APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Beaman.

TAJBI KOM ABALAL DESAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* MOWLA KHAN WALAD ALIKHAN DESAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1917. *February 6.*

Mahomedan Law—Marriage with a wife's sister during the continuance of first marriage—Whether invalid or wholly void—Legitimacy of the issue of such marriage.

Under the Mahomedan Law the marriage with a wife's sister during the subsistence of the first marriage is only *fasid* (invalid) and not *batil* (void). The issue of such marriage is legitimate and can inherit.

Aizunnissa Khatoon v. *Karimunnissa Khatoon*[1], dissented from.

SECOND appeal against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by J. H. Bettigiri, Subordinate Judge at Gokak.

The facts material for the purposes of this report are as follows:—

The property in suit belonged to one Hussankhan. He married one Amabi and during the subsistence of his marriage with Amabi he married her sister Sadabi. By Amabi he had no issue; by Sadabi he had a daughter, Tajbi (plaintiff No. 1). Hussankhan died in 1868 leaving him surviving Amabi, Sadabi, Tajbi (plaintiff No. 1) and a first cousin of his named Mowala Khan (defendant No. 1).

Amabi and Sadabi having subsequently died, Tajbi as the daughter and heir of Hussankhan sued to recover possession of Hussankhan's property wrongfully withheld by Mowala Khan (defendant No. 1).

Defendant No. 1 contended *inter alia* that the marriage of Sadabi with Hussankhan was void and that therefore Tajbi could not inherit.

* Second Appeal No. 1001 of 1915.

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The Subordinate Judge found that Tajbi (plaintiff No. 1) was not entitled to any share, but allowed plaintiff No. 2 who was the purchaser of right, title and interest of Amabi's share, one-fourth share in the plaint property.

On appeal the decree was confirmed the learned Judge observing that the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] was an authority for holding that the marriage of Sadabi was void under the Mahomedan Law and her daughter Tajbi (plaintiff No. 1) was illegitimate and could not inherit.

Plaintiffs appealed to the High Court.

Tyabji with *T. R. Desai*, and *S. G. Desai* for the appellants :—The only question is whether a marriage of a Mahomedan with his wife's sister during the lifetime of the first wife and during the continuance of the first marriage is entirely void so as to render the issue born of that marriage illegitimate. The lower Courts, in following *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] held that such a marriage was illegal. The case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] is wrongly decided. It is against the texts of Mahomedan Law, and is not binding on this Court. According to the true view of Mahomedan Law such a marriage is merely *fasid* (voidable) and not *batil* (void); and if it is consummated and children are born of it they are at any rate not illegitimate and cannot be excluded from inheriting the estate of their father. I rely both upon the texts of Mahommedan Law and upon the view thereof taken by modern text writers, viz., Baillie, Ameer Aly, Abdul Rahim and Abdul Rahman and others.

As to texts, see (*a*) Fatwa-i-Kazi Khan, p. 421; (*b*) Hedaya, Book III, Chapter 3; (*c*) Kanz-ud-Daqaiq, p. 103; (*d*) Inaya, Vol. II, p. 74; (*e*) Tahtawi, Vol. II, p. 59;

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(*f*) Fatwa-i-Alamgiri, Vol. I, p. 259 (Baillie, p. 32). The view taken in Fatwa-i-Alamgiri should be accepted because it is an authoritative treatise of Mahomedan Law dating since the time of Aurangzeb and has been accepted as a high authority by Courts for over two centuries.

As to modern text-writers. (*a*) Abdul Rahim, in his Mahomedan Jurisprudence, observes a distinction between marriages, *batil* and *fasid*, and in spite of the decision of the Calcutta High Court he is inclined to class a marriage with a wife's sister as falling within the class of *fasid* and rendering the issue legitimate.

(*b*) Abdul Rahman, in his Institutes of Mahomedan Law, Article 135, sets out following the *Fatawa* that even if the marriage is bad the children are legitimate.

(*c*) Ameer Ali, in his treatise of Mahomedan Law, took the view that the marriage was only *fasid* and not *batil*: see Vol. II, pages 236, 316, 319, 368, 369 and 386.

(*d*) Wilson:—No doubt he takes the view against us, but he implicitly accepts the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] without any distinction or discussion: Article 39A, p. 48. Wilson cannot be taken as an authority on this point, his conclusion not being supported by any independent reasoning.

As to the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] the learned Judges fell into four obvious errors, viz., (*a*) they did not realise the weight to be attached to Fatwa-i- Alamgiri; (*b*) they ignored the fact that the Quran did not make the issue illegitimate; (*c*) they did not realise adequately the distinction between temporary and permanent prohibitions and the effect of consummation; and, lastly, (*d*) they erroneously assumed that such a marriage was opposed to the customs of the people, and was never met with in practice.

