No. 13.—Appendix V to the Memorial; being extracts from a paper contributed by Sir W. Comer Petheram to the "Law Quarterly Review" for April, 1899, page 173, Volume XV, No. 58, entitled "English Judges and Hindoo Law."

In the year 1781, the right of the Hindoo and Mahomedan inhabitants of British India to regulate their lives and properties by their own law was recognised by an Act of the Imperial Parliament, and that right has since been repeatedly affirmed and re-affirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the High Courts. The Queen's Courts in India and the Judicial Committee of the Privy Council are therefore under the obligation to administer Hindoo Law to Hindoos and Mahomedan Law to Mahomedans, and have done so successfully where they have been able to ascertain what the Hindoo or Mahomedan Law on the subject in question really was. But the difficulty for an English Judge, who knows nothing of Sanskrit, and has had no experience of India, to ascertain what the Hindoo or Mahomedan Law is, must always be very great; and though the works of Hindoo and Mahomedan writers and the industry of Sanskrit and Arabic Scholars, both European and Indian, have in recent years, placed a large amount of information within the reach of students of Eastern Law and Custom, which was not before accessible to them, there is reason to fear that some of the decisions of the Judicial Committee, which are binding on all the Courts in India, are not in accordance with the law by which Hindoos and Mahomedans regulate their lives.

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Page 174.—As has been said before, the joint family is the cherished institution of the Hindoos. It is the institution which has enabled them to exist for ages without either a poor law or public hospitals or charitable institutions; and one of the most curious things in the history of the administration of Eastern Law by European Judges has been the persistent way in which they have attacked this particular institution, in the interest of the money-lenders, *in precisely the same way that they have attacked the Mahomedan families in India, in the interest of the same money-lenders, by refusing to recognise the Mahomedan family settlements, which are known as Wakfs, and by means of which Mahomedans in all countries are accustomed to protect their properties.*

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Referred to in paragraph 14, page 8, paragraph 30 (xx), page 17 of the Memorial.

Page 175.—It may not be quite accurate to say that the Indian Legislature is passing enactment after enactment for the purpose, but it is undoubtedly true that for years the Indian Legislatures and the Judges of the High Courts have been in vain trying to invent some scheme which would give back to the landowners some portion of the protection of which the Judicial Committee has deprived them.

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Page 184.—The outcome of all this is that as far as the Courts of law are concerned, the special distinguishing features of the Mitakshara joint-family system are abolished, and as far as the Courts could destroy it, the system has ceased to exist. *This, as must always be the case when the law of the Courts differs from the law of the people, has caused much misery and ruin, and has also in its own way tended to foster a feeling of distrust and discontent among certain classes.* But this is all that it has been able to do. Notwithstanding the decisions of the Courts, the Mitakshara joint undivided family with all its immemorial usages, customs and laws, continues, and will continue to be the system under which Hindoos, over by far the larger part of India, regulate and will continue to regulate their lives and fortunes. The cause which appears to have been most active in maintaining the differences which exist between the law of the Courts and the laws of the people of India, is the doctrine held by the Judicial Committee that as they are the Final Court of Appeal, they are unable to reconsider their own decisions, but, that whatever may have been the law on any subject, before a decision of theirs was pronounced, after their pronouncement the law is as they have declared it and can only be changed by legislation. This doctrine is no doubt beneficial as regards the House of Lords, as the Law Lords are in touch with the people affected by their decisions; and if they do not commend themselves to the desires of the community affected by them, the law can be changed by Parliament. But the case of the Privy Council in its relation to India is very different. Very few of its members have much knowledge of India and fewer still have ever been much in touch with the Indian peoples, and it would be very difficult to change either the Hindoo or Mahomedan Law as declared by the Privy Council by legislation. The Queen's Courts are under the obligation to administer Hindoo Law to Hindoos and Mahomedan Law to Mahomedans, and any attempt by the legislature to change, what had been declared by the highest tribunal to be Hindoo or Mahomedan Law, unless it were to premise, that the highest tribunal had been misled in some of its declarations as to such law, would look very like an infringement of

the rights of the Indian peoples, which were created by Statute in 1781, and have since been over and over again recognised and confirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the Courts.

W. C. PETHERAM.

No. 14.—Appendix VI to the the Memorial; being extracts from Sell's "Faith of Islam" on Zakat and Ijtihád.

NOTE TO CHAPTER I.

IJTIHÁD, *page* 32.

QUESTIONS connected with Ijtihád are so important in Islám, that I think it well to give in the form of a note a fuller and more technical account of it than I could do in the Chapter just concluded. This account which I shall now give is that of a learned Musalmán, and is, therefore, of the highest value. It consists of extracts from an article in the Journal Asiatique, Quatriéme Série, tome, 15, on "Le Marche et les Progres de La Jurisprudence parmi les Sectes orthodoxes Musalmanes," by Mirza Kázim Beg, Professor in the University of St. Petersburg.

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"Orthodox Musalmáns admit the following propositions as axioms :—

1. God the only legislator has shown the way of felicity to the people whom He has chosen, and in order to enable them to walk in that way He has shown to them the precepts which are found, partly in the eternal Qurán, and partly in the sayings of the Prophet transmitted to posterity by the companions and preserved in the Sunnat. That way is called the "Sharí'at." The rules thereof are called Ahkám.

2. The Qurán and the Sunnat, which since their manifestation are the primitive sources of the orders of the Law, form two branches of study, *viz.*, Ilm-i-Tafsir, or the interpretation of the Qurán and Ilm-i-Hadís, or the study of Tradition.

3. All the orders of the Law have regard either to the actions (Dín), or to the belief (Imán), of the Mukallifs.*

4. As the Qurán and the Sunnat are the principal sources from whence the precepts of the Sharí'at have been drawn, so the rules

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* A Mukullif is one who is subject to the Law.