
AL - FIQAH
(ISLAMIC JURISPRUDENCE)

VOLUME THREE
MU'AAMLAAT (AFFAIRS)

- Part – I Manakahaat (Matrimonials)
Part – II Maaliyaat (Property)
Part – III Mazari'at (Cultivation)

BY

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Islamic Laws, relating to “Mu’aamlaat” (Affairs) of the Human L in this compilation, have been divided in Fifteen Parts, given in volumes III, IV, and V, as per details given below.

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BOOK – I
NIKAH (MARRIAGE)

(MARRIAGE)

*(Hidayah, Kitab-un-Nikah)*Note

Allah says, "whoever among you cannot marry free believing women, (let him marry) such of your believing maidens as your right hands, possess" (Qur'an, Ch. 4 (Nisa), verse 25), and the Holy Prophet Muhammad (peace be upon him) has said, "Nikah (Marriage) is my "Sunnah", whoever has no inclination towards my "Sunnah" is not of me." (*Al-Sunan*); and that "O Assembly of young ones, whoever of you has the power, he should marry (*Muslim*)

CHAPTER 1

THE MARRIAGE CONTRACT

1. FORMS

Marriage is contracted by means of declaration (Eejaab) and Acceptance (Qubool), both to be expressed in the past tense. First declaration is to proceed from the one, and then Acceptance from the other, party to the marriage.

Marriage may also be contracted by the parties expressing, one in the imperative, and the other in the past tense; as if a man says to another, "contract your daughter in marriage to me", and the other one says, "I have contracted my daughter in marriage to you."

Marriage may also be contracted by the use of the word "Nikah", as if a woman says to a man, "I have married myself to you for so much "Mehr" (dower), and the man says, "I have accepted", or by the word "Tazweej", in the same manner; or by the word "Hibah" (gift), as if the woman says, "I have bestowed

* Qur'an Ch. 2 (Baqarah), verses 221, 232, 234, 235, Ch. 4 (Nisa), verses 3, 22, 23 to 27; Ch. 5 (Maa'idah), verse 5; Ch. 24 (Noor) verses 3, 26, 32, 33; Ch. 33 (Ahzaab), verses 6, 37, 50; Ch. 60 (Mumtahanah), verse 10; Mishkaat, Kitab-un-Nikah, 'Airunh Hidayah, Vol. II, pp. 3 to 145.

myself upon you", or similarly by the word "Tamleek" (consignment), as if the woman says, "I have consigned myself over to you", or by the word "Sadaqah" (alms), as if the woman says, "I have given myself as "Sadaqah" to you."

Note : In cases of Hibah,, Tamleek and Sadaqah there is no Mehr (dower).

Marriage may also be contracted by the use of the word "Bai" (sale), as if the woman says, "I have sold myself into your hands."

Marriage, however, cannot be contracted by the use of the word "Ijarah" (hire), as if a woman says, "I have hired myself to you for so much" ; nor by "Ibahat" (permission) ; nor by "Ehlaal" (rendering lawful) ; nor by "Aariyat" (loan) ; nor by "Wasiyat" (will).

2. WITNESSES

Marriage cannot be contracted without the presence of two male witnesses, or one male and two females, who should be free, sane, adult and Muslim, whether of established integrity of character or not, or may ever have suffered punishment as slanderers. Faasiqs (i.e. not being 'Aadils) or unjust persons can also be the witnesses.

Evidence of slaves, insane, idiots, minors and infidels is not valid.

Two male infidels can, however, be witnesses of the marriage of an infidel woman to a Muslim man.

The negotiator of the marriage can also, in certain cases, be a witness to it.

Section

PROHIBITED DEGREES *
(*Fasl Fee Bayan-il-Muharramaat*)

Prohibition to marry women is on account of blood, fosterage, or marriage, relations, and accordingly it is unlawful to marry :-

1. mother or a grandmother (paternal as well as maternal) ;
2. daughter or a granddaughter, or any of one's own direct descendants ;
3. sister, a niece, or an aunt—(niece includes sister's daughter as well as brother's daughter) ; daughters of all the sisters (i.e. full sisters, paternal sisters as well as maternal sisters) ; daughters of all the brothers (i.e. full brothers, paternal brothers as well as maternal brothers) ; aunts include paternal as well as maternal aunts, the aunts of the father as well as the aunts of the mother (both paternal as well as maternal) ;
4. mother-in-law (whether the marriage with her daughter is or is not consummated) ;
5. step daughter (if the marriage with her mother is consummated) ;
6. step mother or step grandmother ;
7. daughter-in-law or a grand-daughter-in-law ;
8. foster mother or a foster sister ;
9. two sisters (free or slave) ;
 - a) but, if a man marries the sister of his female slave with whom he has not cohabited, such marriage is valid ; but after such marriage the man should not have any sexual intercourse with his female slave ;
 - b) if a man happens to marry two sisters by two contracts and it is not known which marriage took place first, separation from both the sisters must ensue ;

* Qur'an, Ch. 4 (*Nisa*), verse 22, *Mishkaat, Kitab-un-Nikah, Babul Muharramaat.*

10. two women of whom one is the aunt or niece of the other ;
11. two women related within the prohibited degrees ;

but a man may marry two women one of whom is a widow and the other the daughter of that widow's former husband by another wife, because in such a case there is no affinity, by blood or by fosterage ;

LAWFUL AND UNLAWFUL MARRIAGES

Cases which induce illegality

1. if a man commits adultery with a woman, her mother and daughter become prohibited to him ;
2. if a woman touches a man in lust, her mother and daughter become prohibited to him ;

Cases which do not induce illegality

1. if a man commits lewdness with a woman but does not produce an emission, this does not create prohibition ;
2. if a man enters a woman in anus, this does not create prohibition.