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Under these circumstances, the appellant Tajbi, being a legitimate daughter, is entitled to a share in the estate of the deceased Hussankhan as a daughter and the decree of the lower Court should be varied to that extent.

Coyajee with *G. S. Mulgaonkar*, for the respondents Nos. 2 and 3:—The case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] is rightly decided. That decision is based upon the Quran, the majority of texts and upon other considerations all of which outweigh the rule to the contrary laid down in Fatwa-i-Alamgiri: see Quran, Sale's Edn., Chapter IV, p. 368.

As to the texts, (*a*) Fatwa-i-Kazi-Khan, section 306, joining of two sisters in marriage makes the marriage with the second void (*batil*); see Mahomed Yusuf's Tagore Law Lectures, Vol. II, pp. 111, 112.

(*b*) Hedaya, Bk. 2, Chapter I; Hamilton p. 78; Grady, p. 28. It is unlawful to marry and cohabit with two women being sisters.

(*c*) Kifaya, Vol. I, p. 1, marriage can be only with a *mahal*, i.e., fitting subject.

(*d*) Viquaya:—The connection should be in the way required by law.

(*e*) Inaya:—The general condition of marriage is competency in the matter of sanity and majority and a fitting subject (*mahal*) and *mahal* is a woman to whose marriage there is no legal bar.

(*f*) Kohistani, Vol. II, p. 248:—There is no difference between *batil* and *fasid* in the matter of marriage.

(*g*) Rudd-ul Muhtar, Vol. II, p. 444. This commentary supports our submission.

As to the text writers: (*a*) Wilson, p. 48, it is quite clear that the Calcutta view is right. He interprets

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the prohibition as being mandatory. If once the marriage is illegal then consummation can have no effect; (*b*) Ameer Ali is no doubt against me but he is answered by the Calcutta Judges; (*c*) Abdul Rahman merely sets out what he infers to be the rule to be found from Fatwa and Tahtawi; his Book (Institutes of Mahomedan Law) is only a collection of extracts from certain books. Even he classes such a marriage as absolutely void (Articles 134 and 135); (*d*) Abdul Rahim's comment is only by way of passing. He does not give a decided opinion, though from the language used it is possible to suggest that he agreed with Ameer Ali.

The case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] is also based upon a previous authority of that Court: *Shureef Oonisa* v. *Khizur Oonisa Khanum*[2].

T. R. Desai, in reply.

BEAMAN, J.:—The only question we have to answer is whether Tajbi is, under the Mahomedan Law, the legitimate daughter of Hussankhan.

The admitted facts are that he first married Amabi, and subsequently her sister Sadabi, who is the mother of Tajbi. The later marriage took place during the subsistence of the marriage with Amabi, and both sisters appear to have survived him.

The same question arose in the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*.[1] The Calcutta High Court held that the issue of a sister of the husband's first wife, if the second marriage was contracted or consummated during the continuance of the first, that is before the sister first married had died or been divorced, was illegitimate.

We are unable to agree with that view of the Mahomedan Law. There is nothing in the reasons to be

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found in the judgment, there is nothing in the mass of material upon which the judgment is based, which, in our opinion, would warrant a Court in over-riding so high and so clear an authority as the Fatwa-i-Alamgiri.

Briefly the reasoning of the learned Judges in the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] may be thus summarized :—

(1) No distinction can be drawn from the language of the original text in the Quran between the prohibited women mentioned in it.

The words used suggest no such distinction or any intention to make it.

It cannot be maintained on grounds of law, or reason, or even when looked at in the light of common sense.

(2) The weight of authority (contained in the writings of accredited authorities on the tradition, and the law) is against the law laid down in the Fatwa-i-Alamgiri.

(3) The reasoned conclusions of Baillie upon the point, set forth in Chapter VIII, Bk. I, are his own, and are not drawn direct from his chief authority, the Fatwa-i-Alamgiri. They are, therefore, entitled to no more weight than the opinions of any other modern writer on the Mahomedan Law. Similarly, Ameer Ali, in summing up this topic, is not clear, and even if his considered opinion is the same as Baillie's, it is certainly of no higher authority.

(4) Doubt has been thrown upon the authority of the Fatwa-i-Alamgiri by later Mahomedan lawyers such as the author of the Rudd-ul-Muhtar ; and

(5) The text directly in point professes to be based upon the authority of the Muhit of Sarakhshi (1096), the original of which was not before the Court.

