\textsuperscript{14} The commentary on Surat XXXIII (4,5)
It would therefore clearly appear that adoption in Islam would be permissible only if -

1. The true identity of the child is disclosed to him where it is known.\textsuperscript{15}
2. The rights of inheritance of the natural heirs are not disturbed.\textsuperscript{16}

To provide security to the adopted child one of the following methods or a combination of them could be adopted:

a. Provide \textit{Kafala} (maintenance) for the child.

\textsuperscript{15} The acknowledgement of Paternity under Muslim law is in the nature of a declaration by the father that a child is his legitimate off-spring. This acknowledgement may be expressed or implied. The following conditions are necessary for a valid acknowledgement.

   The paternity of the child should be doubtful i.e. it should neither be proved nor disproved, that the child is illegitimate i.e. there is uncertainty about the legitimacy of the child. The acknowledgement of paternity under Muslim Law has some likeness to adoption under Hindu Law but there are differences as follows:

   \begin{align*}
   &\text{Adoption} &\text{Acknowledgement of paternity} \\
   &1. \text{An adoptee is the son of another person.} &1. \text{An acknowledgement proceeds on the basis of actual paternity.} \\
   &2. \text{The child is severed from the natural family and is planted in another.} &2. \text{There is no change of family.} \\
   &3. \text{It is possible only when father is known and gives the child.} &3. \text{It is possible only when paternity is not known.}
   \end{align*}

\textsuperscript{16} The Muslim Law of inheritance consists of two distinct elements. The customs of ancient Arabia and the rules laid down by the Koran and the Founder of Islam. The Koranic reform came as a superstructure upon the ancient tribal law, it corrected many of the social and economic inequalities then prevalent. Taking a broad view, the Islamic scheme of inheritance discloses three peculiarities.

   i. The Koran gives specific shares to certain individuals.
   ii. The residuary goes to agnatic heirs and failing them to uterine heirs.
   iii. Bequests are limited to one third of the estate.

The Mohammedan Law of inheritance was founded by the Prophet on republican principles at a time when the modern democratic conceptions of the equality and division of property was unknown even in the most advanced countries of Europe. It provides that upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition and to prevent any diversion of property made even with the consent of the heirs unless that consent is given after the owner's death, when the reason is, not that the testator had power to defeat the law of inheritance but that the heirs having become owners of property, could deal with it as they liked and could therefore ratify the act of their ancestor. Fyzee A.A., Outlines of Mohammedan Law, 1974, Fourth Edition, Oxford University Press, New Delhi.
b. Make a gift (always permissible under Muslim Law in favour of the child.17

c. Bequeath up to 1/3 of the property in his favour18 (also permissible under Muslim Law).

Today some Muslims do adopt children in India but at present since there is no law19 in India to make their adoption legal, the adoption remains informal.

In some Islamic countries such as Pakistan, Iran, Tunisia, and even some Arabic countries, substantial changes have been made in personal laws. Therefore, an attempt could be made again in the cause of justice to the destitute and orphaned child or Lakeets.

**Legitimacy and Acknowledgement**20

Legitimation, Legitimacy in the Muhammadan, as in other systems of law, parentage involves

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17 Mohammedan Law permits a gift of a man's property during his lifetime and also after his death by will, while a disposition *inter-vivos* is unfettered as to quantum. A testamentary disposition is limited to one-third of the net estate.

18 A Mohammedan cannot by will dispose of more than one third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect unless the heirs consent hereto after the death of testator. Law allows a man to give away the whole of his property during his lifetime but only one third of it can be bequeathed by will. The policy appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion as much as a third to a stranger. But it also appears that a holder of property may to a certain extent defeat the policy of law by giving in his lifetime the whole or any part of his property by gift. Any Muslim male or female, who has attained majority and is of sound mind can make a gift. The three essentials of a gift are: (i) declaration of gift by donor; (ii) acceptance of gift by donee; (iii) delivery of possession.

19 The Joint Committee of the Parliament Introduction in Rajya Sabha in 1976, the Indian Adoption Bill. This bill was opposed by the Muslims on the ground that adoption was against the Quran. The Bill would allow Muslims to disobey Quranic injunction against adoption. It would throw out of gear, the Islamic Law of inheritance. It would add more persons to the list of prohibited degree of relationship for marriage. They also argued that it was an attempt foist Hindu Law on Muslims. Inspite of the fact that this bill was only enabling legislation. It would force no one to adopt and Muslims need never adopt a child. The answer was that even 'bad' Muslims should not be allowed to adopt as the proposed legislation would do. The Adoption Bill lapsed with the dissolution of the Parliament in March 1977. Another Bill was introduced in the Lok Sabha on 16/12/1980. This Bill exempted Muslims from its operation. Section 5.3(1) of this Bill said: “No adoption order shall be made in respect of a Muslim child or for adoption by a Muslim of any of any child whether a Muslim or not under this Act”. This Bill also lapsed when parliament was dissolved in 1984.

20 All. 289, 341; Cases, 199; Wilson 80; Tyabji 228.
certain rights and obligations. The relation between a father and his child is called paternity; the relation between a mother and her child is called maternity.21

By and large, there are two modes of filiations known to the law: as a rule, the law treats the natural father as the father of the child; sometimes, however, adoption leads to the result that someone who is not the father acquires rights similar to those of the father. Adoption is not recognized in Islam,22 as it was disapproved by the Koran.23 In addition to natural filiation, the first form, another is also known, namely, acknowledgement of paternity. The peculiarity of Muhammadan law is that in certain cases where it is doubtful whether a person is the child of another, the acknowledgement of the father confers on the child the status of legitimacy.24

In considering these and allied questions, the distinction between the status of legitimacy and the process of legitimation must be kept in mind. ‘Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Muhammadan law.’25 In Muhammadan law such an acknowledgement is a declaration of legitimacy, and not a legitimation.26 ‘No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgement is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the

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21 Wilson 79; Tyabji 217 sqq.
22 Mahmood J. in Muhammad Allahabad v. Muhammad Ismail (1888).
23 The Koranic passages in tyabji, loc. Cit; Ameer Ali, Il, 218.
26 Tyabki 225, com.
statement provided his legitimacy be possible.\textsuperscript{27} Legitimation per subsequeiens matrimonium is not known to Muhammadan law.\textsuperscript{28}

Parentage is therefore established in Islam in one of two ways and there is no third: (i) by birth during a regular or irregular but the marriage should not void, or (ii) by acknowledgement, in certain circumstances.

The rules regarding the presumption of legitimacy according to Muhammadan law, and how far they have been altered by legislation.\textsuperscript{29} Islamic law ordains that:

1. A child born within six months of the marriage is illegitimate, unless the father acknowledges it.
2. A child born after six months of the marriage is legitimate, unless the father disclaims it.
3. A child born after the termination of marriage is legitimate if born-
   within 10 lunar months-in Shiite law;
   within 2 lunar years-in Hanafi law; and
   within 4 lunar years - in Shafil or Maliki law.\textsuperscript{30}

The reasons for such divergent periods are not difficult to understand. In the first instance, we have to take into consideration the imperfect knowledge of gestation and pregnancy prevalent in early times. Baillie thinks that in laying down such long periods, the Sunnite doctors had in view those abnormal conditions which 'sometimes perplex the most skilful of the medical faculty in Europe'.\textsuperscript{31} The second reason is humane sentiment. If a woman gave birth to an illegitimate child, not only would the child be excluded

\textsuperscript{27} Sadik Husain v. Hashim Ali (1916) 43 I.A. 212, 234; Cases, 247; also per Straight I. in Muhammad Allahdad v. Muhammad Ismail, Cases, 216.

\textsuperscript{28} F. A. Mann, "Legitimation and Adoption in Private International Law", Law QuaT. Rev. for 1941,112; Cheshire, loc. cit.

\textsuperscript{29} Baillie, I, 392-3, 396-7.

\textsuperscript{30} Tyabji 219, where the author says rightly that at present these , periods are repealed in India. Ameer Ali, II, 191-2.

\textsuperscript{31} Ameer Ali, II, 191, note 4.
from inheritance, but the woman herself would be punishable for the
offence of zina. Thus Ameer Ali cites the views of two European
jurists, D’Ohsson and Sautarya, who are of opinion that the ancient
jurists ‘were actuated by sentiments of humanity, and not any
indifference to the laws of nature, their chief desire being to prevent
an abuse of the provisions of the law regarding divorce and the
disavowal of children’.33

The present rule on the subject is to be found in the conclusive
presumption raised in Sec. 112, Indian Evidence Act. The rule may
be shortly stated as follows: A child born during the continuance of a
valid marriage, or within 280 days after its dissolution, the mother
remaining unmarried, is conclusively presumed to be legitimate,
unless there was no access when he could have been begotten. The
question whether Sec. 112, Indian Evidence Act, supersedes the
rules of Muhammadan law was left open in the leading case of
Muhammad Allahdad v. Muhammad Ismail by Mahmood J.,34 but
since that time the trend of modern decisions is to regard this as
purely a question of the law of evidence governed by Sec. 112, Indian
Evidence Act, even with regard to Muslims.35 If, however, the
marriage is held to be irregular, difficult questions may arise.

Acknowledgement- The (iqrar) of paternity takes place in Islam as
follows: (I) where the paternity of a child is not known or established
beyond a doubt;36 and (2) it is not proved that the claimant is the
offspring of zina i.e. illicit intercourse; and (3) the circumstances are
such that they do not rebut the presumption of paternity, an
acknowledgement of paternity by the father is possible and effective.

32 Zina in Islam is the generic name for illicit intercourse, the chief forms whereof are
adultery and fornication.
33 Ameer Ali, loc. cit. v (m) (1888) 10 All. 289,339.
34 (1888) 10 All. 289, 339.
35 The clearest exposition of this view will be found in Tyabji 219 sqq.; Mulla 340, com.
36 ‘Paternity does not admit of positive proof, because the connection of a child with its
father is secret. But it may be established by the word of the father himself …’
Ameer Ali, II, 196-1, citing Fatawa Alamgiri.
1. **Unknown paternity** - The rule as to acknowledgement of legitimacy arises only if the paternity of the child is not certain. To use the terminology of the Indian Evidence Act, the paternity of the child must neither be 'proved' nor 'disproved', but it should be 'not proved'.

The leading case on the subject is *Muhammad Allahdad v. Muhammad Ismail*. A, claiming to be the eldest son of G, brought a suit against and his three sisters for his rights in certain villages and his three sisters were born to Moti Begum after her marriage to G; but A was born to her at a time unknown. Nothing was known or proved as to who the father of A was, it being certain that the mother was Moti Begum. G, during his lifetime, had acknowledged A as his legitimate son. It was held (i) that there was no proof of the paternity of A, (ii) that there was no legal impediment to the marriage of G with Moti Begum, and (iii) that it was not proved that A was the offspring of *zina* (illicit intercourse), or that he was the natural son of G born before his marriage with Moti Begum. Therefore A had the status of an acknowledged son of G and as such had the right to inherit G's property with and his sisters.

The Muhammadan law of acknowledgement of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged

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37 *Roshanbi v. Suleman* (1944) 46 Bom. L.R. 328, where a good summary of the law will be found.
38 (1888) 10 All. 289; Cases, 199. The leading judgment is that of Mahmood J., pp. 324-43. The opinion of Straight I. (pp. 300-21) is also important as it contains texts.
child is not proved in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgement has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.\textsuperscript{39}

2. \textbf{Legitimate son only}- An illegitimate son cannot be ‘acknowledged’ as legitimate, for there is no such thing as ‘legitimation’ in Islam. Mahmood J. points out that the legitimation of an illegitimate son is possible in Roman and Scots law, but no analogy exists between the principles upon which those rules proceed and those upon which the Muhammadan rule of the acknowledgement of parentage is founded. Putting the matter shortly, the former two systems proceed upon the principle of legitimating children whose illegitimacy is proved and admitted, whilst the Muhammadan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child.\textsuperscript{40}

In \textit{Sadik Husain v. Hashim Ali},\textsuperscript{41} the Judicial Committee of the Privy Council held that an acknowledgement by a Muslim that a person is his son is substantive evidence that the person is his legitimate son. Statements made by a member of a Muslim family, in this case the widow of the alleged father, that a person is a son, or an heir, are evidence merely of family repute of legitimacy.

3. \textbf{Irrebutable Presumption}- First, the ages of the parties must be such as to be in consonance with the presumption of paternity; secondly, marriage must be possible between the father and mother; thirdly, the person acknowledged must not be the offspring of zina

\textsuperscript{39} Per Mahmood J., 10 All. At pp. 334-5. This doctrine is now well established, Tyabji 225; Mulla 342-4.

\textsuperscript{40} 10 All. At p. 341.