During 'Iddat of a wife

A man cannot marry the sister of his divorced wife during her 'Iddat.

Marriage with one's own slave

A master cannot marry his female slave, nor a mistress can marry her slave.

Marriage with Kitabiyah

Marriage with a Kitabiyah chaste woman is legal and valid. In this connection free Kitabiyah women, as well as the slaves, are equal in matrimonial legality.

Marriage with Majoosees

Marriage with Majoosee women is unlawful.

Marriage with Pagans

Marriage with Pagan women is unlawful.

Marriage with Sabeans

Marriage with a Sabean woman is lawful if she believes in the Divine Scriptures, and professes faith in the Prophets ; otherwise not.

Marriage during pilgrimage

It is lawful for a man as well as a woman to marry during the state of Ehraam, but consummation of the marriage is not allowed till the Ehraam is put off in the Hajj as well Umrah. Similarly, a man can also validly give a woman, as her guardian, in marriage to anybody during the state of Ehraam.

Marriage with female slaves

It is lawful for a free Muslim, to marry a female slave, whether she be a Muslim, or a Kitabiyah, although he is able to marry a free woman, and also, able to pay the dower and maintenance to such a woman ;

But it is unlawful for a man already married to a free woman to marry a slave.

A man married to a slave may, however marry a free woman.

If a man marries a slave woman during the 'Iddat of his divorced free wife, it is void, according to Imam Abu Hanifah.

Number of wives allowed

1. Four wives are allowed to a free man, the wives may free or slaves ; but it is not lawful for a free man to have more than four wives at one and the same time;
2. Two wives are allowed to a slave ; but it is unlawful for a slave to have more than two wives at one and the same time.
3. A man having the full number of wives as above cannot marry another woman during the 'Iddat of any of them, whether the divorce given to her is final or revocable.

Marriage with a woman pregnant by adultery

A man may lawfully marry a woman who is pregnant by adultery, but he should not cohabit with her till after delivery.

But it is unlawful to marry a pregnant woman taken as a captive in the war, because the parentage of her Foetus is from some one of the enemy.

Marriage of Umm-e-Walad

A man cannot give in marriage his Umm-e-Walad (being pregnant by him) to another, because the Umme Walad is the partner of his bed ; but he may so contract his enjoyed female slave, because an absolute slave is not considered the partner of her master's bed.

Muta'ah or usufructuary marriage, where a man says to a woman, "I will take the use of you for such a time for so much," is void.

Muta'ah or usufructuary marriage

Muta'ah or usufructuary marriage, (i.e. where a man says to a woman, "I will take the use of you for such a time for so much,"), is void.

Nikah al-Muwaqqat or temporary marriage

Nikah al-Muwaqqat or temporary marriage, (i.e. where a man marries a woman, for any number of days, in the presence of two witnesses), is void.

Double marriage by one contract

If a man marries two women by one contract, one of whom is lawful to him, and the other prohibited, his marriage with the one who is lawful is valid, but that with the other who is prohibited is void.

Marriage by a Judicial Decree

If a woman sues a man on the plea of marriage, (saying that he had married her), and produces evidence in her favour, and the Qazi declares her to be the wife of such a man, although the man had never been actually married to her, yet he may, after this, lawfully reside with her ; and this will be a sign of the authority of a judicial decree in appearance ; and if the woman desires sexual intercourse, the man may lawfully have such intercourse with her ; and this will be a sign of the authority of a judicial decree in reality.

GUARDIANSHIP AND EQUALITY

(Hidayah, Kitab-un-Nikah, Baab Fil Aulia wal Akfaa)

A. GUARDIANSHIP *

1. A woman who is adult, and of sound mind, may lawfully marry by her own consent, even without the consent of her guardian ; and whether she is a virgin or Sayyebah.

But according to Imam Abu Hanifah and Imam Abu Yusuf, such marriage is illegal if there is no equality between the parties.

2. An adult virgin cannot be married without her consent, and therefore, it is not lawful for a guardian to give in marriage an adult virgin against her consent.

I. TOKEN OF CONSENT

(1) **From a Virgin :** When a guardian, having to power to engage in the contract, requires the consent of an adult virgin, if she smiles or remains silent, this is a her consent ;

But if a marriage is proposed to an adult virgin by anyone other than her guardian, or by a Wali-e-Ba'eed (distant guardian, i.e. other than father, brother or uncle), her silence or smile is not enough, unless she by her lips pronounces her consent.

In requiring the woman's consent, it is necessary that the husband proposed to her should be specifically named and described to her, to enable her to form an idea of him, in order to know her liking or disliking.

* Mishkaat, Kitab-un-Nikah, Baab-ul-Wali Fin Nikah Wa Isteezanal Mar'ateh.

If a man contracts an adult virgin in marriage to another without her knowledge, upon coming to know of it, the same tokens are enough to signify her consent.

(2). **From a Sayyibah** : if a guardian proposes a marriage to a Sayyibah (or a woman with whom a man had sexual intercourse), it is necessary that her consent be specifically expressed by words, as, "I consent to it."

II. CASES UNDER WHICH A WOMAN IS STILL CONSIDERED AS VIRGIN :

(1). If the signs of virginity in a girl are effaced, by leaping or any other exertion, or by a wound, or by frequent menses, yet she is still to be considered as a virgin for the purpose of her consent ;

(2). If the signs of virginity are effaced even by fornication, yet she is to be taken as virgin for the purpose of her consent, provided her virginity is not finished on account of an erroneous or invalid marriage, or she is not known to have offered herself to fornication publicly, in which cases she is to be taken as Sayyibah for the purpose of her consent.