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The learned Judges of the Calcutta Court recognized, and accepted the classification of marriages with prohibited women in two categories: (1) Those which were "*batil*" or absolutely void, and (2) Those which were "*fasid*" or only invalid (or irregular). Also they recognized and accepted the general rule regulating the resultant legal consequences of marriages falling within the one or the other category. Void marriages could have no legal effects, invalid marriages, if consummated, could. Last, they also appear to have accepted the criterion in general use for determining whether a marriage with a prohibited woman should be classed in the category of void, or of invalid marriages. This criterion is to be sought in the nature of the prohibition; if that be permanent, then the marriage is void, if temporary, then the marriage is invalid. Adopting the classification, its legal consequences, and the test, the Judges held that a marriage with a sister during the subsistence of a prior marriage with her sister was void, and whether consummated or not, had no legal consequences, and that this was so because the prohibition against marrying two sisters together was a permanent prohibition, and brought a wife's sister within the "moharrim" or (in effect) the pale of incestuous adultery. It will thus be seen that the true foundation of the judgment was the very strong opinion the learned Judges held upon the true and intended meaning of the passage in the Quran. There is now a general consensus among the best modern text-book writers on Mahomedan Law, that the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*[1] was wrongly decided. Whether Ameer Ali was clear upon the point in his book then before the Court or not, he has made his own view unmistakably clear in later editions.

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In dealing with a point of this kind it is well to remember that where the origin of law lies in Revelation, Divine or semi-Divine communication, or inspiration, the form of expression is almost certain to be extremely compendious. For all purposes of modern jurisprudence and applied law, derived from such sources, Courts have almost invariably to draw upon the amplification of the first Revelation, taking the form of Treatises, themselves some times sacro-sanct, and later of mere commentaries of admittedly human origin. In administering the Hindu Law, English Courts rarely, if ever, have recourse to the Shrutis. The Smritis of Manu and Yajnavalkya, e.g., being, if not actually, Divine, sacro-sanct, are, wherever expressly applicable, of paramount authority. But in practice the Courts of India rely far more upon the critical commentaries, such as the Mitakshara, the Mayukha, and in Bengal, the Dayabhaga.

In interpreting a highly condensed text such as that in the Quran, prohibiting certain women, supposing the actual words to leave any material point ambiguous, the Courts must look to the way in which the most authoritative exponents of the law thus enjoined have understood it, and to what extent traditions thus legitimately moulded have gradually come to be established, and accepted as integral parts of the Mahomedan Law, as long as that law was administered by Mahomedan lawyers in Mahomedan Courts. The Fatwa-i-Alamgiri stands in much the same relation to the Mahomedan Law, first revealed it is true, but later going through a long process of traditional interpretation and resultant moulding in the hands of sages and learned lawyers, as the Institutes of Justinian stood to the Roman Law which had preceded them. The Fatwa-i-Alamgiri was an authoritative exposition of what the Mahomedan Law was, at a time when Mahommedanism was at the height of its power in this country.

By the time of Aurungzeb, Mahomedanism, as a temporal power, had perhaps passed its zenith, but through the centuries which separated Mahommed, from the leading lawyers of Aurungzeb's Empire, Mahomedanism had absorbed and represented in more than one important sphere the highest mental culture. The codification of the Mahomedan Law, as it had, in the meanwhile, been shaped by its leading exponents, was the work of men, whose minds may be allowed to have been strictly trained, to systematize, and reduce to coherent and practically applicable principles, much that had been matter of dispute, uncertainty and controversy. And where the authors of the Fatwa-i-Alamgiri announce without doubt or qualification the legal limits and proper mode of administering the law the prophet had in mind, in such a connection as this, we do not see where Courts can look for better authority, or why they should set themselves to interpret over again what was thus declared in the plainest and simplest language. In this connection reference may be made to the observations of the Privy Council in *Aga Mahomed Jaffer Bindanim* v. *Koolsom Beebee*[1]. Their Lordships say that "they do not care to speculate on the mode in which the text quoted from the Quran, which is to be found Sura II, vv. 241-2, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and high authority."

