RESPECTFULLY DEDICATED

TO

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GOVERNOR AND COMMANDER-IN-CHIEF OF THE
COLONY OF THE GAMBIA,
IN RECOGNITION OF HIS EFFORTS FOR THE IMPROVEMENT
OF THE CONDITION OF HIS MAJESTY'S MUSLIM
SUBJECTS ON THE WEST COAST OF AFRICA.

PREFACE.

In offering this little work to the public, it is necessary to say a word or two with regard to its purpose and the circumstances to which its appearance is due. In the first place it is hoped that it may be of general use to English students commencing the serious study of Arabic, with a view whether to the Indian or to the Egyptian service: its immediate *raison d'être*, however, is of a more special nature. The recognition of Muslim law, and especially such portions of it as relate to family rights, (marriage, succession, wills, gifts etc.) in our West African Colonies and Protectorates, has created a need for some handbook in which the principles (at least) of that law might be studied by commissioners and other legal officers on whom mainly falls the responsibility for its due administration. Unfortunately, at the present moment there is no work in the English language quite suitable for this purpose. Of general introductions to the study of Muslim law, it is true, two excellent examples are afforded in Sir R. K. Wilson's "Anglo-Muhammadan Law" and Mr. Ameer Ali's "Student's Handbook of Mahommedan Law": but both are written with a view particularly to Indian judicial arrangements and from a Ḥanafī standpoint. On the West African Coast, (as also over most of the

north-west of the continent) on the other hand, the rite of Mālik holds exclusive, or all but exclusive sway; and what, therefore, is required is a manual setting forth concisely the doctrines of that school. As a stop-gap, until some more complete work can make its appearance, it is hoped that these excerpts from Ibn Abū Zayd's treatise, together with the simple notes which we have subjoined, may prove acceptable to those for whom they are specially intended.

The Arabic text has been printed along with the translation for two reasons. (*a*) For the lawyer or administrator who is to take a useful part in the practical application of Muslim law, it is of the greatest importance, indeed one may almost say indispensable, to have some acquaintance with the original. To deal with questions involving the *status* and most important rights of one's fellow-subjects, relying solely upon translations and manuals in some European tongue, is to "swim on bladders" in deep water: the fact must be recognised at the outset, that here is no shallow study to be taken up and mastered in a few weeks, but a vast science in which the genius of the same people which gave arithmetic, algebra, trigonometry, astronomy, optics, chemistry and medicine to the western world, and generally stood at the cradle of modern science, has exhibited itself in all its power and exactitude. To acquire, therefore, the technology of the subject is the first and indispensable step towards sound knowledge: and for the encouragement of the beginner it may be added that, despite the marvellous and well-nigh inexhaustible richness of the Arabic

language in the domain of *belles lettres*, the conventional language of Muslim law is by no means so copious or varied as to defy any really earnest student; while the justness and preciseness of its employment will even at an early stage rouse his appreciation.

(*b*) The second reason is almost the converse of the first. It is the authors' earnest hope that this little work, besides being useful for English readers in approaching the study of Arabic, may turn out to be serviceable also in some instances to Arabic scholars, both in West Africa and in Egypt, in acquiring a better knowledge of the English language. We have found ourselves in the course of considerable practical experience among natives, that a man may have a good knowledge of the one tongue, and considerable familiarity with the colloquial employment of the other, and yet be quite incapable of accurately rendering even a simple legal passage from the latter into the former, still less from the former into the latter. There exists among the un-Europeanised natives of the West Coast of Africa at the present day an amount of Arabic or semi-Arabic culture which is only now coming to be realised: among those who are Europeanised, on the other hand, western education has made great strides, and is making greater every day. The regrettable point is that few, if any, persons can be found properly equipped with both; while the vernacular speech of the country or tribe is useless, from its lack of technical development, for the conveyance of any beyond simple ideas. The situation is a curious one—two great languages, each forming a *lingua franca* for indigenous

tribes as little known to the average inhabitant of the one country as they were to the Prophet of the other; and between the two, so far as law or grammar or any scientific subject is concerned, no communication, no bridge of any kind.

The "First-fruits" of Ibn Abū Zayd is in itself too small a bridge to span so wide a gulf; but if it can contribute in any way towards laying the foundations, its publication will not have been in vain. Already, in its original form, in the hands of great numbers of natives on the Coast, it ought in any case to receive some measure of welcome, such as is due to an old friend though dressed in a foreign garb.