\textsuperscript{41} (1916) 43 I.A. 212; Cases, 238.
(illicit intercourse); and fourthly, there must not have been a disclaimer or repudiation on the part of the person acknowledged.\textsuperscript{42}

An important decision on legitimacy is \textit{Habibur Rahman Chawdhury v. Altaf Ali Chawdhury}.\textsuperscript{43} \(H\), the son of a Jewess, Mozelle Cohen, claiming to be the legitimate son of Nawab Sobhan of Bogra, filed a suit against \(A\) and others, for a share of inheritance. \(A\) was the daughter's son of the deceased Nawab. \(H\) affirmed that Mozelle was married to the Nawab, and that, in any event, the Nawab had acknowledged him as his son on many occasions. It was held that neither a marriage nor a proper acknowledgement was proved, and the plaintiff failed. Lord Dunedin, in delivering the judgment of the Board, said: "Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a \textit{status} which results from certain facts. Legitimation is a \textit{proceeding} which \textit{creates a status which did not exist before}. In the proper sense there is \textit{no legitimation under the Mohammedan law}. Examples of it may be found in other systems. The adoption of the Roman and the Hindu law affected legitimacy. The same was done under the Canon law and the Scots law in respect of what is known as legitimation \textit{per subsequens matrimonium}."\textsuperscript{44} By the Mohammedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina, that is, illicit connection, and cannot be legitimate. The term 'wife, necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgement of legitimacy in favour of a son. This

\textsuperscript{42} Wilson 85; tyabi, loc. Cit.
\textsuperscript{43} (1921) 48 I.A. 114; Cases, 247.
acknowledgement must be not merely of sonship, but must be made in such a way that it shows that the acknowledger meant to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it: i.e. it must not be made when the ages are such that it is impossible in nature for the acknowledger to be the father of the acknowledgee, or when the mother spoken to in an acknowledgement, being the wife of another, or within prohibited degrees of the acknowledger, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgement may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgement has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgement of legitimacy is in this position: The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgement the onus is on him to prove a marriage. Once he establishes an acknowledgement, the onus is on those who deny a marriage to negative it in fact.45

The acknowledgement may be either express, or implied by conduct.46 It must be a statement or conduct intended to have legal effect; a mere casual admission is not enough. A prolonged cohabitation in the nature of concubinage, inconsistent with the

44 F.A. Mann, op.cit.
relation of husband and wife, is not sufficient\(^47\) nor can such a presumption arise in the case of a common prostitute.\(^48\) A clear repudiation by the father would also destroy the force of an implied acknowledgement.\(^49\)

The acknowledgement of the children has the legal effect of the acknowledgement of the wife as well; for the acknowledgement of a man is valid with regard to five persons his father, mother, child, wife and *mawla* (a freed slave).\(^50\) A valid acknowledgement gives rights of inheritance to the children the parents and the wife. An acknowledgement once made is not revocable\(^51\)

Guardianship (wilaya) may be (i) of the person, (ii) of property, and (iii) in marriage.\(^52\) In the first instance there is guardianship of the person. Guardians of property, as such, are rarely appointed in Islamic law; an executor (*wasi*) is the guardian of property. Guardianship in marriage is a species of *wilaya*, and a marriage guardian is called *wali*.\(^53\)

**Guardianship of person**- In Indian law, three periods of guardianship of minors have to be considered. A minor is (i) a person under 15, in Muhammadan law, (ii) a person under 18, under the Indian Majority Act,\(^54\) and (iii) a person under 21, who has a guardian appointed by the court, or who is under the superintendence of the Court of Wards.\(^55\)

In India, broadly speaking, a minor is a person who has not completed the age of eighteen years. In Muhammadan law, minors between the ages of 15 and 18 can act independently of any guardian

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\(^{47}\) *Abdool Razack v. Aga Mahomed* (1893) 2 I.A. 56.


\(^{49}\) *Habibur Rahman v. Altaf Ali* (supra); as to the way in which paternity can be claimed, *Tyabji* 222-24.

\(^{50}\) *Baillie, I*, 407; *Mst. Bashiran v. Mohammad Husain* [1941] Luck, 615.

\(^{51}\) *Wilson* 87; *Tyabji* 223; *Mulla* 346.

\(^{52}\) *Wilson* 90.

\(^{53}\) *Tyabji* 235.

\(^{54}\) Section 3; *Guardians and Wards Act*, 1890, Section 4, Clause i.
in marriage, dower and divorce. For instance, a Muslim wife of 16 may sue for divorce without the intervention of a guardian.\textsuperscript{56}

All applications for the appointment of a guardian of the person, or of the property, or of both, of a minor must be made under the provisions of the Guardians and Wards Act, VIII of 1890. The court will, if necessary, make the order consistently with the welfare of the minor. In making such order the court shall be guided (i) by what, consistently with the law to which the minor is subject, is for the welfare of the minor; (ii) by the age, sex and religion of the minor, by the character and capacity of the proposed guardian, and the wishes of a deceased parent; and (iii) by the preference of the minor himself, if sufficiently old to form a preference.\textsuperscript{57}

The custody of an infant child belongs to the mother; this right is known as hidana.\textsuperscript{58} The mother is entitled in Hanafi law to the custody of her male child till the age of 7 years, and of her female child till puberty; and in Ithna Ashari law - to the custody of her male child till the age of 2 years, and of her female child till the age of 7 years.\textsuperscript{59}

'The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate, or wicked, or unworthy to be trusted.'\textsuperscript{60}

Although the mother has the custody of a child of tender years, this does not imply that the father has no rights whatever. The

\textsuperscript{55} Ameer Ali, II, 535-6; Tyabji 231; Mulla 348.
\textsuperscript{56} See 29 (iii) above; Ahmed Suleman v. Bai Fatima (1930) 55 Bom. 160; tyabji and Mulla, loc. Cit.
\textsuperscript{57} Mulla 349-51 gives the substance of the Act.
\textsuperscript{58} Classical, hadana; legal, hid; loosely spelt in India hizanut, from the Persianized form, Ency. Of islam, III (rev. ed), 16 per de Bellefonds.
\textsuperscript{59} Tyabji 238; Mulla 352. Some Hanafi texts mention other ages as well; but this is the rule in India, Fat. Law 279-80.
\textsuperscript{60} Baillie, I, 435. for a discussion of the rights of the mother, see Atia Waris v. Sultan
nature and extent of the mother's right of custody were considered by the Privy Council in *Imambandi v. Mutsaddi*, and it was said:

It is perfectly clear that under Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But, she is not the natural guardian; the father alone, or if he be dead his executor (under the Sunni law) is the legal guardian.61

Thus, where the father and mother are living together, their child must stay with them and the husband cannot take the child away with him; nor can the mother take it away without the permission of the father, even during the period when she is entitled to the custody of the child. Where the child is in the custody of one of its parents the other is not to be prevented from seeing and visiting it. The father's supervision over the child continues in spite of the child being under the care of female relations for it is the father who has to maintain the child.62

**Disqualifications**—A minor cannot act as a guardian, except in the case of his own wife or child. If one of the parents is a non-Muslim, the other is entitled to the custody of the child.

As regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship; so also, immorality or adultery or neglect to take proper care of the child. A person is not worthy to be trusted who is continually going out and leaving the child hungry.63 The ancient doctor would obviously have frowned upon a modern society mother who goes out for bridge (or social service) in the morning has lunch with a friend and comes home late in the evening after a dance at the club.

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61 Ahmad PLD 1959 (W.P.) Lahore 205.
62 (1918) 45 I.A. 73, 83; Cases, 264.
63 Tyabji 238, Com.
63 Baillie, I, 435.
A mother does not lose the custody of her infant children merely because she is no longer the wife of her former husband but where she marries a second husband, the custody of such children normally belongs to her former husband, especially where he is otherwise a fit and proper person to be appointed a guardian of the person of his children; and even a step-cousin can be preferred by the court.

On account of disputes relating to the properties belonging to the petitioner, Zynab, she and her husband, Mohammad Ghouse, resided separately in the city of Madras. There were four children of the marriage, three daughters and one son, the youngest child. Their ages were seven, five, three and one year and ten months, respectively. For some time Ghouse married a second wife, but the marriage was dissolved by *khul*. All the children resided with the mother, Zynab, but one day the husband came and forcibly took away two of the children, a girl aged five and the boy, aged one year and ten months. Zynab thereupon preferred a petition under the Guardians and Wards Act for the custody of her two children. It was held that she was entitled to the custody of her children and the fact that she stayed separately from her husband was not a disqualification.

Failing the mother (by absence or disqualification), the following female relations are entitled to custody in order of priority: (i) mother's mother, how high soever; (ii) father's mother, how high

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64 *Rashida Begum v. Shahab Din* PLD 1960 (W.P.) Lahore 1142, a curious case where, it may be pointed out with deference, the judge has introduced irrelevant considerations regarding the Koran and traditions; the only portion which need be perused is 1-3 and 40-1.

65 *Mir Mohamed Bahauddin v. Majeed Bunnissa Begum* A.I.R. (1952) Mad. 280; Mulla §§352, 354. Custody must however be distinguished from guardianship, and if for any reason the mother is deprived of custody, the right to custody revives, and till the child attains the prescribed age, the custody belongs to the mother's mother. *Tyabji §252; Baiji, I, 431, 436.


father; (iii) the paternal grandfather’s executor. These are the legal guardians of the property of the minor. It must be emphasized that the substantive law of Islam does not recognize any other relatives, such as the mother, the uncle or brother, as legal guardians, but they may be appointed by the court. Failing the above, the court is entitled to appoint a guardian; and in the exercise of its judgment it may appoint the mother or some other person as such guardian, for a woman is under no disqualification to be so appointed.

**Defacto Guardian** - A person, not being a legal guardian or clothed with the authority of a guardian by the court, may place himself in the position of a guardian by intermeddling with the property of the minor. Such a person is called a *de facto* guardian, as distinguished from the *de jure* guardians who are, as we have seen above, (i) the legal guardians and (ii) guardians appointed by the court. Such *de facto* guardians are merely custodians of the person or the property of the minor, and have no rights but only obligations. Neither the mother, nor the brother, nor the uncle can, without the authority of the court, deal with the property of a minor.

Guardian enjoy restricted power vis-à-vis immovable property of the minor. The legal guardian cannot sell the immovable property of the minor except where he can obtain double its value; or where it is necessary for the maintenance of the minor; or where there are debts and legacies to be paid, and there are no other means; or where the expenses of the property exceed the income; or where the property is falling into decay. (ii) A guardian appointed by the court

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77 The Hanafi texts distinguish the powers of the father from those of any other guardian, and subdivide fathers according to their powers of judgment. It is unnecessary to go into these details in a work of an elementary character.

78 *Imambandi v. Mutsaddi* (1918) 45 I.A, 73, 84; *Cases*, 260, 266; *Tyabji* 259; *Wilson* 112; *Mulla* 359.


81 Macnaghten cited by the Privy Council, see *Tyabji* 274 com, *Mulla* 362.
has no power to sell or mortgage without the permission of the court. A wrongful disposal contrary to the provisions of the Guardians and Ward Act 1890, is voidable.\textsuperscript{82} Nor can a guardian purchase property on behalf of the minor.\textsuperscript{83} (iii) A de facto guardian has no power to sell the property of a minor; such a sale is a nullity.\textsuperscript{84} A de facto guardian cannot refer disputes relating to immovable property to arbitration\textsuperscript{85} nor can a Muslim mother, who has no authority to act as a guardian of the property of the minor, refer matters to arbitration, without leave of court, and without getting herself appointed as a legal guardian.\textsuperscript{86} The leading case on the subject is \textit{Imambandi v. Mutsaddi}.\textsuperscript{87} One Ismail Ali Khan died in March 1906, possessed of considerable landed property. He left three widows, A, B and Zohra, and several children by each widow. Zohra had two children, a son and a daughter. In June 1906, Zohra conveyed for Rs 10,000 the shares of herself and her children to certain purchasers. The purchasers applied for mutation of names in the local registers, and the two widows A and B, and their children, opposed them. The purchasers from Zohra filed a suit claiming that Zohra was the acknowledged wife and her children the legitimate children of Ismail Ali Khan and that Zohra, acting on her own and her children’s behalf, could lawfully alienate the property. The lords of the Privy Council held that the mother had no power to alienate the property, for she was not the legal guardian. Mr. Ameer Ali, in delivering the judgment of the Board, lays down that the mother in Muhammadan law is only entitled to the custody of a minor and is not the natural

\textsuperscript{82} Mulla 363. The most exhaustive discussion of the powers of guardians appointed by the court will be found in Tyabji 265 sqq.

\textsuperscript{83} Tyabji 274.


\textsuperscript{85} \textit{Mohammad Ejaz v. Md. Iftikhar} (1931) 59 I.A. 92.

\textsuperscript{86} \textit{Johara Bibi v. Mohammad Sadak} A.I.R. (1951) Mad. 997.

\textsuperscript{87} (1918) 45 I.A. 73; \textit{Cases}. 260.
guardian. The father is the legal guardian. Speaking of de facto guardians, he says, 'It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "de facto" guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it. The judgment then proceeds to lay down who are the legal guardians in the absence of the father, and the important distinction which the Hedaya makes between dealing with the immovable and the movable property of the minor. Curiously enough, one who intermeddled with the property of another was known by the term 'fazuli' in early times, and yet is known by the undeservedly dignified title of de facto guardian in modern law. Summing up, he says: “For the foregoing considerations their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a 'de facto guardian', has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.”

In Venkama Naidu v. S. V. Chisty even the sale deed executed by the mother was held void and inoperative under the Muhammadan law, but that where a Muslim minor seeks to recover property sold by his unauthorized guardian professing to act on his
behalf, he seeks an adjudication that the sale is void and without such a declaration he cannot obtain the property; that in such cases, the maxim that 'he who seeks equity must do equity' clearly applies, and the court has power under Sec. 41 of the Specific Relief Act to award compensation if the justice of the case so requires.

The same High Court (Madras) has held that while the alienation by a mother of immovable property of a minor is void, where there is a joint sale of property held by the minor in common with other major heirs, the sale is valid so far as the shares of the major heirs is concerned.94

But the Patna High Court has taken a different view. In *Kharag Narain v. Hamida Khatoon*.95 It was held that since such a deed was void, no compensation need be paid by the minor, and no discretion need be exercised under Sec. 41 of the Specific Relief Act. A different set of circumstances arose in Nagpur. It was affirmed that a Muslim mother is not the legal guardian capable of dealing with the property of her minor children. But a Muslim mother, if she is appointed a *guardian ad litem*, is not required to obtain permission of the District Judge under Sec. 29 of the Guardians and Wards Act for transferring the property of the minor in order to settle amicably a dispute before the court. All that she has to do is to obtain the permission of the court itself. The Collector is not such a court, but he has certain powers of the court conferred on him. If therefore the matter fell within the jurisdiction of the Collector and was decided by him, the permission thus granted would also be for the larger purposes of the compromise. The sale, being not merely by a *de facto* guardian, but by a *guardian ad litem*, with the consent and approval of the Collector, was held to be binding on the minor.96

Similarly, the brother has no such right. A Muslim died leaving

a will, there being four grandsons who were brothers. There was nothing in the will to show that any of the brothers was to act as a guardian for the others during their minority. It was held that the three eldest brothers not being legally entitled to act in the absence of testamentary appointment, had no power to sell their minor brother’s property for the purpose of satisfying a mortgage debt.