Abating the authority of such a passage as that upon which we are commenting from the Fatwa-i-Alamgiri, by pointing out that it is expressly based upon an earlier work, the Muhit of Sarakhshi, which the learned Judges would have wished to see for themselves,

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appears to us to miss the point. In the first place it is, to say the least of it, unlikely, that any two English Judges would have been more competent to give a text from the Muhit its real meaning than the compilers of the Fatwa-i-Alamgiri. In the second place the citation of authority in such a book as the Fatwa-i-Alamgiri, whether or not its meaning may be capable of other interpretations, need be taken no further than this, that what is expressed upon it is what, in the considered opinion of the Authors of the Fatwa-i-Alamgiri, is the right law. That, and that alone, appears to us to be what Courts are first to consider in valuing the authority of the Fatwa-i-Alamgiri. Thirdly, whatever may now seem to be the literal face meaning of a passage in the Quran, Courts cannot forget that the law flowing from that Revelation had by the time the Fatwa-i-Alamgiri was published, been administered in Mahomedan Courts under the rule of Mahomedan Sultans and Emperors for ten centuries, and therefore that the exposition of it at that time by the highest available legal talent, by all the best jurists in the service of Aurungzeb ought to be highly respected. Last, we cannot admit that such a work as the Rudd-ul-Muhtar, written as late as 1817 A.D., can be or ought to be weighed, as authority, against the Fatwa-i-Alamgiri. The Mahomedan Empire of India had long been extinct. The author (from whom immensely long and often highly confused and sometimes altogether irrelevant excerpts have been made in the Appendix to the judgment of the Calcutta High Court), is extremely dogmatic, and gives many indications of the high opinion he entertains of himself. But it is safe to say that no Mahomedan would put him upon the same level, or anywhere near the same level, as the compilers of the Fatwa-i-Alamgiri. We have no right to discredit the latter because the Rudd-ul-Muhtar throws doubt upon its authority.

Before considering the text in the Quran, these propositions may be stated. We do not think any one of them will be seriously disputed.

(1) The prohibited women fall into three classes: (*a*) those who are prohibited for consanguinity; (*b*) for affinity; (*c*) for unlawful conjunction.

(2) The ground of permanent prohibition is that marriage with a woman so permanently prohibited would be incestuous at any time by reason of consanguinity, or at any time after the bar had been established by affinity.

(3) The grounds of temporary prohibitions are various. But the notion of incest certainly underlies the particular prohibition now under discussion. But the ground of the prohibition, confined to that notion, is clearly not permanent. It is incestuous to have two sisters in marriage together; but it is not incestuous to marry a wife's sister after the wife has been divorced or died. It at once becomes clear that, unlike the cases of permanent prohibition for affinity (although this too is referable to affinity for its substantial reason) the prohibition will not survive the removal of the person by death or divorce, marriage with whom has first set up the bar of affinity. No one has yet contended that a Mahomedan may not marry his wife's sister, merely because she was his wife's sister. Here then is a case of continuing condition, or obstacle, which ceasing to exist, the disability disappears. Otherwise, in all cases of permanent prohibitions for consanguinity or affinity. The distinction is quite simple and plain. On the ground of affinity a man is permanently prohibited from marrying his mother-in-law or his step-daughter. He could not marry them after the death of his wife. But a man is not permanently prohibited, on the ground of affinity or any other ground, from marrying his wife's

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sister. After his wife's death, he may of course marry her sister. It seemed to the learned Judges of the Calcutta High Court that no reason could be given for such a distinction, and when they looked at the matter in the light of common sense, they were equally at a loss. Even were that so, Courts must not be too exacting in getting at sound reason for all the rules laid down in Oriental, archaic, often very arbitrary, systems of law.

(4) Marriage with a permanently prohibited woman is void, and has no legal consequences. Marriage with a temporarily prohibited woman, if consummated, may have legal consequences.

(5) Three principal consequences are: Right to dower, Obligation to perform *iddat*, Legitimacy of issue, "the establishment of *nasab*, or paternity."

To be clear whether a marriage is absolutely void, or only invalid, or irregular, or illegal (the latter word appears to be used loosely, and applied to both classes of marriage) it is necessary to enquire whether one or more of these legal consequences flow from the marriage under any conditions. If they do, then the marriage cannot have been void.

Next we will state what we think to be the only principle upon which our Courts can hope to regularize the administration of the Mahomedan Law upon the point. It needs to be systematized, and placed upon a solid ground of intelligible and virtually universal principle, if we are ever to be freed from the chaos of texts, glosses, definitions, illustrations, distinctions and exceptions which most of the Doctors of the Mahomedan Law abound.

Confined to the question we have to answer, and leaving aside for the moment express authority where the legitimacy of the issue of a marriage is disputed, it must be first found whether the marriage was

absolutely void, or only invalid. The test is whether the woman married was permanently, or only temporarily, prohibited. If it be found that she was only temporarily prohibited, although the contract made while that prohibition persisted, was a void contract, if followed by sexual intercourse, the woman will be entitled to dower, will be under obligation to perform *iddat*, and the issue if born after six months will be legitimate.