In the notes we have occasionally made use of the excellent commentaries of al-Sharnūbī, Abū-l-Ḥasan and al-ʿAdawī. But in general, keeping in view the educational purpose for which this edition is intended, and seeking to avoid adding anything which would complicate the subject by the importation of new matter not essential to the comprehension of the text, we have inserted instead short explanations of our own as being more in accordance with this purpose. Some apology may seem due for the numerous appendices relating to Succession: but those who have themselves striven to master, still more to exhibit in a clear light for the guidance of others, the intricacies of that most troublesome branch of the law, will appreciate the impossibility of rendering intelligible even the general outlines of the subject as given by our author without running to considerable length. We have, it may be said, done our utmost to be concise and at the same

time simple: among other expedients to that end, making extensive use of cross-references within brackets so as to avoid digression and repetition.

We crave the indulgence of critics for mistakes, whether of omission or commission, which may be discovered in the work. Official and other duties, and the immense amount of labour involved in the preparation of a larger and more important work, have resulted in scant justice being done to what is truly a *parergon*. But the object in view being, not to offer to the world an exact compendium of the law, but merely to smooth the path of the student at the outset, it is hoped that what is good in the book may outweigh the defects and render it acceptable.

We have taken certain liberties with the text, which critics, it is hoped, may find excusable in view of the practical purposes aimed at in the preparation of this edition. We have, to begin with, selected only such portions of the original work as deal with those branches of the law which already have received, or it is believed are likely to receive, express legislative recognition in our West African Colonies, viz: civil status, marriage, succession, gifts, wills, and guardianship. We have omitted all references to the institution of slavery as being without general utility at the present day. We have divided the text up into three hundred and six separate rules, which we have numbered in Arabic characters, indicating the English translation of each by the corresponding European number: this arrangement, to which the concise and disconnected style of Ibn Abū Zayd's *dicta* naturally

lends itself, will, it is hoped, render matters clearer for the beginner, and also facilitate reference. The system of transliteration adopted is, with a few exceptions, that recommended by the Geneva Congress of Orientalists. In the translation of the rules, we have rendered the Arabic technical terms by English equivalents, sanctioned in general by the usage either (a) of Anglo-Indian writers, such as Hamilton, Ameer Ali, Wilson, etc., or (b) of Perron, Seignette, Zeys, and other French authorities; selecting in every case such expressions as seemed best fitted to convey to the beginner a correct understanding of the principle involved. In the notes, on the other hand, we have in a good many instances employed the original terms (walī, waṣī, ʿiddah, etc.,) as being shorter and more precise.

In conclusion we desire to express our indebtedness to Dr. Blyden of Sierra Leone for having brought to our notice the need existing for an English translation of the Risālah and the kind encouragement which he has given us in the enterprise. We can only regret that his multifarious other labours should have prevented this distinguished Orientalist from himself undertaking the work.

16th February, 1906.

INTRODUCTION.

GENERAL CHARACTERISTICS OF MUSLIM JURISPRUDENCE.

If there is one quality distinguishing above all others the legislative work of the Prophet of Islam, it is the quality of moderation. "Truth lies in the middle," خير الامور اوسطها: [1] in his unswerving adherence to this maxim lies the proof of his mission as a practical guide for human conduct, and the explanation of the permanence, during upwards of thirteen centuries enjoyed by the religious, and jural institutions which he framed. While other systems of jurisprudence have grown up, and run their course and passed away — or at the best have altered their whole character in such a manner that only the student of antiquities can identify in the living form the traces of the past — Muslim law remains at the present for all practical purposes the same as it was at the commencement. Within the sphere of family relations, (marriage, succession, wills, gifts etc.) more especially, it has undergone hardly any modification since the days of the author (born 312, died 389 A.H.) whose little work is here presented to the public. How is this unexampled continuance, this marvellous vitality, to be explained? The secret lies (1) in the moderation

[1] Cf. Kur-ān, 2, 137: "Thus have We made you a middle nation etc.": وَكَذٰلِكَ جَعَلْنٰكُمْ اُمَّةً وَّسَطًا الآية.

already referred to as exhibited by the great founder; (2) in the manner in which the spirit was caught by his immediate followers and carried by them into every branch and detail of the great legal systems which their learning and enthusiasm built up from the foundations laid by the master.

It will stand the student in good stead if he will bear this principle in mind as he advances into what might otherwise seem the needless complications of Muslim jurisprudence. "Truth lies in the middle"; but the difficulty is to find the middle, or, having found, to follow it through every branch and detail of social relations.

EXAMPLES OF THE MIDDLE COURSE CHOSEN BY THE PROPHET IN LEGISLATIVE MATTERS.

SLAVERY.