III. CASE OF ALLEGATION AND DENIAL :

If a man says to a woman, "you had heard of your being contracted to me by your friends, and you kept silent"; and the woman replies, "No, I had refused", her reply is to be credited.

If, however, the husband produces evidence to prove her silence, the marriage becomes established. If, however, he has no evidence, then no oath is to be imposed upon the wife. This is the view of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad differ with it.

IV. MARRIAGE OF MINORS :

The marriage of a minor boy or girl, by the authority of his or her paternal kindred, is lawful, whether the girl be a virgin or not.

Relatives stand in the same order as regards the authority to contract the minors in marriage as they stand as regards the inheritance ; but in this authority, the more distant relatives, are superseded by those of nearer degree.

V. OPTION OF PUBERTY :

1. If the marriage of a minor is contracted by the father or the grandfather, no option of puberty is available to him or her.

2. But if the marriage is contracted by anybody other than their parents, each one of them is entitled, after attaining puberty, to choose whether the marriage should continue or should be finished.

3. In dissolving the marriage, decree of the Qazi is necessary in all cases of option of puberty.

(a) Token of acquiescence after puberty

If the girl, contracted in marriage during minority, be major when the marriage is first mentioned to her, and she upon that remains silent, her silence, according to Imam Abu Hanifah and Imam Muhammad is to be construed as her consent ; but if she remains ignorant of the contract, her right of option, continues till such time as she is informed of it, and remains silent.

(b) Circumstances which annul the right of option

The right of option, in a virgin, after puberty, finishes by her silence ; but the right of option of a man does not finish by the same circumstance, nor till he expresses his approval by word, or by deed, as paying her dower, or cohabiting with

her, and so on ; and similarly the right of option of the girl after puberty (in a case where the husband enjoys her before she, attaining puberty) is not finished till she expresses her consent or refusal in terms (as if she says, "I approve", or "I refuse"), or till her consent is proved by her conduct, in admitting the husband to sexual intercourse, and so on.

(c) Continuance of a right of option after puberty

The option of puberty of a virgin does not continue to the end of assembly (i.e. the place or company in which she may be at the time of her attaining puberty) ; but that of a Sayyibah, or a youth, is not finished even by the rising from the assembly. This is because the silence of a virgin amounts to consent, but not that of a Sayyibah or a youth. Therefore, the option of the former is finished but not that of the two latter.

(d) Separation on account of option is puberty is not divorce

Separation between a husband and wife on account of option of puberty is not divorce, from whatever side it may happen, because it with propriety proceeds from the wife, whereas not the divorce. Similarly, separation on account of option after manumission is not divorce.

(e) Inheritance in the marriage of minors

If a girl contracted in marriage by her guardian, dies before attaining puberty, her husband inherits of her ; and, similarly, if a boy so contracted in marriage dies before attaining maturity, his wife inherits of him ; and so also when either of them dies after attaining puberty, but before separation took place between them.

VI. GUARDIANSHIP IN MARRIAGE

(a) Persons who cannot be the guardians in marriage

1. guardianship to contract others in marriage is not allowed to a slave, a minor, or a lunatic ;

2. Infidels cannot be allowed to give in marriage a Muslim male or female ;

(b) Persons who can be the guardians in marriage

1. Maternal relations can be the guardians if paternal relations are unfit (if they are of the same family or tribe, such as the mother, maternal uncle, or aunt, and also all others within the prohibited degrees) ;

2. The Mawla of a minor female slave, who has emancipated her, may give her in marriage, if there is none of her paternal relations ;

3. For the persons who have none to act as their guardian, the authority of contracting them in marriage vests in the Imam or the Qazi ;

4. The nearest guardian present in the absence of others can give the minor in marriage ;

5. The guardianship over a lunatic woman even in the presence of her father vests in her son. according to Imam Abu Hanifah and Imam Abu Yusuf.

Section

B. EQUALITY (KAFA'AT)

(Fasl Fil Kafa'at)

“Kafa’at, literally, means equality, but legally it signifies the equality of man with a woman in many respects as follows :

1. Equality in marriage : The Holy Prophet has said, “take your care that none gives women in marriage except their guardians, and that they are not so given except with their equals.”

If a woman marries herself to a man who is inferior to her, guardians have the right to separate them.

It may, however, be noted that while the husband should be equal to the wife, it is not necessary that the wife should also be equal to the husband.

2. As regards tribe or family : Equality with respect to lineage, is necessary because this is the source of distinction among the mankind.

3. As regards religion : 'Ajamees, i.e. the people other than Quraishes and Arabs, are equal to each other, regard should not being be among them to lineage but to Islam. Ajamee descendants of Muslims for two or more generations are equal to each other. But the one who has embraced Islam, is not the equal to an 'Ajamee whose father and grandfather were Muslims.

4. As regards freedom : Equality with respect to freedom is the same as with respect to Islam.

5. As regards character : Regard should be to equality in piety and virtue.

6. As regards fortune : Equality should be with respect to property, by which the man can be able to pay the dower and provide maintenance to the wife.

7. As regards profession : Equality should be in the profession, because some professions are mean, e.g. , barbers, weavers, tanners, scavengers, etc.,

8. As regards status : If a man gives his minor daughter or son to a slave for some good reasons, it is lawful, otherwise not.

VII. CASES OF IMPROPER DOWER :

1. If a woman gives herself in marriage, on a dower much smaller than her proper dower, her guardians have a right to oppose it, till her husband agrees to give her proper dower, or to separate from her. This is the view of Imam Abu Hanifah.

2. If a father gives in marriage his minor daughter, on a smaller dower ; or, if he marries his minor son, on an exorbitant dower, this is legal and valid.