We will now deal with the text in the Quran. It runs as follows in Sale's translation[1]. "Ye are forbidden to marry your mothers, and your daughters, and your sisters, and your aunts both on the father's and on the mother's side, and your brother's daughters, and your sister's daughters, and your mothers who have given you suck, and your foster sisters, and your wives' mothers, and your daughters-in-law (step daughters?) which are under your tuition, born of your wives' unto whom ye have gone in (but if ye have not gone in unto them, it shall be no sin in you to marry them), and the wives of your sons who proceed out of your loins; and ye are also forbidden to take to wife two sisters, except what is already passed: for God is gracious and merciful."

The literal translation is "made unlawful upon you, your mothers and your daughters and your sisters &c., &c., and to join together two sisters, &c."

This makes it clear beyond doubt that what was forbidden was not marriage with a wife's sister, but "joining together two sisters," in other words, this prohibition is against unlawful conjunction, and from its very nature temporary. Had the text borne the meaning put upon it by the Calcutta High Court, the wife's sister would have been expressly prohibited, as all the other women are. This strikes at the root of most of the reasoning in the judgments of the Calcutta High Court,

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and deprives it of much of its force. It might be argued that although a marriage is temporarily and not permanently prohibited, yet, if it takes place in fact while the temporary prohibition is in force, it is as void as though it had been permanently forbidden. If that were really so, it would destroy one of the principles upon which the sound and systematic administration of this part of the Mahomedan Law in our Courts must rest.

But we doubt whether it is. Rigorously analyzed the ground of the doctrine, that a marriage with a woman permanently prohibited is absolutely void, is simply that from the moment that prohibition takes effect, any sexual connection with her must always be incestuous. And no issue of necessarily incestuous intercourse can ever be legitimate. But even on the confused dicta of the Mahomedan lawyers, it would not be contended that where a man simultaneously married two sisters, and had intercourse with them both, but could not remember with which first, and both had issue, such issue would be illegitimate. In such circumstances it seems to be agreed that both sisters would be entitled to dower, would both be obliged to perform *iddat*, and presumably therefore the children of both would be legitimate. *Nasab* would be established. Yet it is equally clear and certain, that having regard to the prohibition against marrying two sisters at once, if that rests upon a basis of such marriages being incestuous, in the case supposed the children would be the children of incest, or at any rate one of them would, though it might be difficult to say which. Again if a man married first A and then while A was still alive, her sister B, and had intercourse with B and begot a child upon her, and the very same night A died, it may be doubted much whether any one would contend that the child so begotten must be illegitimate. Such an example introduces the always illusive and difficult

time element. If it really would have the play above attributed to it, then it is clear that the incestuousness of the act which brought the child into being would not be the true determinant. In every case of permanently prohibited women it would. No matter when the act of procreation took place if by reason of consanguinity or affinity the woman was permanently *haram* to the man, the child born of their union would be illegitimate. An examination of the text-book writers old and relatively modern puts it beyond all doubt that in numerous instances of temporary prohibition, all the legal consequences of marriage may follow, if in fact there has been consummation. In all these cases, there is no incest, and *time* is always the determinant factor. In dealing critically with a topic which has been subjected to such interminable examination, and fine drawn distinction, the difference between incest and adultery must never be lost sight of. Fornication or adultery was severely punished under the Mahomedan Law, and a great part of the extracts appended to the judgment in *Aizunnissa's case*[1] is devoted to this question of punishment. It has little if any relevance to the question we have to answer. It has now been shown, we hope conclusively, that the Quran was incorrectly interpreted by the learned Judges of the Calcutta High Court, and that rightly read, it allows full play to the principles upon which we would decide this case.

We propose now as briefly as possible to summarise the collection of texts appended to that judgment, omitting all that is not relevant to the matter in hand. It is a great pity that this was not done before the ill-digested mass was printed in the appendix. We venture to say, after having gone through it all, that it ought to have been carefully sifted; that a

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great deal of it is quite irrelevant, and much also is utterly unintelligible, even, supposing if any sense could be extracted from it, that would be relevant. The plain truth is that many of these early writers in their desire to define and distinguish, and systematize, went far beyond their powers, with the inevitable result, that instead of clearing the points they were discussing they have rendered them hopelessly obscure. We need only refer to the treatment of errors in act and errors in subject. That dissertation, which is meant to be extremely subtle, profound and semi-metaphysical, is in fact only unintelligible verbiage.

A careful analysis of the materials available will show that there is nothing in them prior to the promulgation of the Fatwa-i-Alamgiri, which necessarily impairs the soundness of the doctrine therein enunciated upon this point.