The guardian of a minor also has no right to make an agreement for the purchase of immovable property on behalf of the minor; such an agreement is void by Indian law.

A Full Bench of the Hyderabad High Court has considered the question: Whether a minor who has agreed to purchase property through his guardian can bring a suit for specific performance of the contract. The majority M. S. Alikhan and Siddiqi J.J. answered the question as follows:

“'No', but if the guardian is a de jure guardian and competent to bind the minor by his contract and the contract is for the benefit of the minor, then 'yes'.”

Deshpande J., however, dissented and made a distinction between a contract for sale and a contract for purchase of property. The former, according to him may be legal in certain circumstances; but the latter, not. In view of the difference of opinion, it is difficult to state the law with certainty. But, with respect, it is submitted that in view of the Privy Council decision, the minority judgment appears to be preferable.

But legal guardian of the movable property of a minor has the power to sell or charge the movable property of the minor for the minor’s necessities, such as food, clothing and nursing; and a de

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98 Mir Sarwarian v. Fakhruddin (1912) 39 I.A. 1; Mul1a 36S; Tyabji 274.
100 For necessities in English law, see Anson on contracts, 18th ed., 126.
facto guardian has similar rights. But a guardian appointed by the court has larger powers. He has. However, to deal with the property of the minor as carefully as would a man of ordinary prudence if it were his own.

The Guardianship of the minor child is terminated on his attaining attained puberty. Puberty is the age of majority in Islam, and in the absence of evidence it is attained at the age of 15. No person is entitled to the custody of a virgin after she has attained puberty and discretion; if she is married, she is then capable of being taken to the house of the husband. Hence, guardianship in Islam terminates at puberty.

A guardian appointed by the court may for sufficient reason be removed or he may resign. In a fit case the court is entitled to appoint a person other than the legal guardian if the legal guardian is, in the opinion of the court, unfit for the responsibility of guardianship.

'Marriage,' the Prophet is reported to have said, 'is committed to the paternal kindred,' and relations stand in the same order in point of authority to contract minors in marriage as they do in point of inheritance. Ameer Ali shows that *wilayat al-ijbar* or *patria postestas* is not a peculiarity of Islamic law. The distinguishing feature of Islamic jurisprudence is that it empowers a father to impose the status of marriage on his minor children. This power of imposition is called *jabr*; the abstract right of guardianship *wilayat* (or *wilaya*), and the guardian so empowered is known as *wall*. The right in varying forms was recognized both by the pre-Islamic Arabs

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101 *Imambandi's case.*
102 Guardians and Wards Act, 1908, Sec. 27. A full discussion of the powers of guardians will be found in Wilson 113 sqq.; Tyabji, pp. 244 sqq. and Mulla 366-8.
103 Tyabji 280.
104 Tyabji 281.
105 Tyabji 282.
106 Wilson 93, comment, based on the *Hedaya* and *Fatawa Alamgiri*. See generally, Wilson 90-96A; Ameer Ali, II, 234 sqq.; Tyabji 63 sqq.; *Fat. Law* 52 sqq.
and Jews; and under the Muhammadan law of all schools, the father has the power to give his children of both sexes in marriage without their consent, until they reach the age of puberty-known as bulugh.107

Guardianship may be of the person or of property; in both these cases, guardians can be appointed by the court in certain circumstances. It is to be noted, however, that in respect of marriage guardianship, no one can be appointed by the court. It is the substantive law itself that declares who, for the purposes of marriage, possesses the patria potestas; the court cannot appoint a wali for marriage although, in some cases, the kazi himself could act as a marriage guardian.108

A minor can only be given in marriage by a marriage guardian (wali); minority, in the absence of specific proof, terminates at the age of 15.109 A guardian must be (i) a person who has attained puberty, (ii) of sound mind, and (iii) a Muslim.110 It is extremely doubtful if a non-Muslim can be a guardian for the marriage of a Muslim girl.111

The following persons are entitled, in order of priority, to act as guardians in marriage: (i) the father,112 (ii) father’s father, h.b.s., (iii) the brother and other collaterals according to the priorities in the laws of inheritance (i.e. asabat, Agnatic Heirs), (iv) the mother and maternal relations, and finally (v) the ruling authority, that is, the kazi or the court.113

In Fatimid law, where the father and the grandfather of a virgin coexist, the grandfather has the prior right.114 A minor was married

108 Tyabji 65; Ameer Ali, II, 243.
110 Tyabji 64.
111 Wilson 95; Tyabji, loc. Cit., com., Mulla 271.
112 Tyabji 65.
113 Ameer Ali, II, 242-3; Tyabji, loc. cit.; Wilson 93; Mulla 271.
114 Fat. Law §§57 (ii), 64, 65.
with the consent of a remoter relation, but without the consent of a nearer one who was the proper legal guardian. The consent of the legal guardian was not obtained, nor was the marriage ratified by him. Held, that such a marriage was void, and even consummation could not remove the taint of its total invalidity. A judge, however, cannot marry the girl to himself, for it would be a marriage without a guardian. In his personal concerns he is a mere subject and the guardianship devolves on the person above him, that is the wali. 'Nay, the Caliph himself is no more than a subject in things that regard himself.' This appears to be a salutary safeguard against the unlimited powers of an amorous or dishonest kazi.

A person, if married during minority, has, on attaining majority, the right to terminate the marriage by exercising the 'option of puberty'; if he is still unmarried, guardianship terminates, and such person has the absolute right to contract a lawful marriage. This rule applies both to men and to women, but there is a difference of opinion on the point regarding women.

The right of jabr in general terminates on the attainment of puberty. The Hanafis and Ithna ' Ashari Shiites hold that the right of jabr, in the case of males as in that of females, continues only until they have arrived at the age of puberty. After that age a Hanafi or an Ithna Ashari female can marry without a guardian. The Malikls, Shafi'Is and Fatimid Shiites, on the other hand, hold that jabr continues in the case of females until they are married and emancipated from parental control. Hence, a -alikl, Shafi, or a Da'iidl or Sulaymanl Bohora virgin who has attained majority cannot marry without a guardian and her only remedy is, as in the case of

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116 Ameer Ali, ll, 243.
117 See above, pp. 94 and 174.
118 Ameer Ali, ll, 236; Wilson 392, p. 419.
Muhammad Ibrahim v. Gulam Ahmed\textsuperscript{119} to change over to the Hanafi school and marry according to its tenets. Details can be noted marriage guardians in other schools\textsuperscript{120}

Defacto Guardian it appears that both Hindu law and Muslim law recognize \textit{de facto} guardians, but what has happened is that by judicial interpretation the powers of the \textit{de facto} guardians were enlarged under Hindu law, while they were limited under Muslim law.

When a person having no right to do so assumes the charge of another's estate and carries on the administration and management of the estate—this continuous course of conduct results in conferring on him the status of \textit{de facto} manager. In respect of a minor's estate, such a person is known as \textit{de facto} guardian. Whether this status gives him some powers, or rights, different systems of law differ, yet all agree that it imposes on him certain liabilities and obligations. Thus, \textit{de facto} guardianship is a concept under which past acts result to present status.

A \textit{de facto} guardian is a self-appointed guardian. A fugitive or isolated act of a person in regard to minor's property does not make him a \textit{de facto} guardian, nor does staying with the minor for some time. It is only some continuous course of conduct in respect of a minor's property that makes him a \textit{de facto} guardian.\textsuperscript{121} Tayabji defines a \textit{de facto} guardian as "an (unauthorized) person who as a matter of fact \textit{de facto}) has custody and care of the person and/or of his property"\textsuperscript{122}

\textsuperscript{120} Tyabji 68; and 'Marriage of Minors' in (1936) 38 Bombay Law Reporter, Journal 41-3; and among the Da'udi and Sulaymani Bohoras, see Daaim, II 807 sq.; and Fat. Law 52-68. For a Shafi'i case, see K. Abubukker v. V. Marakkar A.I.R. (1970) Ker. 277.
\textsuperscript{121} Chinna v. Vinayakathamnul AIR 1929 Mad 110.
\textsuperscript{122} Tayabji (4th ed ) 213.
As far as the powers of the de facto guardian are concerned it may be recalled that the Muslim authorities classify the acts which are required to be done in respect of minor under three categories viz., acts of guardianship, acts arising out of the want of the minor, and acts which are purely advantageous to the minor. The Muslim authorities hold the view that the last two acts may be performed by a 'maintainer' or 'taker-up' of the minor. The 'maintainer' or the 'taker-up' may be relative or a stranger, but he is not a de jure guardian. He is nothing but a de facto guardian. But the Privy Council put a damper on de facto guardian's power at an early date.

In Matadeen v. Md. Ali,123 the Privy Council said: "It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a de facto guardian. He may by his de facto guardianship, assume important responsibilities in relation to minor's property, but he cannot thereby clothe himself with legal powers to sell it." Then came Imambandi v. Mutsaddi,124 which is considered to be the leading case, and which laid down that under Muslim law, a de facto guardian has no power of alienation of a minor's property, and that such an alienation is void. In Md. Amin v. Vakil Ahmed,125 reiterating this position, the Supreme Court observed: "A de facto guardian has no power to convey any right or interest in immovable property which the transferee can enforce against the minor. This has come to be the established position".126

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123 ILR (1918) 45 Cal 878.
124 AIR 1952 SC 358.
126 In the following cases the court has taken the view that alienation is void; Vemana v. Abdul KadirAIR 1948 Mad 37; Kadirv. Koya AIR 1956 Mad 368; Mainnissa v. Abdul AIR 1966 Mad 468; Ali Mohammed v. Ramnivas AIR 1967 Raj 258; Tikam Chand v. Rahim Kizan AIR 1971 MP 23; Azeez v. Chitamma ILR 1954 TC 370; Md Sardar v. Baboo Gynu ILR 1952 Nag 17; Kharag Narayan v. Bibi Hamide AIR 1955 Pat 475; Sheik v. Sheik AIR 1963 Pat 108; Ran, 'Sa Ilahi. Mohboob Illahi ILR (1925) 7 Lah 35, but the court said that it has power under section 42, Specific
Such an alienation is void.\textsuperscript{127} An alienation by the \textit{de facto} guardian can be challenged only by the minor and not by a third person.\textsuperscript{128} But if a co-sharer as \textit{de facto} guardian of a minor sells his interest as well as of the minor's, sale will be valid as to the former's interest but void as to the minor. There is sufficient authority for the view that a \textit{de facto} guardian has the power to sell or pledge movable properties of the minor for the minor's imperative needs, such as food, shelter, clothing or medical care.\textsuperscript{129} In \textit{Md. Amin v. Vakil Ahmed},\textsuperscript{130} the Supreme Court held that a \textit{de facto} guardian had no power to enter into a family arrangement on behalf of the minor. In this case, a brother of a minor had entered into a family arrangement on behalf of the minor.\textsuperscript{131} It also seems to be clear that a \textit{de facto} guardian has no power to refer to dispute relating to the minor's property to arbitration.\textsuperscript{132} The minor is not bound by any award rendered by the arbitrator in such a case. Even if the \textit{de facto} guardian is later on appointed as guardian by the court, the award will not be binding on the minor.\textsuperscript{133} Similarly, the \textit{de facto} guardian has no power to sign an agreement on behalf of the minor for the continuance of a

\textsuperscript{127} Relief Act (old Code) to make it a condition precedent that the minor should refund the amount by which his estate has benefited. The Madras High Court followed this decision in \textit{Abdul Majed Adv. Ramzan Bibi AIR 1931 Mad 881}, said that there was no such obligation in the minor under the general law. In \textit{Aydernentv Syed Ali ILR (1912) 37 Mad 514}, the court said that the alienation by the \textit{de facto} guardian is neither void nor voidable, but remains suspended until the minor on attaining majority ratifies it or repudiates it. The decision preceded the Privy Council decision in \textit{Imambandi} and therefore, may be treated as overruled. In \textit{Firm Jawahar Singh v. Municipal Committee Khat AIR 1937 Pesh 74} the court said that an alienation by the \textit{de facto} guardian is voidable. Abdul Kohim v. Ian Md. AIR 1951 A 11147; \textit{Cyasuddin v. Allah Tala WakfAIR 1986 A1139.}

\textsuperscript{128} \textit{Jhulan v. Ram AIR 1979 Pat 59.}

\textsuperscript{129} \textit{Rugia Begam v. Iqbal AIR 1989 AP 30. 58.}

\textsuperscript{130} \textit{Imambandiv. Mutsaddi ILR (1918) 45 Cal 818.}

\textsuperscript{131} \textit{Imambandiv. MutsaddiILR (1918) 45 Cal 818.}

\textsuperscript{132} \textit{Md. Ejaz v. Iltakar ILR (1932) 59 Al 92; Moshiuddin Ahmed ILR (1920) 47 Cal 713; Joharav. Mohammed AIR 1951 Mad 997; AbdulKarimv. MauniraniILR 1954 Pat 6.}

\textsuperscript{133} \textit{Ahmed Ibrahim v. Meyyappa AIR 1940 Mad 265; Khurasanyv. Acha AIR 1928 Rang 160.}
business in which minor’s deceased father was a partner. A *de facto* guardian call also not validate a bequest to an heir by consenting on behalf of the minor who is a co-heir.

In *Md. Moizuddin v. Molini*, the Calcutta High Court said that a *de facto* guardian cannot bind the minors by execution of a hand note for a debt which their father owned. It seems what the *de facto* guardian can borrow money for the minor’s imperative needs. But if it is not done to meet the imperative needs of the minor, or, no emergent need for borrowing is shown, then such a debt will not be binding on the minor. In a series of cases it has been held that a partition of properties effected by the *de facto* guardian is void, and not binding on the minor, even if the arrangement is for the benefit of the minor, and has been followed for a long time, since the partition amounts to alienation of property. Under Hindu law it is an established position that partition is not alienation. Since in the majority of cases the view is held that an alienation made by the *de facto* guardian is void, the period of limitation to set aside a transfer by the *de facto* guardian is twelve years.