At the time when the Great Arabian lived, the institution of slavery existed everywhere throughout the world. In Arabia it prevailed extensively. That Muhammad wished to discourage slavery is certain [1]: notwithstanding this, we know him to have extended to it an implied and reluctant recognition. Why? Because slavery had a good side as well as a bad: the good side was that it mitigated the atrocities of

[1] لقد اوصانى حبيبى جبرائيل بالرفق بالرقيق حتى ظننت أن الناس لا يستعبد ولا يستخدم:

"Verily my friend Gabriel continued to enjoin on me kindness to slaves until I thought that people should never be taken as slaves or servants". Ḥadīth cf. Kur-ān, **90**, 14.

war. Tribal warfare went on throughout Arabia: war on a wider scale was about to commence with the outside world: in the former, in the latter, captives were or would be spared with a view to disposal in the slave-markets. To prohibit slavery was to decree the slaughter of all captives: this the Prophet saw, and for this reason, we may believe, more than for any other, he chose a middle course, viz: while tolerating the relation of master to slave, to strictly forbid any abuse of power by the former, and by the recognition of numerous methods by which slaves might, and occasions upon which they ought to be liberated, to promote the speedy enfranchisement of the whole population.

CONDITION OF WOMEN.

Arab women in the time of Muhammad were like chattels in the hand of their fathers, or of their husbands. In a not very remote past, however, it would appear, matters had been otherwise: descent was traced, not through males, but through females, and children belonged, not to the father's, but to the mother's tribe; with the result that women frequently acquired great wealth and influence, and enjoyed what according to all civilised ideas of morality must be considered an excessive freedom with regard to their relations with men. The Prophet took the middle course: he upheld the authority of the husband over the wife, as the surest safeguard of the honour and happiness of both; but laid down strict rules with regard to the manner in which wives were to be treated; not merely with

regard to the necessities of life, lodging, food, clothing etc., but with regard to the husbands' mode of conversing with them, the companionship which it was his duty to supply, etc., etc.

SUCCESSION.

In Muhammad's time, when a man died, his whole belongings passed to his nearest agnate (or male relative through males), who was of age and capable of bearing arms; e. g. his sons or son's son, his father or his brother etc. Maternal relations had no right to any share, while step-mothers were in a still worse position, inasmuch as they passed absolutely to the heir, who might retain them as wives or dispose of them by sale. This was the working-out of the system of descent through males. On the other hand, under the older system by which children were reckoned as of the mother's tribe, property would devolve from a man, not to his son, but to his sister's son, and the maternal bond was all-important. A remembrance at least of this earlier system lingered in the sympathies of the people; and the close and warm relations commonly existing between a man or a woman and his or her mother's relatives, came occasionally to disturb the natural course of devolution. Here, again, the course chosen by the Prophet was a middle one: he retained the more modern principle — as it then was in Arabia — of agnatic succession, but accorded recognition to the natural instincts of non-agnatic kinship, by assigning to the mother, (or failing her to

the maternal grandmother etc., a fixed share in the succession of the child), and granting her in case of repudiation the custody of her children till the age of puberty. Daughters also were admitted to share the succession along with sons, and sisters along with brothers, receiving as their share half that accorded to their brothers.

SCHOOLS OF MUSLIM JURISPRUDENCE.

A schism, dating back to the martyrdom of the great Caliph, ʿAlī, has divided the Muslim world into two great sects, known as: (1) Sunnīs; (2) Shīʿahs. It is with the former only that we have any concern in this little work; and the first point to note about them is that they are not themselves at one on all points, but on the contrary form no less than four distinct schools or rites. Chronologically, they may be enumerated thus: (a) Ḥanafīs, or followers of Abū Ḥanīfah, born at Kūfah 80 A.H., who, originally a Shīʿah, seceded from that party, and becoming a Sunnī distinguished himself equally by his subtlety and insight, and by the lengths to which he carried the process of analogical deduction (قياس). (b) Mālikīs, or followers of Mālik b. Anas, a judge in Medina, born 94, died 179 A.H., (795 A.D.) celebrated for the boldness and range of his decisions, but an upholder of tradition rather than of analogy, and author in the Muwaṭṭa' of the earliest considerable collection of ḥadīth extant. (c) Shāfiʿīs, or followers of Muhammad b. Idrīs al-Shāfiʿī, born at Ghazzah in Syria, 150

A.H. (819 A.D.), a strong traditionist, but relying also on analogy and agreement among the early jurists. (d) Ḥanbalīs, or followers of Aḥmad b. Ḥanbal, born at Baghdad 164 A.H., died there 241 A.H. (855 A.D.), a traditionist and author of a musnad or collection of authenticated reports of the sayings of the Prophet.