In the Fatwa-i-Kazi-Khan (A. D. 1190) it is written :—"Another of those classes is the joining of two sisters in marriage, whether they be free women or female slaves ; then if the husband has married them together (that is, by one contract), the marriage with both of them is void (*batil*) ; but if he has married them consecutively, (that is, one after the other), the marriage with the first is valid, and the marriage with the second is void (*batil*)....And if a man marries a woman, and he afterwards marries her sister, the marriage of the first is valid, and that of the second is void (*batil*)."....."If a man marries a woman by an invalid marriage and co-habits with her and gets a child by her after six months, the *nasab* will be established from him."

Here certainly the writer describes without qualification the marriage with the second sister as "void" (*batil*). But it may be doubted whether he was

laying down more than a general proposition, without particular regard to the nice distinctions afterwards drawn so profusely between the legal consequences of a void and an invalid marriage.

Hamilton's Hedaya (A. D. 1190), "*It is unlawful to marry two sisters.*—It is not lawful to marry and co-habit with two women being sisters, neither is it lawful for a man to co-habit with two sisters.....because the Almighty has declared that such co-habitation with two sisters is unlawful." This carries the matter no further, and what follows about the case of a man marrying two sisters at the same time without being able to say which was first married has but an indirect bearing upon the question. Like all other passages on that topic however the principle is that where no priority can be established the marriage of both must be dissolved, and each must have half the dower. To that extent it is clear that such a marriage is not void. Then follows a passage which lays down that a woman is not entitled to any dower for an invalid marriage which has not been consummated. But in case of consummation she is entitled to her proper dower.

The next passage is from the Hedaya, Book II, Chapter 3. "The descent of a child born of a woman enjoyed in an illegal marriage is established (in the reputed father), because in this, regard is had to the child's preservation, &c."

Under the extract from the Hedaya, Book VII, Chapter 5, dealing with slander, the following passage occurs:—"It is to be observed, as a rule, that punishment for slander is not incurred by the accusation of any person guilty of such a carnal conjunction as is in its own nature unlawful, because the term whoredom (*zina*) signifies a carnal conjunction of this description: but where a person forms such a carnal connexion as

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is unlawful on some other account, punishment for slander is incurred by the accusation of him, as a carnal conjunction of this description is not whoredom. The connexion of a man with a woman who is not his property in any shape whatever (such as a strange woman), or with one in whom he has no property in some one shape (as in a partnership slave, for instance), is unlawful in its own nature; so also is his connexion with a woman who is his slave, but who is one with whom co-habitation is unlawful to him by a perpetual illegality (such as his foster-sister); but his connexion with a slave with whom co-habitation is unlawful to him by such an illegality as is not of a perpetual nature (as in the case of one with whose sister he co-habits either as his wife or as his slave) is unlawful on another account." "That is to say," says the marginal note, "although it be not unlawful in its own nature, yet it is made so by circumstances; but this is not a perpetual illegality, as the prohibition (in the instances here cited) would be removed by the death or other means of removal of the sisters, contrary to perpetual illegality, which existing in the subject herself, can by no means be removed." This passage and the commentary thereon in the Inaya subsequently noticed support the view advanced in this judgment.

Kanz-ud-Daqaiq (A. D. 1300). "In a case of invalid marriage the customary dower becomes obligatory where there has been co-habitation.....and the paternity will be established, and the *iddat* will be obligatory."

Sharhi Viqaya (A. D. 1349). "In the case of an invalid marriage nothing will be obligatory unless there be co-habitation, even if there be valid retirement. (But) if he were to co-habit he will have to pay the customary dower.....and the parentage will be established from the time of co-habitation."

All these citations show that in invalid marriages co-habition validates them for all practical purposes. But they do not touch the main question, viz., whether the marriage of a sister while the marriage with her sister subsists is merely invalid, or wholly void.

A passage from the Inaya (A. D. 1384) merely goes to show that marriage establishes, *inter alia*, the bar of affinity, and instances the case of sisters. The meaning simply is that when a man has married one sister, the other sister becomes (*haram*) unlawful to him.

The Inaya has this passage Vol. II, p. 10. "The Hedaya has confined the case to two contracts, because if he marries them (sisters) by one contract, the *nikah* is *batil* on account of *juma* (or joining) between two sisters, and therefore they will not be entitled to any dower; and he has confined the case to one where the husband does not know which marriage is first; because if he knows this, the *nikah* of the second is *batil*.....The Kazi will separate the wife and husband in the case of a *fasid* (invalid) marriage. *Easid* marriages are, for example, a marriage without witnesses, the marriage of a sister during the *iddat* of another sister, of a fifth wife during the *iddat* of the fourth wife, &c., and the *nasab* of the son of her (that is, the wife in a *fasid* or invalid marriage) will be established...."