**Hizanat** - All Muslim authorities recognize the mother’s right of hizanat. According to the *Rudd-ul-Muktar*, "the right of the mother to the custody of her child is recognized whether she be a mosalman, or a kitabia or a majoosia, even though she be separated from her husband. But it does not belong to one who is an apostate." The *Fatwai Alamgiri* puts it thus: "The mother is of all persons the best entitled to the custody of her infant children during connubial

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134 Bibi Kulsoon v. Mariam AIR 1933 Oudh 97.
135 AIR 1935 Mad 1041.
137 Kunhi Bi v. Kakhn AIR 1939 Mad 881.
139 Article 144, Limitation Act, (old).
relationship as well as after its dissolution". The term *hizanat* is applied to the woman to whom belongs the right of rearing up a child.

Of all the persons, the first and foremost right to have the custody of children belongs to the mother, and she cannot be deprived of her right so long as she is not found guilty of misconduct. Mother has the right of custody and care of children during the period laid down in Muslim law. *Hizanat* is recognized in the sense that it can be enforced against the father or any other person. But it is a right to which obligations are attached. The mother's right of *hizanat* is solely recognized in the interest of children, and, in no sense, it is an absolute right; she cannot exercise it the way she likes to exercise it. Mother's right of *hizanat* is, in fact, a light of rearing up of children. If she is not found suitable to bring up the child, or her custody is not conducive to the physical, moral and intellectual welfare of the child, she can be deprived of it.

Since Muslim law considers the right of *hizanat* as no more than the right of rearing up the children; it terminates at an early age of the child. In this regard Muslim law makes a distinction between the son and the daughter.

The son—according to the Fatwai Alamgiri, the mother is entitled to the custody of a boy until he is independent of her care, that is, until he is seven years old. According to the Hanafis, it is an established rule that the mother's right of *hazanat* over her son terminates on the latter's completing the age of seven years.

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141 The Rudd-ul-Muhtar, II, 1041.
142 The Fatwari Alamgiri, I, 728.
144 Baillie I, 435. See also Imtiaz v. Masood AIR 1979 All 25.
The Shias hold the view that the mother is entitled to the custody of her son until he is weaned,146 (this is considered to be the completion of two years) and that during this period the mother cannot be deprived of the custody of her son under any circumstances whatever, except with her own consent.147 On the completion of the age of two by the son, the mother’s right of custody terminates.

According to the Malikis, the mother’s right of hizanat over her son continues, till the child attains puberty.148 The rule among the Shafis and the Hanbalis is the same as among the Hanafis. But these schools hold the view that on completion of the age of seven years, the child is given a choice of living with either parent. But in every case, the father is entitled to the custody of his son when it attains puberty.149

Among the Hanafis, the mother is entitled to the custody of daughters till they attain the age of puberty.150 Among the Malikis, the shafiis and the Hanbalis, the mother’s right of custody over her daughters continues till they are married.151 On the other hand, under the Ithana Ashari law, the mother is entitled to the custody of her daughters till they attain the age of seven.152 In all the schools of Muslim law, the mother has the right to the custody of her married daughter below the age of puberty in preference to the husband.153

The mother has the right of her children upto the ages specified ill each school, irrespective of the fact whether the child is legitimate or illegitimate.

146 See the Sharaya-ul-Islam.
147 Sherkan v. Ajboi 11 Born LR 75.
148 105 Sautaya, 1, 348.
149 The Fatwai Alamgiri, 1.730; The Fatwai Kazi Khan, 1.478.
150 The Fawai Alamgiri, I. 730; The Fatwai Kazi Khan, 1.478.
151 The Rudd-ul-Muhtar, II. 1054.
152 Bailie, 11.95.
153 In the Matter of Khatija Bibi ILR (1870) 5 Born LR 557; In the matter of Mohim Bibi (1874) 13 BLR 160. See also clause (a) of s. 19, Guardians and Wards Act 1890.
Since the right of hustanat of the mother is a right of rearing up of children given to her in the interest of children, she cannot surrender her right to any person, including her husband, the father of the child. For instance, if she abstains khula from her husband on the stipulation that she would surrender her right of hustanat to the father of the child, the khula will be valid and the stipulation will be void. Further, the mother cannot be deprived of her right of hustanat on the ground of her poverty; it is for the father of the child to provide her with sufficient funds for the maintenance of the child.

Other females who are entitled to hustanat—Among the Hanafis, the following females are after the mother, entitled to hustanat of the minor children of the age up to which the mother is entitled to it:

(a) Mother's mother, how high soever.\(^{154}\)
(b) Father's mother, how high soever.
(c) Full sister.
(d) Uterine sister.
(e) Consanguine sister.\(^{155}\)
(f) Full sister's daughter.
(g) Uterine sister's daughter.
(h) Consanguine sister's daughter.
(i) Maternal aunts, in like order as sisters.
(j) Paternal aunts, in like order as sisters.\(^{156}\)

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\(^{155}\) In the Hedaya and the Fatwai Alamgiri the consanguine sister is not mentioned. Mulla holds the view that the omission is purely accidental, since the paternal aunt is expressly mentioned. Ameer Ali puts her after full sister's daughter and uterine sister's daughter. (Il 253) It is submitted that there seems to be no reason why she should be relegated to such a low position.

\(^{156}\) Tayabji considers that the inclusion of father's mother and paternal aunt is expressively mentioned. Ameer Ali puts her after full sister's daughter and uterine sister's daughter. (Il 253). It is submitted that there seems to be no reason why she should be relegated to such a low position.

Tayabji considers that the inclusion of father's mother and paternal aunt is Father's anomalous as the basis of this principle is that the custody of a minor child belongs by right to its mother's relations. (3rd ed) 275.
Tayabji\textsuperscript{157} and Ameer Ali,\textsuperscript{158} give a different list. The rule is that among the females, the nearer excludes the remoter. Under the shia school, after the mother, the hizanat belongs to the father.\textsuperscript{159} In the absence of both the parents, or on their being disqualified the grandfather is entitled to the custody. Authorities are not clear as to who is entitled to the custody after the grandfather.\textsuperscript{160} Some shia authorities have laid down certain rules of preference on the basis of which the text-books writers have compiled a list of persons who are entitled to the custody of minor children in the absence of the grandfather. Ameer Ali holds the view that after the grandfather, hizanat belongs to the grandmother, after her it belongs to the ascendants, then to collaterals within the prohibited degrees, the nearer excluding the remoter.\textsuperscript{161}

Among the Malikis the following are entitled to the custody of minor in the absence of the mother: (a) the maternal grandmother, (b) the maternal great grandmother, (c) the maternal aunt and grand-aunt, (d) the full sister, (e) the uterine sister, (f) the consanguine sister, and (g) the paternal aunt.

All the schools of Muslim law recognize the right of the father to the custody of his minor children in the following two cases: (i) on the completion of the age by the child upto which mother or other females are entitled to its custody, and (ii) in the absence of the mother or other females who have the right to hizanat of minor children. The father cannot be deprived of the right of hizanat of his male child of seven years if he is not found to be unfit.\textsuperscript{162} The father's

\textsuperscript{157} Tayabji (3rd ed), 275. Tayabji has based his list on the Hedaya & the Fatwai Alamgiri. He does not include consanguine sister and consanguine sister's daughter.

\textsuperscript{158} Mohammedan Law, (5th ed), 253-54.

\textsuperscript{159} Baillie, 11.96 Solimunissav. SaddatiLR (1914) 36 A11466; Kundanv. Aisha, ILR (1938) All 963.

\textsuperscript{160} Md. Jameel v. Ishrath Sajeeda AIR 1983 AP 106.
right of *hizanat* continues till the child attains puberty. It appears that among the shafiis and the Hanbalis, the father is entitled to the custody of his female children till they are married. Whether or not the father can deprive the mother, or any other female entitled to the custody of a child, by appointing a guardian by his will, is not free from doubt. In Baillie's Digest it is stated that the father has the power to entrust the custody of his children to the executor appointed by his will. On the other hand, the courts have taken the view that the father has no power to deprive the mother or any other female relation from *hizanat* of the child upto the age to which she is entitled to the custody. In our submission, the father has the power of appointing a testamentary guardian and entrusting him with the custody of his children, but the mother or other females will be entitled to the custody of the children upto the specified ages. The testamentary guardian will be entitled to the custody of the minor children only in those cases where the father is entitled to it.

In the absence of the father in both the aforesaid cases, the following persons are, according to the Hanafis, entitled to the custody of children:

(i) *Nearest paternal grandfather*,
(ii) Full brother,
(iii) Consanguine brother,
(iv) Full brother’s son
(v) Consanguine brother’s father,
(vi) full brother of the father,
(vii) Consanguine brother of the father,
(viii) Father’s full brother’s son, and
(ix) Father’s consanguine brother’s son.

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163 Baillie 1, 676.
165 This list is based on Mulla’s Mohammedan Lai (17th ed) 336.
Among the above, the rule is that the nearest excludes the remoter. Among the Shias, hizanat, belongs, in the absence of the father, to the grandfather. As to who is entitled to hizanat after the grandfather, the Shia authorities are not clear. In no case a person not related to the child within the prohibited degrees is entitled to the custody. Among the Malikis, the persons entitled to the custody after the father are, the father's executor, the father's son, the father's nephew, the father's uncle, and the father's cousin.\textsuperscript{166}

According to the \textit{Rudd-ul-Muhtar},

\begin{quote}
\textit{hazina} (female entitled to custody) should be free, adult, trustworthy and capable of bringing up the child, and not married to a stranger.\textsuperscript{167} It seems that all the schools of Muslim law agree that a\textit{ hazina} should be (i) of sound mind, (ii) of good moral character, (iii) living at such a place where there is no risk, morally or physically, to the child, and (iv) of such an age which would qualify her to bestow on the child the care it may need—this will not apply to mother.\textsuperscript{168}
\end{quote}

All the schools of Muslim law also agree that a\textit{ hazina} will forfeit her right of hizanat in any of the following cases:

\begin{enumerate}
\item[(i)] by her insanity and minority,
\item[(ii)] by her apostasy,
\item[(iii)] by her marriage to a person not related to the child within the degrees of prohibited relationship,
\item[(iv)] by her going away and residing, during the subsistence of marriage, at a distance place from the father's place of residence.
\item[(v)] Removal of the child by the hazina.
\end{enumerate}

Insanity is a disqualification, and no person of unsound mind is entitled to the custody of a child. Minority is also a disqualification; but a minor mother is entitled to the custody of her.

\textsuperscript{166} Ameer Ali, II. 253.
\textsuperscript{167} Amdeer Ali II. 253.
children. A non-Muslim mother is entitled to the custody of her minor children, and she cannot be deprived of this right on the ground that she belongs to another faith, provided she was a non-Muslim at the time of her marriage. A Muslim mother who converts to another religion, forfeits her right of *hizanat*.\(^{169}\) No other female who is non-Muslim is entitled to the custody of a child. The orthodox Muslim authorities laid down that a woman who changed her religion should be confined to prison till she returned to her faith. In its modern ramification, it means that a *hazina* who ceases to be a Muslim forfeits her right of *hizanat*. The Shia law is very categorical, and lays down that a person who has ceased to be a Muslim is not entitled to the custody of a child. It is submitted that apostasy is no longer a bar to the right of *hizanat* after the coming into force of the Caste Disabilities Removal Act, 1850. The Act provides that no law or usage shall inflict on any person who renounces his religion any 'forfeiture of right or property'. The predominant judicial view is in favour of this interpretation.\(^{170}\) Ameer Ali takes a contrary view.\(^{171}\) Mulla differs from Ameer Ali.\(^{172}\) Under the Guardians and Wards Act, 1890, the court in deciding the question of guardianship, is required to consider the personal law as well as the welfare of the child. Under the Act, in determining the question of custody, the paramount consideration is the welfare of the child.\(^{173}\) In several cases it has been held that the change of religion by the guardian by itself is not enough to deprive him or her of the right of guardianship or custody.\(^{174}\)

\(^{168}\) Ameer Ali, 11, 256.
\(^{169}\) The Hedaya, i. 392.
\(^{171}\) 129 Ameer Ali, 11,259.
\(^{172}\) Mulla, (15th ed), 234.
\(^{173}\) Section 25.
\(^{174}\) Budenv. Bahadur Khan AIR 1942 Pesh 41.
The Muslim law givers of all schools have laid down that a hazina who marries a person who is not related to the child within the degrees of the prohibited relationship forfeits her right of hizanat. The underlying notion of this rule is that in the home of her new husband (if a stranger) she will not be able to look after the child, with the same love and affection. Thus, according to the Rudd-ul-Muhtar, 'The right of hizanat is lost by the mother (or any other female) marrying a ghair-mahram (i.e. a person not related to the child within the prohibited relationship) of the minor, for a stranger will not be agreeable to her bringing up the child with affection and care.' A corollary to this rule is that if the hazina marries a mehram, the rights of hizanat is not lost. But the mehram must be by consanguinity. Thus, the mother will not forfeit her right of hizanat if she marries child's paternal uncle, who is mehram by consanguinity.

The judicial opinion on this point is conflicting, though the predominant view is that the disqualification is not absolute. The Jammu and Kashmir High Court observed that though a Muslim mother may lose her preferential right of hizanat if she marries a ghair-mehram, but that fact alone is not enough to disqualify her from being appointed a guardian by the court, the welfare of the child being the paramount consideration. The present law may be stated thus.