Section

AGENCY TO CONTRACT MARRIAGE

(*Fasl Bil Wakalat-bin-Nikah*)

1. Matrimonial Agents are persons authorised by the parties to contract marriage on their behalf. This is known as "Wakalat-bin-Nikah."

2. It is lawful for a nephew to marry the daughter of his uncle with himself. Imam Zufar, however, hold it as unlawful.

3. If a woman authorises a man to contract her in marriage with himself, and he accordingly he does so in the presence of two witnesses, it is lawful. Imam Zufar and Imam Shaafe'ee, however, hold it as is illegal.

(a) Marriage contracted by unauthorised person :

1. If a man gives in marriage the slave of another, without the owner's consent, but validity of it is suspended upon consent of the owner ; then if he approves, it is lawful ; otherwise not.

2. Similarly, if a man gives a woman in marriage without her knowledge in the presence of two witnesses, or if a woman gives a man in marriage without his consent, the validity is depends upon her or his consents.

3. If an unauthorised person says to two persons, "be you witness that I have married such a woman who is absent"; and thereafter, when the woman hears of it, and gives her consent, yet the marriage is void ; but if, on the unauthorised person saying as above, a third person says, "I have married that woman to that man", and the woman on hearing it gives, her consent, the marriage is lawful

4. Similarly, if a woman says, "be you witness that I have given myself in marriage to such a man who is absent", and the man afterwards hears of it and gives his consent, the marriage is still void ; but if, on the woman thus speaking, a bystander says, "be you witness that I give consent on behalf of such a person", and afterwards the man, on hearing of it, gives his consent, the marriage is valid.

(b) Agent exceeding, or acting contrary to the authority

1. If a man authorises another, as his agent, to procure from him a wife, and the agent contracts him to two women, by one contract, his marriage is not valid with either ;

2. If a person authorises another, as his agent, to contract him in marriage to a woman, and the agent contract his marriage with a female slave who is the property of another person, it is valid, according to Imam Abu Hanifah.

CHAPTER 3

DOWER *

(*Hidayah, Kitab-un-Nikah, Baab-ul-Mehr*)

1. Marriage without dower :

Marriage without dower is valid ;

2. Smallest dower :

The smallest dower is ten Dirhams ;

If a man assigns, as dower, a sum less than ten Dirhams, still the wife is to receive ten Dirhams ;

3. Wife entitled to whole dower :

The wife is entitled to whole dower upon the consummation of the marriage or the death of the husband ; and to one-half of it upon divorce before consummation ;

4. No dower stipulated :

Where no dower is stipulated in the contract, the wife is to receive her proper dower known as "Mehr-e-Misl" ; or a present in case of divorce before consummation ; the present should be of three pieces of dress according to Aa'isha and Ibne Abbas ;

5. Dower specified after marriage :

If a man marries a woman without specifying any dower, and the parties afterwards agree to a dower and specify its amount, such dower goes to the woman if the husband either consummates the marriage or dies ; but if he divorces her before consummation, she is to receive only a present ;

* Qur'an, Ch. 2 (*Baqarah*), verses, 229, 236 and 237 ; Ch. 4 (*Nisa*), verses 4, 19, 20, 21, 24, 25 ; Ch. 33 (*Ahzaab*), verses, 10 and 11, Mishkaat, Kitab-un-Nikah, Baab-us-Sidaaq

6. Addition to dower :

If a man makes any addition to the dower of his wife subsequent to marriage, such addition is binding upon him ;

7. Remittance :

A wife may remit any part, or the whole, of dower ;

8. Khilwat-e-Saheeh

If a man retires with his wife, and there is no legal or natural obstruction to the sexual act, and afterwards divorces her, the whole dower is to go her ;

But if a man retires with his wife while one of them is sick, or fasting in the month of Ramazan, or is in the state of Ehram of Hajj or Umrah, or while the woman is in her courses, this is not “Khilwat-e-Saheeh” or complete retirement ; and if the husband divorces his wife after such retirement, she is entitled to half dower only ;

Note : a fast of atonement, or of a vow, is the same as a voluntary (Nafl) fast ; and if one of the parties is observing a voluntary (Nafl) fast, the woman is entitled to her whole dower ;

If an eunuch (Majboob) retires with his wife, and thereafter divorces her, according to Imam Abu Hanifah, she is entitled to her whole dower ;

Note : It is incumbent upon the woman to observe the ‘Iddat, after the divorce, in all the cases cited above, for the sake of caution, because of the possibility of her being pregnant.

9. Case in which the present (or gift) to the wife is laudable, or incumbent :

It is better to give a present (or gift) to every woman divorced by her husband, excepting, (a) The one whose dower has been stipulated, and whose husband divorces her before consummation, and (b) the one whose dower has not been stipulated and who is also divorced before consummation ; because in their behalf a present (or gift) is not merely laudable, but incumbent ;

10. Reciprocal bargain between two contractors :

If a person contracts his daughter, or his sister, in marriage to another, on the condition of the other to give a sister or a daughter in marriage to him, so that such contracts shall be a return for each other, both the contracts are lawful, and a "Mehr-e-Misl" (proper dower) becomes due to both the women ;

11. Marriage on a condition of service from the husband :

If a free man marries a woman, on the condition of serving her for a fixed time, or of teaching her the Qur'an, still her proper dower is incumbent upon him, according to Imam Abu Hanifah and Imam Abu Yusuf. But if a slave, by his owner's permission, marries a woman on the same terms, it is lawful, but the woman is entitled to the contracted service only.