The conjunction of these passages is intended to show that the writer treats the marriage with a sister during the subsistence of a marriage with her sister as absolutely void, and not within the group of "invalid" marriages of which examples are given. That is a fair construction no doubt. But the authority is neither pointed nor conclusive.

Again we have another passage from the Inaya, which deals with *haram* or unlawful intercourse. This is said to be of two kinds, that which is unlawful

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in itself, and that which is unlawful for some other reason. Under the second class we find an instance of intercourse with two slaves who are sisters, and it appears that this is more or less condonable. But the writer was evidently not thinking of marriage. The Inaya, also Volume II, p. 496, commenting upon the passage with reference to slander in the Hedaya observes: "The accuser in the second class shall be subjected to punishment, because the illegality in this class is on account of a temporary cause which is susceptible of being removed. Dost thou not see that when a *majusi* (or fire-worshipper) woman accepts Islam, or when one of the sisters goes out of the ownership of the man, then it shall be competent to the man to have intercourse; therefore the intercourse is not *zina*, and the accuser of the man shall be subjected to punishment. And the remaining portion (of the Hedaya) is clear (not requiring commentary)."

The Aynee (A. D. 1446) a commentary on the Hedaya contains this passage, dealing with the marriage of two sisters "because if the man marries them by one contract, the marriage is *batil* on account of *juma* (or joining) between two sisters, and therefore they will not be entitled to any dower, and the Hedaya has confined the case to one where the man does not know which is first; because if he knows this, the marriage of the second is *batil*." All this appears to be written with special reference to the right of dower.

In the Fath-ul-Qadir (A. D. 1456) there is an interesting little passage to this effect. "If a man were to marry his slave girl to another man, while she is pregnant by the (former) man, the marriage is *batil*, (Hedaya)." "The expression 'the marriage is *batil*' is said by some (to mean) *fasid*, as mentioned above, and there is no difference in marriage between them (*batil*

and *fasid*) contrary to (the case of) sale." This shows that at that time the distinction between void and invalid as applied to marriage, which has come to be so much insisted upon, was not valued very highly. The same author states that the Hedaya in dealing with the question of the marriage of two sisters has confined the case to one where the man does not know which was first married, because if he does the prior marriage is *sahih* or valid, while the second is *batil* or void. But in view of what he had already said about there being no real distinction in marriage between *batil* and *fasid*, not much importance need be attached to this.

Zakhairat-ul-Uqba (A. D. 1496) enumerates instances of "*fasid*" marriages which would appear to be incompatible with the inclusion in this class of such a marriage as we are here dealing with.

Jamai-ur-Rumuz or Kohistani (A. D. 1534). "To a man is unlawful his near root, which is his mother, ...and it is permissible that unlawfulness be explained by *fasid* and *batil*, because there is no difference between *batil* and *fasid* in the matter of marriage." Such views may explain practically every thing we find in the texts and commentaries so far which may appear to conflict with the more liberal, and, we think, more sensible view taken of this question in the Fatwa-i-Alamgiri.

The same author goes on to say "And in *nikah* which is *fasid*, that is *batil*, as, for instance, a marriage with a woman prohibited perpetually or temporarily, or with a woman on whose behalf there has been compulsion, &c.,...if the man has had no intercourse then nothing shall be obligatory on account of the dower fixed...or *iddat*, or maintenance, although he might have validly retired with her....And if he has

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had intercourse with her and admits the fact, then the *nasab* shall be established from him, if she gives birth to the child after six months from the intercourse according to Mahommed."

In the section on punishment in the same treatise we find this passage, "and it drops," (punishment ceases) in respect of the man who has intercourse "from doubt.....as if a man marries a woman without witnesses, or a slave girl without the permission of her master, or a slave girl upon a free woman, or a *majusi* woman, or five women in one contract, or joins two sisters, or marries his *maharrim*." Here we have a glaring example of the laxity of grouping or classification characteristic of so much in the Mahomedan Law books.