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175 The Rudd-ul-Muhtar, II, 656.
176 The Rudd-ul-Muhtar, 251-56; The Fatwa Alamgiri, I, 729.
177 In Ansar Ahmed v. Somidan AIR 1938 Sind 220; Mehraj Begum v. Yar Md AIR 1932 Lah 493; Mr Md v. Mujee Bunnisa Begum AIR 1952 Mad 280; it was held that where the law is definite, the court cannot disregard it in the interest of the child. On the other hand, in Gunna v. Oargahi AIR 1925 Oudh 623; Somusunissa v. Saida Khatun AIR 1944 All 1202 627; Tumino Khatzin v. Gohar fan AIR 1942 Cal 281; Abdul v. Zebunissa AIR 1951 Cal 205; Hasan v. Ghalum AIR 1961 J&K 5; Sundariv. Md. Fafoe AIR 1971 J&K 43, the court took the view that prohibition was relative and it could be disregarded in the interest of the child.
(a) A Muslim female who marries a *mehram* does not lose her right of *hizanat*.

(b) If a Muslim female has married a *ghair-mehram* then she may lose her preferential right of custody, if a person preferentially entitled to it is suitable in all respects. But, if the person preferentially entitled is not suitable, then the mother will be entitled to the custody of the child, the disqualification being not absolute.

(c) A mother or a female who has married a *gair-mehram* may also be appointed as a guardian of the minor child by the court, if otherwise found suitable.

(d) In all cases, the question is to be considered mainly from the point of view of the welfare of the child.

The Muslim law-givers have laid down that a *hazina* who is unworthy of credit is not entitled to *hizanat* of the child. The term "unworthy of credit" is applied to a woman who habitually leaves her home, neglects the children, or allows them to starve.\(^{179}\) It is further laid down by the authorities that an adulterous woman is also not entitled to the custody of the child. The *Rudd-ul-Muhtar* lay down the general rule thus: *hazina* is not disentitled to custody in every case of misconduct, but only in the case of misconduct of such a nature which causes detriment to the child or is likely to cause injury to the child.\(^{180}\) Thus a woman who remains outside the home for a considerable time, either on account of work or otherwise and she leaves the child in the home uncared for, is a woman of unworthy credit. But, if, before going out, she makes adequate arrangements for the care of the child, she cannot be deprived of the custody. Similarly, a woman, particularly the mother, though leading an immoral life, may continue to have the custody of the child so long as

\(^{179}\) The *Rudd-ul-Muhtar*, II 1042.

\(^{180}\) Ibid.
no evil effect may be apprehended on the child, and so long as her nurturing is necessary for the child.\footnote{181}

The cardinal principle of \textit{hizanat} in Muslim law, as in most of the modern systems of law, is the welfare of the child. This is the reason why Muslim law gave preference to mother over the father in the matter of custody of children of tender years. Thus, if the \textit{hazina} treats the child with cruelty or neglects it, she forfeits her right of \textit{hizanat}. However, her right of \textit{hizanat} cannot be lost on account of her poverty or want of funds to maintain the child.\footnote{182} If the \textit{hazina} has no house where she can live with the child, or where \textit{hazina} has no funds to maintain the child, then it is the duty of the father to provide her with a house and with funds, together with such attendants, within his means, which are necessary for the maintenance of the child. Poverty of the mother is no ground for depriving her from custody.\footnote{183} In case the child has property, then the \textit{hazina} may provide habitation and maintenance out of that property. In case the child has no property, the father, or any other person, who has the obligation to maintain the child, must pay for the habitation and maintenance of the child.\footnote{184}

What is remarkable about the Muslim law of \textit{hizanat} is that every other consideration is subordinated to the welfare of the child. A woman who is unworthy of credit, may still retain the custody of child, if welfare of the child so requires. This means that every misconduct which otherwise disentitled a \textit{hazina} from the custody of the child is tested on the touchstone of the welfare of the child. Thus no misconduct is absolute, and what amounts to misconduct will vary from case to case.

\footnote{181}{Ibid.}
\footnote{182}{\textit{Amar Illahi v. Rashida} PLD, (1955) Lah 501.}
\footnote{183}{\textit{Suharbi v. D. Muhammad} AIR 1988 Ker 30.}
\footnote{184}{\textit{Siddiquanissa v. Nizamuddin}. ILR (1931) 54 All 128; \textit{Allah Rakki v. Karall Illahi}, ILR 933, 4 Lah 770.}
The Muslim authorities lay down that the home where the husband and wife live together is the place where the child should be brought up. Neither the father nor the mother has the right to remove the child from the matrimonial home. If either of them wants to do so, then the permission of the other is necessary.\(^\text{185}\) Thus, a *hazina* is liable to forfeiture of her right of *hizanat* if she removes the child, without the prior permission of the father of the child, to such a distance from the matrimonial home so as to prevent the father from exercising the necessary control and supervision over child.\(^\text{186}\)

In the following two cases she may remove the child from the matrimonial home: (i) when the change of residence has been made with a view to benefiting the child or, on account of unavoidable circumstances. Thus, exigencies other employment may compel a *hazina* to change her place of residence; and (ii) when the mother separates from the father of child, she is entitled to return to her native place wherever it might be. The *Fatwai Alamgiri* lays down that she cannot go to a place where her marriage did not take place, unless the place is so near that if the father of the child should leave his residence to see the child in the morning he should be able to return before nightfall. It is submitted that this rule relates to a period when the means of communication and transport were primitive, but now-a-days the rule has no validity. If the mother has to live away at a distant place for a justifiable reason, she should not be deprived of her right of custody.

The question came before the Allahabad High Court directly in *Khurshid Gauhar v. Siddiqunnisa*,\(^\text{187}\) where in a considered judgment Amarendra Nath Verma, J. said that the basic postulate underlying the theory of the mother's right to *Hizanat* is that for rearing the child of tender age, mother is the best suited person and

\(^{185}\) The *Fatwai Alamgiri*, II, 1054.

\(^{186}\) The *Fatwai Alamgiri*, I, 731.

\(^{187}\)
this right is not lost by the mere fact that she has been divorced by the husband and is living away from the husband. This principle is based on practical experience based on considerations which are conducive to the proper growth of the child. It cannot be disputed that a child of tender age would feel psychologically most secure in the company of the mother rather than of the father. No one can compete with the mother in that respect. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father. It is normal and natural for a divorced wife to reside separately away from the husband and so long as it is not demonstrated that general supervision of the child to which the father is entitled as the natural guardian has not become impossible, the mother cannot be deprived of the right of *hizanat*. Moreover, as has been repeatedly stressed in the conflict of rival claims put forward by the father and the mother in regard to the custody of a child of tender age based on their respective rights under the personal law, the interest of the child cannot be sacrificed. The overriding consideration in all such cases and in all circumstances is the interest of the child and all other claims of rival parents must be subordinated to it. In this case the father has divorced the mother, turned her away from the matrimonial home, took away the child from her custody and entrusted it to his second wife. Under these circumstances mother applied for custody under section 25, Guardians and Wards Act.

The question came for consideration before the Madhya Pradesh High Court in *Mumtaz Begum v. Mubarak Hussain* where the mother filed a writ of *habeas corpus* praying for the restoration of custody of the child to herself. Almost after three months of the birth of the child, the parties separated. The father

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187 AIR 1986 All 314.
188 AIR 1986 MP 221.
took away the child. He also remarried. The question before the court was: Does the mother lose her right of custody of her child to tender years just because she is not residing with her husband, the father of the child? In a judgment, erudite with learning, Dr. T.N. Singh, J., answered the question in the negative. It is submitted that our main difficulty lies in the fact that we still rely on old text books on Muslim law which display a strange adherence to mechanical jurisprudence. The villain of the present tragedy is the following statement in Mulla: *Principles of Mohomedan Law* (which existed in the first edition and has been faithfully reproduced in all later editions): the mother would lose her right of custody:

If she goes and resides, during the subsistence of the marriage, at a distance from father's place of residence.\(^{189}\) And this will be so even if she has been turned out of the house and has to live per force away from her husband. In our submission Dr. Singh, J., rightly observed that the statement of law in textbooks like Mulla's *Mohamedan Lazu* or Tayabji's *Muslim Lazu* are inadequate to meet the challenges thrown by the contemporary society. He added (in our submission, rightly), indeed, the need for judicial activism in the field stems from state's failure to implement the constitutional mandate of Article 44. Then the learned judge added that there is a judicial sanction for construing any law in the light of Directive Principles and particularly, in the present context to clauses (e) and (f) of Article 39 oblige the state to take steps to ensure, *inter alia* that the tender age of children is not abused "and that" children are given opportunities and facilities to develop in a healthy manner "so that" childhood and youth are protected against exploitation and against moral and material abandonment. Then the learned Judge, drawing strength and authority from Article 51(c), quoted Principle 6 of the Declaration of the Rights of the Child of 1959: The child, for the full
and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother...

The learned judge then referring to Principle 2 of the Declaration said that there is a mandate for enactment of laws for "special protection" of the child to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner postulating further that in this matter "the best interests of the child shall be the paramount consideration". Principle 4 envisages the right for the child to have "adequate nutrition, housing, recreation and medical services." Dr. Singh, J., added that Mulla's aforesaid passage should be read "in the light of norms and nuances of the progressive interpretative technology, sanctioned by the Constitution and our judicial mentors". So read, he observed:

The mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child's father. If there exist circumstances to show that it was difficult for her to reside with her husband or that she had not forsaken voluntarily her husband's company, she should not be penalised. That apart, importance must be attached to the main rider, namely, she resides "at a distance from the father's place of residence". Indeed, we must read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of 7 years, the father must not be denied access to the child. When personal law are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints and prophets found any

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Para 252 (2).
faith, they act as benefactors of the mankind as a whole, if man is
God’s child and if child is the father of the Man, no personal law
claiming divine sanction, can afford to deny paramount
consideration to the welfare of the child.190

A male entitled to the custody of the child is known as hazin.
The Muslim law-givers have not dealt with the disqualifications of
hazin in any detail, but it seems to be clear that just as in certain
cases a hazina may be deprived of the custody of the child, similarly,
a hazin may also be deprived. Thus, a hazin who is a minor, or of
unsound mind, has no right to the custody of the child. A hazin who
is a profligate has no right to the custody of the child.191

A ghair-mehram is also not entitled to the custody of the child.
We have seen earlier that any male relation of the child who is not
within the prohibited degrees by consanguinity is not entitled to the
custody of the child.192 The Muslim authorities lay down that a
minor girl should not be handed over to an agnate not within the
prohibited degrees so long as a non-agnate within the prohibited
degrees such as maternal uncle, is available. In short, if a marriage
is possible between the hazin and the child, then the former is not
entitled to the custody of the child. It is submitted that this
prohibition can apply in respect of female child only. Thus, a boy
may be entrusted to the custody of the paternal uncle’s son, but a
girl cannot be.193 The basis of this rule is that where a marriage
between the guardian and the girl is possible, the guardian is not
entitled to the custody of the child.194 It seems that this rule is not
recognized by the Shias.195

190 Para 252(2) at 225.
191 The Fatwai Alamgiri, 130; Sheohan v. Abdul ILR (1930) 38 Cal. 477.
192 The Fatwai Alamgiri, I.972.
193 The Rudd-ul-Muhtra, II. 1050.
194 Haliman Khatun v. Ahmadi Begum AIR 1949 All 627.
195 153 Tayabji (3rd ed), 281.
Welfare of the child-paramount consideration - Just as under the personal law of any other community so also under Muslim law, in determining all questions relating to minor children, including custody, the welfare of the child is the paramount consideration. In *Salamat Ali v. Majjo Begum*\(^{196}\) the Allahabad High Court observed that under the personal law if mother is entitled to custody of a minor child she should normally get it, but the court should also consider whether in so doing it would be for the welfare of the minor: If evidence shows that she would not be a fit person to have the custody or that it would not be in the welfare of the child to give her custody.\(^{197}\) In *Abdulsattar Husen v. Shahina Abdulsattar*,\(^{198}\) the parents were separated and father had remarried and was in a touring job. The mother was neither remarried nor was likely to remarry. She was earning Rs. 3000 p.m. Taking into account the welfare of the minor, custody was given to mother and father was given access to the child. In *Rahima Khatoon v. Saburjaneesa*,\(^{199}\) the court held that grand-mother was a better guardian for the minor in comparison to the mother who had remarried after the death of the minor’s father. The court should not give effect to the personal law, but should be guided by the paramount consideration of the welfare of the child.

Guardianship and custody under Muslim law - Like Hindu society, Muslim society has been essentially a patriarchal society in which father’s dominant position was recognized. Father’s rights were sweeping and restrictions on them were nominal.\(^{200}\)

A remarkable feature of Muslim law of guardianship and custody is that, on the one hand, detailed rules have been laid down

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196 AIR 1985 All 29
197 Ibid.
198 AIR 1996 Born 134.
199 AIR 1996 Gau 33.
200 Law of Adoption Minority, Guardianship and Custody, Dr. Paras Diwan, III Ed. 2000, p.761.
for the guardianship of a minor's property, while, on the other, there are very few rules relating to the guardianship of a minor's person. The reason for the scantiness of the rules of guardianship of a minor's person is the notion to which the Muslim law-givers, it is submitted, rightly subscribed that the guardianship of a minor's person is more a matter of custody than of guardianship. And, we find that the Muslim law-givers have laid down detailed rules relating to the custody of minor children. In this lies their farsightedness. It is remarkable that in an essentially patriarchal society, they could lay down that the custody of children of tender years belonged to the mother. Thus, a clear distinction is maintained between guardianship and custody—a distinction which could be established in English law only after a protracted struggle extending over almost two centuries, and then, too, by legislation. It is unfortunate that in the early days of administration of Muslim law during the British Raj, some text-book writers and Judges could not decipher the distinction between guardianship and custody. On the one side, undue prominence was given to the paternal right, on the other, the mother was dubbed as guardian of her children of tender age.

The source of law of guardianship and custody are certain verses in the Koran, and a few ahadis. The Koran) the ahadis

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201 Thus, in Tayabji’s Muhammadan Law, section 231 runs: “Guardianship of the person is referred to in Muslim law as Hizanat”. Raffi and Paggot, JJ said: “The right of guardianship of female minor primarily rests with the mother.” Salim-un-nissa v. Saddat Hussain (1944) 36 All 446. To the same effect are the remarks of Jialal, J. in Nur Begum v. Begum 1934 Lah 274 and Davis, J. in Re Isso 1942 Sind 204.