12. Remittance of dower by the wife :

If a man marries a woman on a dower of one thousand Dirhams, and the woman makes a gift of the said one thousand, and presents the same to him, and he takes possession of such gift, and then divorces her before consummation, the husband, in such a case, has a claim upon his wife for five hundred Dirhams, because he is not considered, in law, as having received, in the form of gift that identical thing which becomes obligatory upon

his wife in consequence of divorce before consummation, since money is incapable of identification either in the fulfillment or the annulment of contract. So also, if the dower consists not of money, but of articles of weight and measurement, as iron or copper. But if the wife makes a gift to her husband of one thousand Dirhams, without having herself been in possession of the same, and he then divorces her before consummation, in such a case no party has any claim upon the other ;

If a man marries a woman on a dower of one thousand Dirhams and the woman makes a gift of five hundred Dirhams, and then makes a gift to her husband of the whole one thousand – as well of the portion in her possession, as of that which she has not received, or of the latter only – and the husband then divorces her before consummation, no party in such a case has any claim upon the other, according to Imam Abu Hanifah ; Imam Abu Yusuf and Imam Muhammad are of the view that the husband has in such a case, a claim upon the wife for one half of that portion of which she had possession;

If a man marries a woman on a dower of one thousand Dirhams and she makes a gift to him of a part less than the half, say two hundred, and takes possession of the remainder, and the husband afterwards divorces her before consummation, he has in such a case, according to Imam Abu Hanifah, a claim upon her for such a sum together with what she had previously gifted to him, makes a moiety of the whole, namely, three hundred Dirhams ; while Imam Abu Yusuf and Imam Muhammad hold that his claim is for the half of what the woman had made a gift of, namely, four hundred Dirhams ;

If a man marries a woman on a dower consisting of certain specified things, and she makes a gift of the same to him, either before or after the gift, and he then divorces her before consummation, he, in such a case, has no claim upon the woman;

If the dower consists of an animal, or of things, which are a debt on the husband, the rule is the same as in the case of specified things ; because the thing in possession of the woman is of such a nature as, if she had herself borrowed it, must be restored by her ; and articles of this nature are all capable of identical specification ;

13. Stipulation in favour of the wife :

If a man marries a woman on a dower of one thousand Dirhams, on a condition that he will not carry her out of her native place, or that he is not to marry, during his matrimonial relationship with her, any other woman, then if he fulfills the condition, the woman is entitled to her specified dower ; but if he does not fulfil the condition, she is entitled to her proper dower,

If a man marries a woman on a dower of one thousand Dirhams, on the condition that he will not carry her out of her native place, or of two thousand Dirhams if he carries her out of her native place, then, if he resides with her in her native place, she is entitled to one thousand Dirhams ; but if he carries her out of her native place, she, according to Imam Abu Hanifah, is entitled to her proper dower if it does not exceed two thousand Dirhams nor fall short of one thousand Dirhams ; and according to Imam Abu Yusuf and Imam Muhammad she is entitled to two thousand Dirhams as agreed ; while according to Imam Zufar both conditions are void and in either case she is entitled to proper dower which should not exceed two thousand nor fall short of one thousand Dirhams ;

14. Dower of property unidentified :

If a man marries a woman, agreeing to give her, by way of dower, either of two slaves unspecified, and the slave be of different values, then, where the woman's proper dower is under the rate of the slave of less value, she receives it ; or if it exceeds the rate of the slave of more value, she receives it ; and

if it exceeds the former, and falls short of the latter, she in such case is to receive her proper dower. This is according to Imam Abu Yusuf, while Imam Muhammad and Imam Zufar are of the view that the slave of less value goes to her in all these circumstances. But if the husband divorces her without consummation, she in that case is entitled to half of the price of the slave of less value, according to all the doctors ;

If the divorce takes place before emancipation, the wife is entitled to receive from her husband a present (or gift) in addition to half of the price of the slave of less value ; this is the rule established by custom, and must be complied with, as an obligation on the part of the husband, although the value of the present (or gift) exceeds even the half price of such slave ;

15. Dower of property undescribed :

If a man marries a woman, agreeing to give her, as dower, an animal undescribed, it is approved, and the woman is to receive an animal of a middling standard ; but the husband has the option, instead of this, to pay her the value of such an animal in money ;

If a man marries a woman, agreeing to give her a dower of cloth undescribed, she, in such a case, is to receive her proper dower. But if he mentions the kind of the cloth, e.g., "Harawy", it is approved, and the husband has the option to give either a piece of "Harawy" cloth of middling quality or its value. Similar is the case when he also mentions the length, breadth and quality of the cloth ;

Similarly, he has the option where the dower is of goods, the quantity of which is ascertainable by weight or measurement, provided he has not particularly described the quality, but only the species ; but if he particularly describes the quality, he then has no option, and is to give the actual thing mentioned, because, in such a case, it becomes a debt upon him, of the specific weighable or measurable article described ;

16. Dower of unlawful articles :

If a man marries a woman, agreeing to give her, as dower, unlawful articles, e.g., wine or a hog, the woman is entitled to her proper dower, because a condition of agreeing to receive unlawful articles is invalid ; the marriage, however, holds goods ;

17. False assignment :

If a man marries a woman, agreeing to give her, as a dower, a cask of vinegar, and the cask afterwards appears to contain wine, she, in such a case, is entitled to her proper dower, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that she is to receive vinegar of a medium quality, and of the same quantity as the wine ;

If a man agrees to give, as a dower, a certain specified slave, and afterwards it appears that the person so specified was at that time a free man, in such a case, according to Imam Abu Hanifah and Imam Muhammad, proper dower is due. Imam Abu Yusuf says that in such a case the husband owes the estimated value of the free person aforementioned, supposing he was a slave ;