Next in order comes the passage from the Fatwa-i-Alamgiri, which is in our opinion decisive. It runs as follows: "If two sisters are married in one and the same marriage, the Kazi will effect separation between them and him (the husband). If the separation takes place before co-habitation nothing will be payable to them (the sisters). But if the separation takes place after co-habitation, each of them will be entitled to the smaller amount of the two, namely, customary and fixed dowers. This is the *Muzmirat*. But if the two sisters are married by two marriages, the second marriage is *fasid* (invalid), and it will be obligatory on him to put her away; and if the Kazi comes to know about the existence of such a marriage, he will separate them. If she (the second sister) is separated before consummation nothing will be established amongst the *ahkam* (legal effects of marriage). But if she is separated after co-habitation she will have the customary dower, and the lower of the two amounts of the customary and fixed dowers will be obligatory, and it will be obligatory on

her to observe *iddat*, and the *nasab* will be established ...This is in the *Muhit of Sarakshi*."

Then follow liberal extracts from the Rudd-ul-Muhtar, and one quotation from a commentary on the Dur-ul-Muhtar, of the year 1839. We do not propose to criticize these, because we do not consider that either is comparable with the Fatwa-i-Alamgiri.

It may be noted, however, that in the Mahomedan Jurisprudence of Mr. Justice Abdul Rahim, p. 330, it is stated that in the Egyptian edition of the Rudd-ul-Mahtad, Vol. II, p. 380, the marriage of two sisters is said to be *fasid*.

The above brief critical notice supports what we have said, that there is no sufficient ground for holding that the clear and explicit doctrine of the Fatwa-i-Alamgiri really conflicts with sound tradition or makes any innovation upon the Mahomedan Law as it had been gradually evolved up to 1660 A. D. Broadly speaking no doubt such a marriage as that of Saidabi in this case is prohibited and would be described as void. *Per se*, it certainly is void, in the sense that it is expressly forbidden. But since the reason for the prohibition is to be sought in the subsistence of a relation with another, and not in the blood of the woman married, it should not in any classification which aims at logical exactitude, be placed in the same catagory as those which are founded on incest. By 1660 A. D. the best Mahomedan legal opinion had expressed itself very definitely in favour of regarding such marriages as the one we are dealing with to be *fasid* only. This opinion seems to us to be founded upon the only intelligible, universal principle, upon which the Courts could deal with marriages some of which must be absolutely void, while others would only be relatively void, or invalid. That principle, as

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we have stated, is that the test and the only test to be applied is whether the woman in question is permanently or only temporarily *haram*. In every case of the kind the woman in question must be *haram*, and the difficulty is to decide when, although *haram*, she has in fact married a man and the marriage has been consummated, it is to be treated as absolutely void without any legal consequences at all, and when it is to be treated as bad indeed in inception, yet capable of having legal consequences. We see no other ground upon which such a decision can be based with the certainty that it will be uniform and consistent and applicable in every case of doubt than the permanence or otherwise of the prohibition.

It is true that in the case before us, considerations in favour of placing the marriage in one or the other category may so overlap each other as to make it hard to feel that the entire position is logically unassailable. But as contrasted cases diverge further from the point at which, in the present instance, they meet and seem to interpenetrate, the applicability of the test becomes more and more apparent and its use more efficacious.

Taking the whole current of authority and the general trend of informed thought on this subject, it points clearly to some such distinctions having always been recognized by the Mahomedan Law. Where that is so and a particular case on the borderland of such distinctions, to which it may be doubtful whether they can be applied in the ordinary way, arises, surely the Courts would be well advised to accept the authoritative statement of the law as it was then understood by the authors of the Fatwa-i-Alamgiri. It is impossible to say that that statement conflicts with the textual authority of the Quran. Speaking generally, it appears to us to harmonize with the course the law

took during the intervening period, and to be in consonance with the soundest practical principles. It has the support of such a great modern text-book writer as Baillie. The eighth chapter of his first book appears to us to reach conclusions by unanswerable reasoning, and while those conclusions may be his own, they are the conclusions of a writer of profound knowledge intimately versed at first hand with all the best writings of Mahomedan lawyers. The modern Mahomedan text-book writers, Ameer Ali, Tyabji, and Abdul Rahim, are in substantial agreement. All authority appears to us to point one way. Against this is nothing but the judgment of the Calcutta High Court in *Aizunnissa's case*,[1] and after having given it and the materials upon which it avowedly rests our most careful and respectful attention, we find ourselves wholly unconvinced by its reasoning and unable to agree with the law it lays down.

The result is that the decree of the lower Court must be varied by declaring that the plaintiffs are together entitled to a five-eighth share in the estate of Hussan-khan and they do obtain that share by partition of the plaint land. The mesne profits awarded must be increased proportionately to Rs. 375 and Rs. 125 a year until possession for future mesne profits from the defendant No. 1. The plaintiffs are entitled to three-fourths of the costs throughout.

Decree varied.

J. G. R.

[1] (1895) 23 Cal. 130.