202 In the following cases which were under section 488 Cr. PC (old code) the mother is referred to as guardian; Sartraz v. Miran 29 Cr. LJ 1052; Zahura v. Yusuf 32 Cr LJ 247; Muzafaruddin v. Hazara 1952 Cr LJ 996; Yusuf v. Hazi 37 Bom 71; Allah Rakhiv. Karam 35 Cr LJ 344.

203 The following verses in Koran are considered to be the foundation of law of guardianship: “Given unto orphans their substance; and give them not the bad in exchange for the good; and devour not their substance by adding it to your own substance. Verily that would be a great sin. Give not unto the weak of understanding the substance which God has appointed you to preserve for them, but provide them therewith and clothe them and speak to them with kindly speech. Provide orphans until they attain the age of marriage; then if he perceive that they are able to manage their affairs well, then deliver unto them their substance, and
and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor; the guardianship of the person is a mere inference. According to the Radd-ul-Muthar, the right of guardianship of the property of a minor belongs preferentially to the father, in his absence to his executor. If the father had died without appointing an executor, the grandfather is the guardian. After the death of grandfather, the guardianship belong to the grandfather’s executor. If the grandfather had died without appointing an executor, then guardianship is vested in the kazi who may himself act as such, or may nominate someone else to act on his behalf. The Fatwai Alamgiri states the law thus: The executor of a father is in the place of the father, so also, the executor of the grandfather is in the place of the grandfather, and the executor of the grandfather’s executor is in the place of the grandfather’s executor;

devour it not wastefully or hastily for they are growing up. Let him that is rich abstain generously (entirely from taking the property of orphans); and that who is poor let him take thereof in reason. And when ye deliver up their substance unto orphans, have (the transaction) witnessed in their presence". The Koran, iv, 2,5,6.

Another verse runs as under: "Come not near the wealth of the orphans save with that which is better, till he comes to strength". (xvii, 34; iv, 153.)

The following verse may also be noted: "...and they question the concerning orphans, say: to improve their lot is the best. And if you mingle your affairs with theirs, they (are) your brothers. Allaha knoweth him who spoileth from him who improveth. Had Allaha willed, He could have overburdened you. Allaha is mighty, Wise". (ii, 220). It is interesting to note that like Hindu law, the Koran also speaks only of the property of the minors. Nothing is said about the person of the minor children. The Koran permits a guardian of property of a minor to take reasonable recompense for the trouble of looking after the affairs of an infant. (iv, 5).

The following Hadis traces the history of the obligation and liability of guardians of minor children: "When these revelations came down, viz., meddle not with the substance of the orphan, otherwise than for improving thereof "and' surely they who devour the possessions of the orphans unjustly, shall swallow down nothing but fire into their bellies and shall broil in ragging flames'-all those who have orphans in their care went home, and they separated their own food from orphans, and also their water, fearful lest they might be mixed" Then when the orphans left any of their meat or drink, it was taken care of for them to eat afterwards. Then this method was unpleasant to the orphans, and they mentioned it to the Prophet, then the God sent down this revelation, 'O! Mohammed, they will ask the concerning orphans, answer to deal righteously with them is best and if ye mix your things with theirs, verily they are your brother. Then they mixed their meat and drink together. (Misccat-III-Messabib. Book XIII Chapter XVII part 3).

The Rudd-ul-Mukhtar, V. 524.

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and the executor of the judge is in the place of the Judge, when his appointment is in general.\textsuperscript{206}

Not merely the Koran and the Hadis but also all other authorities of Muslim law speak predominantly of the guardianship of the property of the minor; very little has been said by them about guardianship of the person of the minor.

Classification of guardianship: In Muslim law guardians fall under the following three categories:

(i) Natural guardians
(ii) Testamentary guardians, and
(iii) Guardians appointed by the court.

The Muslim law givers and jurists do not use the expression \textit{natural guardian} but it seems to be clear that in all schools of both the Sunnis and the Shias, the father is recognized as guardian-which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. Since the mother is not the legal guardian of her minor children, she has no right to enter into a contract to alienate the minor's property.\textsuperscript{207} The question of her being the natural guardian during the life-time of the father or even after his death does not arise. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father's right to control the education and religion of minor children is recognized.\textsuperscript{208} He also has the right to control the upbringing and the movement of his minor children. So long as the father is alive, he is the sole and supreme guardian of his minor children.\textsuperscript{209}

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\textsuperscript{206} Quoted in Imambandi v. Mutsaddi ICR (1918) 45 Ca1887, 3
\textsuperscript{207} Fathima Biv. Sadhakautalla AIR 1977 Mad 251; Gurbux v. Rafia AIR 1979 HP 66.
\textsuperscript{208} Abdli Aziz v. Nanha I LR 39 All 332; Nandi Mirza v. Muni Begum Al R 1930 Oudh 411.
\textsuperscript{209} Imambandi v. Mutsaddi ILR (1918) 45 Ca1 887.
\end{flushleft}
According to the *Radd-ul-Muhtar* the right of guardianship in respect of the property of a minor belongs preferentially to the father, in his absence, to his executor. If the father had died without appointing an executor, the grandfather is the guardian. If the grandfather is dead but had appointed an executor then guardianship belongs to him. If none of them is there, the guardianship belongs to the *Kazi* (now to the court) and his appointee.\(^{210}\)

The *Fatwai Alamgiri* thus states the comparative position of the father and the executor:

The executor of a father is in the place of the father, so also, the executor of the grandfather is in the place of the father’s executor, and the executor of grandfather’s executor is in the place of grandfather’s executor. And the executor of the Judge’s executor is in the place of the Judge’s executor when his appointment is in general.\(^{211}\)

The rule is different among the *Shias*. The father is primary sole guardian so long as he is alive. After his death the grandfather has priority over father’s executor. The executor of the father, or in his absence executor of the grandfather, is entitled to guardianship only in the absence of the grandfather.\(^ {212}\)

The *Shia* authorities differ as to the effect of father’s appointment of an executor by his will in case grandfather is living. The majority of them take the view that in such a case, the executor appointed by the father would be ineffective.\(^ {213}\) It seems that the Shia law considers the father as the natural guardian of his minor children, and after his death, the grandfather is specified as natural guardian. No other person is recognized as natural guardian.


\(^{211}\) *Imambandiv. Mutsaddi ILR* (1918) 45 Cal 887 at 892.

\(^{212}\) This is the view of Mohammed which is followed under the Shia school.
Thus, it seems that under both the schools the father is the only and probably the sole guardian. Under Shia law the grandfather is also recognized as a natural guardian. Under Sunni school, no other person is recognized as natural guardian.

Under all schools, mother is not recognized as a natural guardian of her children even after the death of the father.\(^{214}\)

Some of the writers\(^{215}\) take the view that the above stated four \textit{de jure} guardians are merely guardians of the property of the minor and they have nothing to do with the person of the minor, though father’s guardianship over the person of the minor is not disputed.

The father’s right of guardianship is recognized in all schools of Muslim law. Even when the custody is with the mother or any other female entitled to custody, the father’s general supervision and control exist. Father’s right to control the religion of his children is recognized even if the mother is a non-Muslim.\(^{216}\) He has also the right to control the education, general upbringing and movements of his children.\(^{217}\) It seems that in the absence of the father the same rights can be exercised by the grandfather or executor- whoever is entitled to guardianship. It has been laid down that the "\textit{wasi} is empowered to do all acts from which benefit may accrue to the orphan, so is the father."\(^{218}\) The power of \textit{wasi} or executor can be limited by the will. But in the absence of such limitations, it seems that he has the same powers.

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a

\(^{213}\) Tyabji: Muhammedan Law, 285.
\(^{214}\) Imambandiv. Mutsaddi ILR (1918) 45 Ca 1 878; See also Ameer Ali, Mohammedan Law, Vol. II (5th Ed) p. 453.
\(^{215}\) Tyabji: Muhammedan - Law, Chapter VII, Faizee: Muhammedan Law, Chapter VI.
\(^{216}\) Radha Bai v. Dr. Basumul 41 IC 572; Abdul Aziz Khan v. Nanhe Khan ILR 39, All 332; Nandi Mirza v. Muni Begum AIR 1930 Oudh 471.
\(^{217}\) Mulla’s \textit{Muhammedan Law} (15th Ed.) P. 292.
\(^{218}\) \textit{Fatwai Kazi Khan}, Val. IV. 420.
testamentary guardian. Among the Shias, the father’s appointment of testamentary guardian is valid only, if the grandfather is not alive. The grandfather, too, has the power of appointing a testamentary guardian. No other person has any power of making an appointment of a testamentary guardian.

Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is in two cases in which the mother can appoint a testamentary guardian of the property of her minor children, both legitimate and illegitimate, viz., first when she has been appointed a general executrix by the will of the child’s father, she can appoint an executor by her will, and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children. The first exception is more apparent than real; any executor of the father has the power to appoint an executor by his will: this provision applies to all executors. The latter exception, too, has little significance since every person is free to appoint an executor of his or her own property.

The mother can be appointed a testamentary guardian or executor by the father, or by the grandfather whenever he can exercise this power. Among the Sunnis, the appointment of non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as of the property of a minor.

According to all Muslim authorities, a non-Muslim alienee cannot be appointed as a testamentary guardian; if such an appointment is made it is null and void. It seems that the appointment of non-Muslim fellow-subject (zimmi) is valid, though it may be set aside by the kazi.219

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According to the Malikis and the Shafii law, a zimmi can be validly appointed testamentary guardian, of the property of the minor, but not of the person of the minor. The shias also take the same view. The Durr-ul-Muhtar states that if a minor, a bondman, a non-Muslim or a Fasik (reprobate), is appointed as testamentary guardian, he should be replaced by the kazi. But any act done by him before his removal, will be valid. Further, if disability ceases to exist before his removal, he cannot be removed. The Fatwai Alamgiri also take this view but holds that the appointment of a minor or insane person as guardian is void, and therefore, any act done by them before or after his removal will be void and non-effective. There is some controversy among the Muslim jurists on the point whether a person who was a minor at the time of his appointment but who ceased to be so before his removal, can be removed on the ground that when his appointment was made he was unqualified. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian.

The Muslim jurists of all schools agree that a profligate, i.e. a person who bears in public walk of life a notoriously bad character, cannot be appointed as guardian. However, all acts done by such a person before his removal are valid and binding, unless found to be contrary to the interest of the minor. Acceptance of the appointment of testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship is accepted, it cannot be renounced save with the permission of the court.

220 This is so according to the juma-ush-Shittat. The Ourr-ul-Muhtar 835.
221 The Fatwai Alamgiri, IV. 214.
222 Ibid. the Radd-ul-Muhtar 689.
223 The Fatwai Alamgiri, IV. 214.
224 The Rudd-ul-Muhtar, V. 689; Fatwai Alamgiri, VI, 212.
225 The Ruud-ul-Muhtar, V. 689; Fatwai Alamgiri, VI, 212.
Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intention to appoint a testamentary guardian must be clear and unequivocal.\textsuperscript{226} A testamentary deposition made by a testator may be invalid, but appointment of the testamentary guardian of minor children will be valid. The appointment of the executor may be general or particular. The testator must have the capacity\textsuperscript{'} to make the will at the time when it was executed. This means that the testator should be major, of sound mind. In sum, at the time of execution of the will he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by called, \textit{wali} or guardian. He is also called \textit{amin}, \textit{i.e.} a trustee. He is also termed as \textit{kaim-mukam}, \textit{i.e.}, the personal representative of the testator.\textsuperscript{227} As in other systems of law, it is the duty of the executor under Muslim law to administer the estate and assets of the testator, to carry out the wishes of the testator with utmost fidelity, and to act as guardian of the minor children whenever he is appointed as a testamentary guardian.

On the failure of the natural guardian and testamentary guardians, the \textit{kazi} was entrusted with the power of appointment of guardian of a Muslim minor. In modern India, the Muslim law of appointment of guardians by the \textit{kazi} stands abrogated. The matter is governed by the Guardians and Wards Act, 1890. The High Courts also have inherent powers of appointment of guardians, though the power is exercised very sparingly.

Under the Guardians and Wards Act, 1890, the power of appointing or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person

\textsuperscript{226} The \textit{Fatwai Alamgiri}, VI. 218-19.
\textsuperscript{227} The \textit{Fatwai Alamgiri}, VI 221.
as guardian of a minor child’s person as well as property whenever it considers it necessary for the welfare of the minor, taking into consideration the age, sex, wishes of the child and the personal law of the minor.\textsuperscript{228} See Part III of this work.

**Powers of Natural Guardian and Testamentary Guardian Over the Property of the Minor** - Muslim law practically makes no distinction between the powers of the father and testamentary guardian over the property of minor children. Unless the power of wasi (executor) are specifically limited by the will, he, as kaim-mukam of the testator, can do all those acts for the superintendence, administration, protection and management of the child’s estate which the testator himself could have done had he been alive.