MĀLIKĪ RITE.

The Mālikī rite or school prevails in Upper Egypt, and over great part of the north and west of Africa. Of all the four schools it may perhaps claim the purest and most direct descent from the great lawgiver of Islam, free equally from the speculative tendencies which characterised the ʿIrāḳ jurists, and from the reactionary influences which had come to make themselves felt by the time that the two later schools came into existence. Somewhat rigid and formal perhaps on certain points as compared with the school of Abū Ḥanīfah, it has on the other hand the immense recommendation of having been from the outset a practical and living body of doctrine, growing up in the earliest home of the faith [1] and interpreted by real judges each of whom would in his time be the repository of of all that was best in the traditional practice and doctrine of the City. Mālik himself must have been in many ways a remarkable man: of good descent, he seems to have had every opportunity of acquiring sound knowledge; and of his many masters, he is

[1] Medina, "The City of the Prophet" (مدينة النبيّ).

reported to have said that there were few who did not subsequently come to consult him on some point of law. He would seem by one account to have been publicly proclaimed as the only m u f t ī or consulting lawyer to whom it was lawful to go for advice. He was careful and precise in repeating traditions; and would never ride on horseback in Medina, out of respect for the city in which the body of the Prophet lay interred. An anecdote related by al-Shāfiʿī with reference to him is as follows: "Muḥammad b. al-Ḥasan said to me: 'Which of the two is the more learned, our master or yours?' meaning Abū Ḥanīfah and Mālik. 'Do you wish,' I said, 'that I should answer with impartiality?' He replied that he did, and I said: 'Then I ask you before God, which of the two is the more learned in the Kur-ān; our master or yours?' 'Yours, to a certainty,' he said. 'I again ask you seriously, which of the two is the more learned in the Sunnah; our master or yours?' 'Yours, to a certainty,' he replied. 'I now shall ask you,' said I, 'which of the two is the best acquainted with the sayings pronounced by the companions of God's apostle; our master or yours?' 'Why, yours, to a certainty,' was the answer. 'Then,' said I, 'there only remain the analogical deductions (قیاس); and if they be not drawn from the three sources we have just mentioned, from whence can they be drawn'?" The great Imām's lack of subserviency and rigorous fidelity to principle seem to have called down upon him the wrath of the 'Abbasid dynasty: he was accused of declaring that an oath of allegiance taken to them was not binding,

and besides receiving a severe flogging was tortured by having his arm drawn out till the shoulder became dislocated. This treatment, however, only raised him still higher in public esteem; and he lived to a very advanced age, as much revered for his piety as honoured for his learning [1].

IBN ABŪ ZAYD.

This jurist, whose full name is Abū Muḥammad b. Abū Zayd [2], was born in Ḳairawān 312 A.H. and died 389 A.H. He was surnamed "the little Mālik" مالك الصغير; according to one statement because he received the law from the founder of the rite by no more than two transmissions, viz., through two other great jurists, Ibn al-Ḳāsim and Saḥnūn; but more probably on account of his learning and force of character. His little treatise on the law has for its full title the quaint description, Bākūrat-al-Saᶜd, "First-fruits of Happiness": it is, however, commonly known as the Risālah (i. e. treatise) of Abū Zayd. It is said to have been the first Mukhtaṣar or summary of the law composed in the school of Mālik. The style is elegant and simple, copious use being made of expressions and passages occurring in the traditional utterances of the Prophet as contained in the Muwaṭṭa', and other dicta belonging to the early period of the

[1] Further particulars concerning Mālik will be found in Baron De Slane's translation of Ibn Khallikan, vol. II, p. 545 seq.

[2] Vide Ḥajji Khalfa, al-Makkari, Vol. I, 553, and the Kitāb-al-Dībāj-al-Muzahhab of Burhān-al-Dīn b. ᶜAlī.

law. The student who masters the concise rules here laid down, will, on his further advance into the intricacies of Arab jurisprudence, find that in each of them he possesses the key to some great controversy which has been waged among the jurists. To those on the other hand who have toiled through the endless pages of the great commentators, and striven to grasp the truth where it lies hid amid the prevailing technicality and formalism, the simple maxims here contained may perhaps be welcome also, as a relaxation or a summary.