If a man marries a woman, agreeing to give her, as a dower, two slaves specified, and one of the two persons named as slaves happens to be free, in such a case, according to Imam Abu Hanifah, the woman is not entitled to more than the single slave remaining, provided the value be equal to ten Dirhams, because the slave is particularly specified, and where the specified dower is admitted to be incumbent, this prohibits the obligation to proper dower. Imam Abu Yusuf says that the woman gets the slave together with the amount of the estimated value of the other person, supposing he was a slave. Imam Muhammad says that the woman gets the slave, together with a property sufficient to complete her proper dower, if that exceeds the value of the slave ;

18. Dower under an invalid marriage :

If the Qazi separates a man from his wife, before consummation, on account of their marriage being invalid, the woman is not entitled to any part of her dower. Similarly, no dower is due after “*Khilwat-e-Saheeh*” (or complete retirement), because, on account of the invalidity of the marriage, the law does not consider retirement as indication of consummation, and therefore it does not stand as such ;

But if a man engages a woman in a invalid marriage, and has sexual intercourse with her, she, in such a case, is entitled to her proper dower ; but she is not entitled to more than the specified dower ; and in such a case, after separation, she must observe the ‘*Iddat*’ which commences from the date of separation, and not from the last sexual intercourse;

19. Child born in an illegal marriage :

The descent of a child born of a woman enjoyed in an illegal marriage is established (in the reputed father).

Imam Muhammad holds that, in the establishment of the genealogy under an invalid marriage, the time (term of pregnancy) is calculated from the first sexual intercourse, and not from the date of marriage, as against the legal marriage where time is to be calculated from the date of marriage ;

20. “*Mehr-e-Misl*” (proper dower) :

Proper dower of a woman is to be calculated, according to the dower usually assigned to her paternal relatives viz., paternal sisters, paternal aunts or daughter of paternal uncles ;

Proper dower of a woman is not to be calculated according to the dower of her mother or maternal aunt because they are not ascendants of her father’s family ;

In calculating the proper dower of woman, attention must be paid to her quality with the women from whose dowers the rule is to be taken in point of age, beauty, fortune, understanding and virtue, because it differs in all these circumstances ; and similarly, it differs according to place of residence, or time (that is to say, times of trouble, and confusion) and the learned ones have said that equality is also to be considered in point of virginity, because the dower is different according to the woman as being virgin or otherwise ;

21. Woman's guardian may become surety :

If the "Wali" (guardian) of a woman becomes surety for her dower, it is approved ; and the woman afterwards is at liberty to claim the dower either from her husband or from her guardian ; and if the guardian pays the dower, he is entitled to take the same from her husband if he stood surety at his desire ;

22. Woman may resist consummation :

Woman may refuse to admit her husband to sexual intercourse until she receives her dower, so as that her right may be maintained to the return, in the same manner as that of her husband to object for which the return is given, as in a sale.

A woman may also refuse to accompany her husband carrying her upon a journey until she receives her dower from him, for the same reason ;

But the husband has no right to restrain his wife from going on a journey, or from going abroad, or visiting her friends, until he discharges the whole of the "Mehr-e-Misl" (proper dower) or the prompt dower ;

What is here said is upon the supposition of the whole dower, or a certain portion of it, being "Mu'ajjal" (prompt) ; but if the whole be "Muwajjal" (deferred), the woman is not so at liberty to refuse sexual intercourse to her husband ;

Similarly the woman may also refuse repetition of the sexual intercourse, after consummation, or “*Khilwat-e-Saheeh*”. This is the doctrine of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad hold that in such a case she cannot refuse. It may, however, be noted that this difference of opinion holds good only where the original sexual intercourse, or complete retirement, has taken place with her consent ; but not if she has been enjoyed by force or during infancy or lunacy ;

23. Right to subsistence :

But even if the woman refuses to admit her husband to a repetition of the sexual intercourse, as stated above, yet she, nevertheless, according to Imam Abu Hanifah, has a claim to her subsistence. Imam Yusuf and Imam Muhammad hold that she is not entitled to any subsistence.

24. Husband’s authority over his wife :

When the husband has duly paid to his wife the whole of her dower, he is at liberty to carry her wherever he pleases ;

25. Dispute regarding the rate of dower :

(a) If the parties differ regarding the rate of her dower, the declaration of the wife is to be credited as regards the rate of her proper dower, and that of the husband as regards any excess. But if he has divorced her before consummation, his declaration alone is to be credited with respect to the half dower. This is the view of Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf says that the declaration of the husband is to be credited, whether before divorce or after, unless where it is to establish , something so small as is known to be short of what such a woman is entitled to expect according to general usage ; and this is approved ;

But, all this applies where the parties dispute regarding the amount of dower itself ; and not with respect to its specification. If they dispute the specification – one asserting that dower had been specified and the other denying it, then according to all the doctors, the proper dower is to be decreed ;

(b) If, after the death of either party, a dispute arises between the survivor and the heirs of the deceased, regarding the amount of dower, the rule in such a case is the same as when the dispute arises between the parties during their life, because the claim to the woman's proper dower does not finish due to the death of either ;

(c) If both parties die, and a dispute arises between their heirs regarding the amount of dower, in such a case the declaration of the heirs of the husband is to be credited, although they declare a sum less than the usual and customary dower of such a woman as the wife of the deceased ; this is the view of Imam Abu Hanifah. Imam Muhammad says that the rule is the same here as where the dispute arises between the parties during their life ;

And if the hirers dispute with respect to the specification of the dower, one party saying that a dower had been specified, and the other denying it, then the declaration of the latter is to be credited, according to Imam Abu Hanifah ;

In short, according to Imam Abu Hanifah, the woman's proper dower is not to be regarded after the death of both the parties, while Imam Abu Yusuf and Imam Muhammad hold that the in such a case proper dower should be decreed.