The father as well as the wasi, in a case of necessity, has the power of selling the property. A wasi can sell the property and after discharging debts of the testator, and debts which are incurred in the administration and management of the property and for the maintenance and education of children invest the balance, if any is left. In every case the sale must be for an adequate consideration, \textit{i.e.}, such as is reasonable among the people of business.\textsuperscript{229}

From the point of view of \textit{de jure} guardian’s power over minor’s property, Muslim law makes a distinction between immovable and movable property. The powers over immovable property are limited, and the guardian can sell them only in certain exceptional cases, while powers in respect to movable property are not so limited. The reason for this distinction is thus explained in the Hadaya:

The ground of this is that the sale of movable is a species of conservation, as articles of this description are liable to decay, and the price is much more easily preserved than the article itself. On the contrary, with respect to immovable property it is in a state of

\begin{itemize}
\item \textsuperscript{228} Section 17.
\item \textsuperscript{229} Fatwai Alamgiri, vol. VI, 220; Dur-ul-Muhtar, 837.
\end{itemize}
conservation in its own nature whence it is unlawful to sell it, unless, however, it be evident that it will otherwise perish or lost in which case the sale of it is allowed.\textsuperscript{230}

The author of the \textit{Dur-ul-Muhtar} has explained the same in the following passage:

\begin{quote}
"I say, as stated by Zaile and Kassatani, that the more correct doctrine is, that the sale of immovable property is not valid as its becoming lost is extremely rare."\textsuperscript{231}
\end{quote}

Under Muslim law, justification for selling movable property is not necessity. Whenever the guardian wants, he can sell the movable property of the minor for an adequate consideration and invest the sale proceeds in a more profitable undertaking. According to the Hadaya:

A guardian may sell or purchase movables on account of his ward either for an equivalent or at such rate as not to make the loss great and apparent, because the appointment of an executor being for the benefit of the orphan, he must avoid losses in as great a degree as possible; but with respect to in considerable loss as in the world of commerce is often unavoidable, it is therefore allowed to him to incur it, as otherwise a door would be shut to the business of purchase and sale.\textsuperscript{232}

Inadequacy of consideration, when there is an indication of fraud, or when inadequacy is so considerable, though there is no indication of fraud, as to cause serious loss or detriment to the minor, or when it is the result of culpable negligence on the part of the guardian, would entitle the minor to get the sale avoided. However, the minor can avoid it only with intervention of the court. If the transaction is \textit{bona fide} and due care and diligence has been

\textsuperscript{230} Hadaya, Vol. IV, 553.
\textsuperscript{231} Dur-ul-Muhtar, 839.
\textsuperscript{232} Hadya, Vol. V, 533, Rudd-ul-Muhtar and Jama-ush-Shittat are also to the same effect.
exercised by the guardian, the guardian is not responsible for any unforeseeable consequences resulting to the detriment of the minor.

As a general rule the guardian has no power to sell the immovable property to himself or to a stranger. But under certain circumstances such power is recognized. According to the *Dur-ul-Muhtar*:233

It is lawful for the executor to sell other than immovable property against an absent adult heir, to pay the debt (or the testator); even the sale of immovable is valid if there is imminent danger of its being lost.

In his commentary on *Dur-ul-Muhtar*, Tehtawai said: If the deceased dies heavily involved in debt, then by consensus sale of immovable property is valid.

The *Dur-ul-Muhtar* itself lays down cases where the executor can sell the property:

When the testator's heirs are minors, a sale of his immovable property by the executor is valid to some persons other than himself at double of its value or for the maintenance of the minors or for the discharge of the debt of the deceased, or for payment of specific legacies which cannot be given effect to in any other way, or where the income does not exceed the cost of its up-keep, or where there is the risk of its being wasted or destroyed, or where it is in the hand of muta-ghollob (powerful misappropriator or usurper.)234

*According to the author of the Fath-ul-Kadir* the father to has the power to sell immovable property in such cases provided he is 'a man who bears good character among people or nothing is known against him'. The *Dur-ul-Muhtar* also lays down that the father has the same powers as an executor.235 But if the father is untrustworthy, the

233 *Dur-ul-Muhtar*, 838.
234 *Dur-ul-Muhtar*, 839.
child on attaining majority can get it set aside unless the sale is for
double of its value. The authorities are, it seems, of the view that the
powers of the father are not greater than the powers of the executor.
There is a difference of opinion among authorities of Muslim law
whether the executor can sell the properties to himself. According to
Abu Hanifa he can. According to Abu- Yusuf only if the sale is to the
manifest advantage of the minor. According to Mohammed it is
unlawful under all circumstances.
The cases in which guardian of a Muslim child may sell the child's
property are as under:

(a) when he can get double of its value,
(b) where it is for the manifest advantage of the child,
(c) there are some general provisions in the will, such as payment
of legacies, which cannot be carried into effect without the sale
of property,
(d) when there are debts of the testator, and they cannot be
liquidated save by the sale of property,
(e) the income of the property is less than the expenditure
incurred in its management and administration,
(l) when it is in the imminent danger of being lost or destroyed by
decay, etc.,
(9) when the property is in the hands of usurper and the guardian
has reasonable fear that there in no chance of its recovery ,
and
(h) when the minor has no other property and the sale is
absolutely necessary for his maintenance.236

In a case of urgent need or necessity Muslim law allows a person in
whose charge and control the child is, to alienate minor's property.

236 Fatwai Alamgiri, Val. VI. 222, Our-ul-Muhtar, 846. The Jama-ush-Shittat and the
Kitab-ul-Anwar are to the same effect.
According to the *Hadaya* the acts in respect of minor-orphans are of the following three descriptions:

(i) Act of guardianship such as contracting an infant in marriage, or selling and buying goods for him; a power which belongs solely to the *wali* or natural guardian whom the law has constituted the infant's substitute in those points.

(ii) Acts arising from the want of the child, such as buying or selling for him on occasions of need or hiring a nurse for him, or the like: which power belongs to the maintainer of the child, whether he be a brother, uncle or (in the case of a foundling) the *Mooltakit* or taker-up, or the mother provided she be the maintainer of the child: and as these are empowered with respect to such acts, the *wali* or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite for the guardian that the child should be in his immediate protection.

(iii) Acts which are purely advantageous to the minor such as accepting presents or gifts, and keeping them for him; a power which may be exercised either by a *Mooltakit*, brother or uncle, and also by the child himself, provided he be possessed of discretion, the intention being only to open a door to the child's receiving benefactions of an advantageous nature. The infant is therefore empowered in regard to these acts or any person in whose protection he may happen to be.  

It seems that Muslim law first lays down the power of an executor and then states that the natural guardian too has such powers. Further, Muslim law permits any person in whose charge the child is (he may be neither a *de jure* guardian nor even a *de facto* guardian) to do all those acts which are beneficial to the child. Some

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237 Macnaughten, Chapter VIII, Cl. 14; *Fatwai Ajamgiri Val.* VI. 222-24.
authorities of Muslim law, divide the acts in respect of minor under
three heads-

(a) acts which are beneficial or advantageous to the child,
(b) acts which are absolutely injurious to the child, and
(c) acts which are mid-way between these two.  

As to those acts which are purely beneficial or advantageous to
the child, any person, whether a guardian or a person in whose care
the child is, can do them. Such acts are, for instance, acceptance of
gifts or alms. If the child is of the age of discretion he himself can do
these acts. Those act which are absolutely injurious to the child,
such as divorcing the wife or emancipating a slave, no person is
empowered to do them. As to acts under the third category that is to
say acts which are neither beneficial nor hurtful to a child, such as
sale or hiring of property for purpose of profit, can be done only by
the father, the grandfather, and their executors, whether he has the
actual custody of the child or not, because their power to deal in this
manner is by reason of their guardianship. They being the legal
guardians can exercise these powers and in their case it is not
necessary that the child should be in their custody.  

However, the lawful guardian, too, can sell property only in
cases of imperative need and in the cases enumerated above. An
alienation made by the father beyond his powers is invalid and the
minor can avoid it. Such an alienation is voidable at the option of the
minor.  

However, since after the demise of the father no guardian of
the property of minor was appointed, alienation made by the mother
of minor’s property, was held void as mother is not a guardian of
minor child’s property.  

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238 Hadaya, Val. IV. 124.
239 Tahinul Haqiq, Vol. VI 34.
As far as the main basis of the guardian’s power of alienation is the need or necessity of the child. The *majma-ul-Anhar* very aptly says that if such power is not given the life of the child or his goods and chattels might run the risk of injury or destruction; such as he may stand in immediate need of ailment, Clothing or nursing, or he may own slaves or live-stock for whom food and fodder must be immediately procured. Such and like urgent and imperative need may recur from time to time. In such cases the lawful guardian is permitted to incur debts or to raise money on the pledge of child’s property. In the absence of legal guardian, this power can be exercised by a person in whose charge the child and his property happen to be.242

The *Mukhtasar-ul-Kuduri* speaking of the power of the executor says that when all heirs are minors, the executor can sell any property, whether immovable or movable belonging to the deceased whether he thinks it necessary for the protection and the preservation of its price. But this view is not accepted by *Shams-ul-aimma* *Halwani* who calls this as an old view. According to him, the sale of immovable property (*akar*) of a child is valid only when there are debts left by the deceased which cannot be discharged otherwise than by the sale of *akar* or when the minor has the need for the price thereof or a purchaser is eager to obtain it by giving double its price, or when there is a specific legacy which cannot be paid save by the sale of the *akar* when the sale is for the benefit of the minor such as payment of tax or land revenue, or when expenses of its upkeep exceed the income, or when being a house or a ship it is in a dilapidated condition: in all such cases the *akar* is to be sold only when there is no other property available for the purpose.243

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243 Vol. V 696, *The Dur-ul-Muhtaar*, and the *Fatwai Alamgiri* also take the same view. They also include another head: when property is in the hand of a usurper and there is no possibility of its recovery.
The legal guardian of Muslim child can lawfully sell or purchase any property on behalf of the minor, but it must be for consideration usually current in transaction of that kind. If the sale is for inadequate consideration it can be set aside at the option of the child, and the executor would also be liable.

As to interpretation of above provisions there is no controversy. It is judicially well recognized that the guardian can sell the property of the child in cases of urgent necessity or for the manifest advantage of the minor. In *Bhutnath v. Ahmed Hossain*, Norris, J., said that under Muslim law the guardian cannot sell the property of the minor unless urgent necessity is shown. The Privy Council in *Kai Dutt Tha v. Abdul Ali*, said that the guardian can sell the property only in certain circumstances. In this case the guardian sold a piece of land of the minor in regard to which minor’s title was disputed thereby ending a dispute in respect to property of the minor which enabled the collector to effect settlement of a large part of land on the minor. The Privy Council held that alienation valid as it was considered to be for the benefit of the minor and a fair price was obtained.

The Bombay High Court in *Hurbai v. Hiraji*, observed that the guardian could sell child’s properties only in a case of absolute necessity or benefit of the child. Muslim law does not permit the guardian to mortgage the properties of the minor. It is very interesting to note that their Lordships said that the same principle would apply to a mortgage which applies to sales. The Madras High

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244 ILR (1885) 11 Cal 417 – See also Mohamud v. Govindarajulu AIR 1971 Mad 44.
245 The case was decided on another point also; the person alienating the property was not a legal guardian, but see AIR 1951 All 247.
246 ILR (1888) 16 Cal 627 (PC).
247 Reference was made to Macnaughten’s *Principles of Mohammedan Law*, Chapter VIII, Cl. 14.
248 ILR (1895) 20 Bom 116.
249 In the earlier cases the same view was taken; Mt. Bukshum v. Mt. Oookin 12 WR 337; Mt. Syedan v. Syed 17 WR 239.
Court has also taken the same view. The court said that an agreement between a minor entered into by his guardian and a co-owner not to divide a spes successionis cannot be for the benefit of the minor and was therefore not valid.

Following the Madras High Court, Shrivastay Ag, C.J., and Ziaul Hasan, J., of the Oudh Judicial Commissioner’s Court took a similar view. The Allahabad High Court said that the guardian may alienate the minor’s property when sale is necessary for the maintenance of the minor and when there is no other property. But where there is neither any need of the minor nor is the property in bad shape, alienation cannot be justified.

In *Abdul Hakim v. Fan Mohammed*, a *de facto* guardian of a child entered into a transaction under which he exchanged certain properties of the minor. The guardian justified the transaction by saying that by entering into the transaction he prevented the property obtained by the minor from passing out of his possession by pre-emption and that he has not changed immovable property into money but has merely exchanged it with another property. Prasad, J., said that under Muslim law the reason for prohibiting alienation of immovable property by the guardian is that policy of the law is to conserve the property and prevent its disintegration. The learned judge said if that principle is not violated an alienation by the guardian would be valid.

It can be said that this is too broad a proposition which is not warranted by any rule of Muslim law. However, the decision may be supported on the ground that the transaction was for the benefit of the minor.

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250 Thottoli Kotilan v. Kunhammed ILR (1910) 34 Mad 527.
251 Mohammed Abdul Rehman v. Mohammed Ibdul Gani Khan AIR 1937 Oudh 56.
252 Asajidaulla Beg v. Ram Ratan Al R 1940 All 74.
254 AIR 1951 All 247.
255 The passage from *Hadya* (quoted above) was referred to by the court in support.
Thus, it can be submitted the following three propositions emerge as to the power of alienation of property (strictly speaking Muslim law only provides for sale) of the minor by a *de jure* guardian:

(a) As a general rule the guardian can alienate the immovable property of the minor only in cases of urgent necessity or manifest advantage to the minor.

(b) The guardian has power to effect a *bona fide* sale of minor’s movable property with the object of investing the sale proceeds safely, and also for increasing the income of the minor.

(c) For the support or ailment or education of the child. The guardian can also pledge the goods and chattels of the minor.

It seems that the authorities of Muslim law were not in favour of giving any power to the guardian of leasing out the minor’s properties. The following passage from the *Fatwai Azamgiri* may be noted:

If the executor gives a long lease of part of the estate for the payment of the deceased’s debts it would not be lawful... He has no power to lend to another the property of the orphan according to all authorities says the Muhit, and if he should so do he would be responsible. Neither the judge has the power to do so.\textsuperscript{256}

As the power of the father to lease out his child’s properties, there seems to be a conflict of opinion. The *Fatwai Alamgiri* takes the view that the position of the father is similar to the position of the executor.\textsuperscript{257}

Ameer Ali takes the view that the executor can let out the property of the minor if there is need to do so and if it is advantageous to the minor; he has also the power to pledge the

\textsuperscript{256} *Fatwai Alamgiri*, Vol. VI. 227.


goods and chattels of the minor if it is necessary for the maintenance of the minor.\textsuperscript{258}

Not many cases have come before the courts in which the question of the guardian’s power of leasing out minor’s property has been discussed. But it seems that our courts rightly applied the same test to leases as they have applied to sale and have held that the guardian has power to lease out minor’s properties. In \textit{Zeebunissa Begum v. Mrs. H.B. Danagher}\textsuperscript{259} the Madras High Court held that under it, is within the competence of the natural guardian of the minor to grant leases of the minor’s property if it is for the benefit of the minor.