بسم الله الرحمن الرحيم

﴿ بابٌ فى النكاح والطلاق والرجعة والظهار والايلاء واللعان والخلع والرضاع ﴾

﴿ اركان النكاح ﴾

١. و لا نكاحَ إلّا بوَلِيٍّ وصَدَاقٍ وشاهدَىْ عَدْلٍ

٢. فَإِنْ لم يُشْهِدَا فى العَقْد فلا يَبْنى بها حتى يُشْهِدَا

﴿ الصداق ﴾

٣. و أقلُّ الصَّدَاقِ رُبْعُ دينارٍ

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1. The enumeration of the constituents of marriage given by Khalīl and other jurists is: 1) a walī to represent the woman; 2) a dower for her benefit; 3) two spouses, both free from any legal impediment; 4) a formula of giving and accepting in marriage. Abū Zayd passes the third over, probably as being a matter of course: his omission of the formula, however, may be intentional, i. e. being based on the view that no particular form of words is necessary to constitute a marriage. As to his mention of witnesses, see below, rule 2, note.

2. The author refers to the duty of the walīs with regard to اشهاد i. e. specially calling in suitable persons to take notice of the marriage, so as to be able to give testimony at

CHAPTER I.

MARRIAGE, DIVORCE, RETURN, INJURIOUS ASSIMILATION, VOWS OF CONTINENCE, ACTIONS OF IMPRECATION, RELEASE AND FOSTERAGE.

CONSTITUENTS OF MARRIAGE.

1. There can be no marriage, without: (a) a matrimonial guardian; (b) a dower; (c) two irreproachable witnesses.

2. If witnesses are not called to the contract, consummation should not take place till two witnesses have been called.

DOWER.

3. The minimum dower is a quarter of a dīnār.

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any time when required. An omission in this respect, however, will not be fatal to a marriage duly consummated, provided that in point of fact two suitable witnesses can be found who, though not specially called, were present at the marriage. This is شهادة testimony, as distinguished from the اشهاد explained above. "The validity depends on testimony (شهادة), not on the point of witness being called on to take notice (اشهاد)." Al-ʿAdawī.

3. Or three dirhams equivalent to about eighteenpence. By custom, however, a substantial dower (for example of ten pounds or upwards) is enforced in most Muslim countries at the present day.

﴿ الاجبر ﴾

٤. و للأَبِ انكاحُ ابنَتِه البكْرِ بغيرِ اذنِها و ان بَلَغَتْ و ان شاءَ شاوَرَها

٥. و أما غيرُ الأَب فى البكْر (وَصىٌّ أو غيرُه) فَلا يُزوّجُها حتى تَبلُغَ و تأْذَنَ

٦. و إِذْنُها صُماتُها

٧. و لا يُزَوّجُ الثيبَ أَبٌ و لا غيرُه الا برضاها

٨. و تأْذَنَ بالقول

٩. ولا تُنْكَحُ المرأَةُ الا باذن وَلِيّها أَوْ ذى الرَّأْى من أَهْلِها كالرَّجُل من عَشيرتِها أو السُّلْطان

١٠. وقد اُختلف فى الدَّنيَّة أَنْ تُوَلّىَ أَجنَبيًا

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5. Compare, however, with regard to a wasī's powers, the more explicit statement made in rule 14.

7. A thayyib means a woman who has in fact lost her virginity lawfully in wedlock; or who is by a conclusive presumption of the law held to have done so, on the ground that she has resided in her husband's house twelve months, she being then above puberty. Defloration by illicit relations will not render a woman thayyib.

9*b*. Commentators are not agreed as to the meaning of ذى الرأى. According to al-ʿAdawī it means one possessing the qualifications requisite for walīship.

RIGHT OF CONSTRAINT.

4. A father may give his virgin daughter in marriage without her consent, even if she has attained puberty; but if he pleases, he may consult her.

5. Persons other than the father, (such as a testamentary guardian etc.), may not give a virgin in marriage until she attains puberty and gives her consent.

6. A virgin's consent is silence.

7. Neither the father or any other can marry a woman who is not a virgin (thayyib) without her consent.

8. A woman (thayyib) must give her consent by speech.

9. A woman cannot marry without the consent (a) of her matrimonial guardian; or (b) responsible member of her family, like a man of her tribe; or (c) of the governing power.

10. There is difference of opinion whether a mean woman may authorise a stranger to act as her matrimonial guardian.

9c. The Cadi, as representing the governing power, may sanction marriages: (1) where it is necessary to marry an orphan between ten and fifteen years of age, in order to secure her honour, property etc. (2) where a woman has no special walī to represent her; (3) where her special walī is in a distant country and has settled there; (4) where a father maliciously refuses to marry his daughter, etc.

10. A *mean woman* means one who is not much sought after, e.g. being of humble birth, poor, a freedwoman, etc. A stranger may, when authorised by her, act as her walī even though she has a special walī; but not where that special walī is mujbir, i.e. is a father or waṣī entitled to employ constraint.