26. Heirs may take the dower :

In case of the death of both parties the heirs of the wife may take the dower out of the estate of the husband, where it has been specified ; but if it is not specified, they cannot claim anything, according to Imam Abu Hanifah ; while

Imam Abu Yusuf and Imam Muhammad are of the view that woman's heirs are entitled to specified dower in the former case, and to proper dower in the latter ;

27. Dispute regarding articles sent by a husband to his wife :

If a husband sends anything to his wife, and she declares it as a present (gift), and he asserts that he has given it in part payment of her dower, in such a case the declaration of the husband is to be credited, because he is the giver, and therefore supposed to know his intention best.

28. Dower of infidels and of aliens :

(a) If a Christian man marries a Christian woman without setting the dower, or on carrion (i.e. the flesh or carcass of any animal which dies a natural death, and not lawfully slain), such as may be deemed lawful by the people, of their religion, and has sexual intercourse with her, or divorces her before consummation, or dies and leaves her, the woman is not entitled to any dower, even though both parties have embraced the faith within the interim. And the law is the same where the parties are aliens married on like terms in a foreign country ;

(b) If a Zimnee marries a Zimneeeyah, on a dower consisting of wine or pork, and one or both afterwards embrace the faith, even then the woman is entitled to unlawful article already settled, and even though the conversion takes place previous to seisin, provided the unlawful article had been specified ; but if this be not the case, the woman, in the case of wine, is to receive the estimated value of such wine ; or in the case of pork, her proper dower. This is according to Imam Abu Hanifah. But Imam Abu Yusuf is of the view that the woman is entitled to her proper dower in either case. Imam Muhammad is of the view that she is in either case entitled to the estimated value of the unlawful article already specified, whatever it may be.

CHAPTER 4

MARRIAGE OF SLAVES *

(*Hidayah, Kitab-un-Nikah, Baab Nikah-ur-Raqeeq*)

1. Master's consent :

The marriage of male or female slave is not lawful without his or her master's consent ;

2. Mukatib :

Nor is it lawful for a "Mukatib" to marry without his owner's consent ; because a Mukatib, although by virtue of his contract of "Kitabat", he is free as regards acquisition, yet of necessity, with respect to matrimony, he remains subject to the laws of bondage. For the same reason, it is not lawful for a "Mukatib" to marry his own male slave without the consent of his owner ;

3. Female slave of Mukatib :

But he may lawfully give his female slave in marriage, as here arises the right of in her dower. Similarly though it is not lawful for a "Mukatibah" to marry herself without the consent of her owner, yet she may lawfully contract her female slave in marriage as here also arises the right of acquisition to her as above ;

4. Mudabbir of Umm-e-Walad :

It is not lawful for "Mudabbirs" of "Umm-e-Walad" to marry without the consent of their owner, because his authority over them still continues ;

5. Dower of slave :

If a slave marries with his master's consent, the dower (of the woman he marries) is a debt upon his person, for the payment

* Qur'an, Ch. 4 (*Misa*), verse, 25, Mishkaat, Kitab-un-Nikah, Baabun.

of which he may be sold, and the obligation of the debt extends to the master also, because he has consented to it, and accordingly devolves upon him, so that the creditor may be scurred from injury ;

6. Dower of Mudabbir and Mukatib :

The “Mudabbir” or “Mukatib” are, however, to pay the dower by labour, because they are not liable to be sold ;

7. Consent of the owner :

If a slave marries without his owner’s consent and his owner afterwards orders him to “divorce” or “put her away”, this does not imply his consent to the marriage ; but if the owner orders him to “repudiate her by a revocable divorce, this implies his consent to the marriage ;

8. Discharge of dower :

If a person asks his slave to marry a particular female slave, and he accordingly marries her, by an invalid marriage, and has sexual intercourse with her, Imam Abu Hanifah holds that the slave should be sold for the payment of her dower, while Imam Abu Yusuf and Imam Muhammad maintain that the dower shall be taken from the slave upon his becoming free ;

9. Mazoon :

If a man marries his “Mazoon” (privileged slave), who is a debtor, with any woman, it is lawful ; and the woman (by her right to dower) becomes a joint creditor with the other creditors ; and therefore after his sale the price is to be divided between his wife and other creditors in proportion to their respective claims ;

10. Marriage of female slave :

If a master gives his female slave in marriage to another man ; he is not under obligation to send her to the house of

her husband, she still remains attached in service to her master ; and the husband will be asked to visit her at her master's house ;

11. Subsistence and lodging :

If the master permits his female slave to go to and live in the house of her husband, her maintenance and lodging are upon her husband ; but the master will have the right to call her for service ;

12. The act of 'Azl :

If a man marries the female slave of another and desirous the act of " 'Azl " (i.e. withdrawing before discharge), this will depend upon her master's permission, according to Imam Abu Hanifah. But Imam Yusuf and Imam Muhammad hold that the right of permission to " 'Azl " rests with the slave woman, because, she being the wife, sexual intercourse with her husband is her right ;

13. Female – slave becoming free after marriage :

If a female slave marries with her owner's consent, and afterwards becomes free, she is then has the right to break off the marriage or continue, whether the husband is a slave or a free man. But if she marries without her owner's consent, and afterwards becomes free, her marriage then becomes legal and valid, because she being major and of sound mind is competent to the declaration and acceptance, and the illegality of her marriage being without her owner's consent finishes with her becoming free ;

14. Owner's right to dower :

If a man marries a female slave, without her owner's consent, on a dower (say) of one thousand Dirhams, although her proper dower is only one hundred Dirhams, and he has sexual intercourse with her, and she is afterwards made free by her owner, the settled dower goes to her owner ; but if the marriage

be not consummated until after freedom, then the settled dower goes to her ;