As to the power to the guardian to carry on business on behalf of the minor and to enter into partnership for the same purpose on behalf of the minor, the \textit{Fatwai Alamgiri} provides:

An executor may give out the property of a minor in partnership, \textit{(muzaribat)} and may enter into partnership with another in respect of it according to the Muhit.\textsuperscript{260}

According to the \textit{Hadaya} the guardian has power to carry on trade or business on behalf of the minor just like a person of ordinary prudence can do in respect to his own business, though he cannot enter into and engage into trade or business which is of speculative nature or hazardous.\textsuperscript{261} When the capital of the guardian as well as of the minor is invested in the same trade or business, then the guardian is bound to keep separate accounts of the minor.\textsuperscript{262} The Privy Council in \textit{Jaffar Ali v. The Standard Bank Ltd.}\textsuperscript{263} said that the guardian of a minor has a power to enter into

\begin{itemize}
\item \textsuperscript{258} Ameer Ali Val. 1 (4th ed) 686.
\item \textsuperscript{259} ILR (1936) 49 Mad 942.
\item \textsuperscript{260} \textit{Fatwai Alamgiri}, Vol. VI. 227; Muzaribat is a type of partnership in which one person invests his capital while the other his labour but both share profits.
\item \textsuperscript{261} Ameer Ali, Vol. I. 683.
\item \textsuperscript{262} Tayabji: \textit{Mohammedan Law}, (3rd ed) 302.7. AIR 1928 PC 130.
\item \textsuperscript{263} AIR 1928 PC 130.
\end{itemize}
partnership on behalf of the minor, but the minor would not be liable personally for losses, his liability would be only to the extent to which he has a share in the partnership. In *Abdul Raheem v. Abdul Hakeem*,\(^{264}\) the Madras High Court said that if the major members of a family made profit by carrying on business in which the property of the minor was utilized, then the minor is entitled to a share in the profit; but in no case the guardian or other members have any power of imposing any liability on the minor. The Allahabad High Court also took a similar view.\(^{265}\) But in *Dubash D.K. Ahmed Ibrahim v. Meyyappa Chettiar*,\(^{266}\) Vardhachariar and Pandrang Raw, J.J., said that the guardian has no power to carry on business which may involve minor’s estate, in speculation or loss. In this case, in our submission, on facts it was not established that the minor was admitted to the benefit of the business.

The result of the above review leads one to the conclusion that the guardian has power to enter into partnership also to carry on trade and business on behalf of the minor, provided the trade or business is not of a speculative character or hazardous, and provided further that it is for the benefit of the minor; in no case the minor would be liable for the losses in business or trade beyond his share. Power to effect partition- The *wasi* has no power to make a partition among the minors, and if he does so, the partition is unlawful.\(^{267}\) But if among the heirs some are minors and some are adults, the executor can separate the share of adults from the share of minors and can hand over the share of adults to them and retain the share of minors in his own hand. But in no case he should separate the share of each minor, if he does so it is unlawful and the entire partition is invalid. But if the portion of the adult share is surrendered to them, and the

\(^{264}\) ILR (1931)54Mad 549.
\(^{265}\) ILR (1932) 54 All 916.
\(^{266}\) AIR 1940 Mad 285.
\(^{267}\) *Fatwai Alamgiri*, Val. VI. 221.
portion of minors retained, and subsequently on their attaining majority, their share is divided among them, the partition as between the adult and minor is valid.\textsuperscript{268}

Similarly, if all the heirs are minors, the executor may allot the shares to legatees, and retain the residue in his hands. In such a case if the share, or any portion of it, is lost or destroyed in the hands of wasi, the minors have no right of recoupment either against the wasi or against the legatees, unless it is caused by the wilful neglect or default of the wasi.

According to the \textit{Fatwai Alamgiri} if a wasi has been appointed by the judge with general power to deal with all matters of minor, then a partition effected by him on behalf of the minor is valid.\textsuperscript{269}

In \textit{Lal Bahadur Singh v. Durga Singh},\textsuperscript{270} the Bombay High Court held that the guardian has power to assert a right of pre-emption on behalf of the minor or to refuse or accept an offer of a share in pursuance of such right and minor would be bound by his act if done in good faith. The same view has been taken by the Allahabad High Court.\textsuperscript{271}

The \textit{de jure} guardian of a minor has power to acknowledge debts on behalf of the minor so as to give a fresh start of period of limitation to the creditor.\textsuperscript{272} But a time-barred debt cannot be acknowledged. In this respect law is uniform in India applicable to the guardian of all minors, Muslims and non-Muslims.

Power to enter into contracts - The guardian of a minor has power to incur debt on behalf of the minor if there is an urgent necessity for it. But if a debt is contracted without any necessity, it is

\textsuperscript{268} \textit{Ibid.}
\textsuperscript{269} \textit{Ibid. at 222.}
\textsuperscript{270} ILR 3 Bom 437.
\textsuperscript{271} Umrao v. Dalip Singh ILR (1901) 23 All 129.
\textsuperscript{272} Subbandari v. Shrimulu ILR (1893) 17 Mad 221.
not binding on the minor. In *Kashnupalli v. Ayina Kashim Shaeb*, the Madras High Court held that the guardian has power to execute a promissory note on behalf of the minor for the benefit of minor. In this case the promissory note was renewed by guardian to prevent a suit being filed against the minor on the basis of the earlier note. (Please refer to our commentary on Hindu Minority and Guardianship Act, under the sub head, "Promissory Notes", where the entire case law has been reviewed).

The Privy Council in *Waghela Rajsanjiv. Shek Masludin* held that the guardian has no power to impose personal liability on the minor. Before the Privy Council decision in *Mir Saruarjan v. Fakhruddin*, this decision was used by some of our High Courts for laying down the rule that the guardian has no power to enter into contracts so as to bind the minor.

There has been conflict of judicial opinion before and after the decision in *Mir Saruarjan* as to whether a guardian can enter into contract on behalf of the minor and whether such a contract can be enforced against the minor, specifically or otherwise. It seems the controversy has not ended even after the Privy Council decision in *Kakulan Subrahmanyama v. Kura Subba*. This was a case decided under Hindu law. The entire matter has been discussed by us in our commentary on section 8, Hindu Minority and Guardianship Act, though the matter is discussed under Hindu law, in our submission the same principles should be applicable to all minors, Hindus and non-Hindus, though there may be some

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273 Ameer Ali Vol. 1 (4th ed) 680; *Rayesthna v. Mahboob Sahib* AIR 1940 Mad 106, where it was held that Mohammedan law was against the award of interest on the loan taken by a minor. It is doubtful whether this would be enforced under the modern law.

274 AIR 1935 Mad 1041; *Abdul v. Md. Ibadul* AIR 1937 Oudh 56.

275 (1887) 141A89.

276 ILR (1911) 39 Cal 232.

277 The Assam High Court even after Subrahmanyama relied on Mir Sarvarjan in Hari Mohan v. Sheo Narayan AIR 1949 Assam 57.
variation in details. For instance, legal necessity has its own meaning under Hindu law, and 'urgent necessity' has its own meaning under Muslim law. What is for benefit of estate or benefit of the minor hardly differs in two systems of law. The Hyderabad High Court in *Amir Ahmed v. Mir Nizam Ali*,\(^\text{279}\) discussed the question of guardian’s contracts from a general point of view and the majority in fact applied the Privy Council decision in *Subrahmanyama*, which was a case under Hindu law. *Wagehela*,\(^\text{280}\) which is also a case of a Hindu Law, has also been invoked before the courts in case where the question has come in the context of Muslim minors. On the other hand, *Mir Saruarjan*, a case of a Muslim minor, has been invariably invoked, in practically every case of contractual capacity of the guardian of a Hindu minor since the date it was delivered, and it seems would continue to dominate the legal thought till it is directly over-ruled by the Supreme Court. In view of this, the question of contractual capacity of the guardian of a Muslim minor is discussed very briefly here.

The earlier reported case on the subject is that of the Calcutta High Court of the year 1893.\(^\text{281}\) In this case a Muslim father on behalf of his minor daughter entered into a contract for the lease of certain lands from the defendant. Pursuant to the agreement, the father on behalf of his daughter constructed a *pucca* building on the vacant land. When the building was completed, the defendant asked for the increase of the rent and on the father’s refusal to do so, instituted a suit for ejectment. Thereafter the father on behalf of the minor instituted the present suit for specific performance of the contract and prayed for an injunction against the defendant restraining him from proceeding with the suit. Norris, I., all along in

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\(^{278}\) AIR 1948 PC 95.
\(^{279}\) AIR 1952 Hyd 120 (FE).
\(^{280}\) (1887) 14 IA 89.
\(^{281}\) Fatima Bibi v. Sebunath ILR (1893) 20 Cal 508.
his judgment proceeds on the basis that the contract was entered into by the minor, and therefore held that under the Contract Act, a minor’s contract being void,\textsuperscript{282} \textit{(Flight v. Bollard},\textsuperscript{283} being applicable), specific performance of the minor’s contract could not be granted, because such contracts lacked mutuality.

A similar question came before the court in \textit{Jugal Kishore v. Anand Lal}\textsuperscript{284} and the court said that unless the contract was shown to be for the benefit of the minor, it cannot be specifically enforced. The court also said that a decree of specific performance should not be passed against the minor during the period of minority. In the same year, the question came for consideration before the Madras High Court.\textsuperscript{285} The guardian of a Hindu minor entered into a contract for the sale of certain land, and the vendee filed a suit for specific performance. Ayyar and Best, J.J. said that \textit{Flight v. Bollard}\textsuperscript{286} was not applicable as the contract was not entered into by the minor and that, at any event, the doctrine of mutuality was not applicable in India. Specific performance was granted. This decision was followed by the Calcutta High Court in \textit{Kharunnissa Bibi v. Loakenath Pal}\textsuperscript{287} where a contract was entered into for the lease of certain lands and a tank on behalf of minors by their guardians. The decree for specific performance was granted and the court expressly dissented from the Judgment in \textit{Fatima Bibi}.\textsuperscript{288}

In 1901 the Bombay High Court rejected the suit of a vendee of the property of a minor for specific performance as it did not find the contract for the benefit of the minor.\textsuperscript{289} In \textit{Mt. Btawaria v. Chandra}}
Nath,\textsuperscript{290} the question again came before the Calcutta High Court, where a certificated guardian contracted to sell certain lands of the minor with the permission of the court. The contract was for the benefit of the minor and specific performance was granted. It was in this conflict of opinion in the Calcutta High Court that \textit{Mir Saruarjan v. Falchruddin}\textsuperscript{291} came for consideration before Rampini, J., who thought it necessary to refer the matter to a Full Bench. One or the two questions referred to the Full Bench was: "Can specific performance of a contract entered into on behalf of a minor be granted." the Full Bench Maclean, C.J., in a very brief Judgment said: "If a contract is validly entered into on behalf of the minor, and there is mutuality in such contract, it might be specifically enforced. Each case must depend upon its particular circumstances and it is difficult to lay down any general rule." Chose, Ceidt and Holmwood, J.J., agreed with him. Rampini J., also agreed though he, added that the rule in \textit{Flight v. Bollard},\textsuperscript{292} did not apply. When the case went back for decision before the Division Bench consisting of Rampini and Woodroffe, J.J., very lengthy arguments were addressed to the court as to the interpretation of the rule laid down by the Full Bench. Woodroffe, J., discussed \textit{Waghela} and said that case laid down that where an onerous covenant not in the interest of the minor is entered into and personal liability is sought to be imposed on him, the guardian goes beyond his power and his action does not bind the minor. The learned judge then said that where a contract is entered into on behalf of the minor by a guardian or manager within his powers and which binds the minor, such a contract, in the opinion of the Full Bench can be enforced, if there is mutuality. From this Judgment the case went to the Privy Council.

\textsuperscript{290} 91 ILR (1906) 34 Cai 163.
\textsuperscript{291} 4 Russ 298.
\textsuperscript{292} (1912) 39 1A 1.
The Privy Council said that it is not within the competence of the guardian or manager of minor’s estate to bind the minor or his estate, by a contract for the purchase of immovable property and that as the minor in the present case was not bound by the contract there was no mutuality, the contract cannot be specifically enforced.293

This decision of the Privy Council has had its overpowering sway over the Indian courts, for about seven decades. In 1952, the question that came directly for the consideration before a Full Bench of the Hyderabad High Court was whether a de jure guardian of a Muslim minor could bind the minor by personal covenants even when covenant was for the purchase of immovable property. The exact question referred to the Full Bench was in general terms, without any specific reference to the Muslim minor. Khan, J. (with whom Siddiqi, J., agreed) categorically said that such a contract by the de jure guardian of a Muslim minor is binding and enforceable, if it is for the benefit of the minor or for necessity. The learned judge reviewed the entire case law and relied on the Privy Council decision in Subrahmanayam.294 On the other hand, Despande, J., said that a contract for the purchase of immovable property cannot be for the benefit of the minor and it cannot be enforced; though a contract for sale of minor’s property for necessity or benefit is binding on the minor and enforceable against him. Mir Saruarjan295 continues to influence our judicial thinking. In our submission, distinction between a contract for sale and contract for purchase is purely artificial and arises out of overpowering influence of Mir Saruarjan. Palekar, J., of the Bombay High Court said that cases are conceivable where purchase of immovable property would become necessary or beneficial to the estate of the minor. The learned judge illustrated

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this observation by saying that suppose a minor’s house is destroyed by fire and the guardian contracts to purchase a new house for the residence of the minor. Such a contract will be for necessity and binding on the minor. Thus, it is submitted that every case should be examined on its own facts and if a contract is for the benefit of the minor or for necessity, whether it is for sale or purchase, or whether for lease or mortgage, it is binding and enforceable.

(1912) 39 IA 1.