15. Father enjoying female – slave of his son :

If a father has sexual intercourse with the female slave of his son, and she gives birth to a child and the father claims the child, the slave becomes his “Umme Walad”, and he is thereafter responsible to his son for her value ;

16. Son marrying his female – slave to his father :

If a man marries his female slave to his father, and she gives birth to a child, she does not become the “Umme Walad” to the father, nor her price is a debt against him, because he is responsible for her dower, and the child born of her is free ;

17. Free woman being the wife of a slave :

If a free woman, being the wife of a slave, ask the owner of such slave to “emancipate him on my behalf for one thousand Dirhams”, and he accordingly emancipates him, the marriage is finished. But Imam Zufar is of the view that it is not finished. But if the woman asks the owner of the slave (her husband) “emancipate him from me”, without mentioning the consideration, the marriage is not finished, and the Walaa rests with the owner. This is according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf holds that in this case (also) the marriage is finished.

CHAPTER 5

MARRIAGE OF INFIDELS

(*Hidayah, Kitab-un-Nikah, Baab Nikah Ehl-ush-Shirk*)

1. Infidels :

(1) if an infidel man and woman marry without witnesses, or whilst the woman is in her 'Iddat due to divorce from a former infidel husband, and there is no objection by the rule of their own sect, and both of them afterwards embrace the faith, their marriage remains valid. This is according to Imam Abu Hanifah. But Imam Zufar says that the marriage is invalid in either case. Imam Abu Yusuf and Imam Muhammad agree with Imam Abu Hanifah in the first case, and with Imam Zufar in the second case;

(2) But if the marriage is within the prohibited degrees, then the marriage is invalid. Thus if a Majoosi marries his mother or his daughter, and they thereafter become Muslims, they are to be separated ;

(3) If only one of the parties accepts the faith, a separation follows ; but if one only appeals, Imam Abu Hanifah holds that separation does not follow, while Imam Abu Yusuf and Imam Muhammad hold that separation follows in this case also ;

2. Apostates :

It is not lawful that an apostate should marry any woman, whether she is a believer, an infidel, or an apostate, because an apostate is liable to be put to death ; moreover, the three days of grace granted to him so that he may reflect upon the errors which causes his apostasy ; and as marriage may interfere in such reflection, the law does not permit it to him ;

Similarly it is not lawful that a female apostate should marry any man, whether a believer, or an infidel, because she is

imprisoned for the purpose of reflection (as above), and her attention to her husband would interfere therewith. Moreover, her imprisonment necessarily prevents the matrimonial intercourse ;

3. Children :

If either the husband or the wife is a Muslim, their children are to be educated in the Islamic faith. And if either one or the other of them becomes a Muslim, and they have infant children, they are to be considered as Muslims on account of the Islam of one of their parents ; as this is tenderness to the children ;

And if one of a married couple is of a superior order, e.g. a Kitabi, and the other of inferior order, e.g., a Majoosi, their children are to be regarded as of the superior order, i.e. Kitabi, as in this case also there is a degree of tenderness with respect to the children, as a Majoosi is worse than a Kitabi ;

4. Conversion :

1. If the wife becomes a Muslim and the husband remains an infidel, the Qazi is to call upon the husband to accept Islam; if he accedes, the woman will continue as his wife ; but if he refuses, the Qazi must separate them, and this separation, according to Imam Abu Hanifah and Imam Muhammad, is a divorce ;

2. Similarly, if the husband becomes a Muslim and the wife remains a Majoosi, the Qazi should call upon her to accept Islam ; if she accedes, she remains his wife ; if she refuses, the Qazi must separate them, but this separation is not divorce ;

Imam Abu Yusuf is of the view that separation in either case is not divorce ;

3. It may also be noted that where separation takes place on account of the woman's refusal to accept Islam, she still

remains entitled to her dower if her husband has consummated the marriage, otherwise not ;

4. If the conversion of either takes place in a foreign country, the separation between them does not take place until completion of three terms of the wife's courses, when she becomes completely repudiated ;

5. If the wife is an slien, she is not to observe the 'Iddat, from separation, due to conversion of her husband ;

6. The conversion to Islam of the husband of a Kitabi does not cause separation, because the marriage of a Muslim man with a Kitabi woman is valid ;

7. If either the husband or the wife accepts Islam, and they afterwards remove to the Muslim territory, a separation takes place between them ; but if either party is brought, as a captive, out of the foreign territory, separation takes place between them ; but if both the parties are brought together as captives, then no separation takes place between them ;

8. If a woman comes from a foreign country to the Muslim country, and she there becomes either a Zimmi or a Muslim, it is lawful for her to marry, although she be already married in the foreign country, and Imam Abu Hanifah holds that she is not to observe the 'Iddat ; while Imam Abu Yusuf and Imam Muhammad hold that she must observe the 'Iddat ;

9. If, however, she is pregnant, then she should not marry until she be delivered ; Imam Abu Hanifah says that she can marry but her husband should not have sexual intercourse with her till after delivery ;

10. If either the husband or the wife apostatizes from the Islamic faith, a separation takes place without divorce, according to Imam Abu Hanifah and Imam Abu Yusuf. Imam Muhammad, however, says that if the apostacy is on the part of the husband, the separation is a divorce ;

11. If both the husband and wife apostatize together, their marriage will continue ;

QASM OR PARTITION *
(*Hidayah, Kitab-un-Nikah, Baab-ul-Qasm*)

1. Equal partition :

If a man has two or more wives, all being the free women, it is necessary for him to make an equal partition of his cohabitation among them, whether he may have married them as virgins or as Sayyibahs, or some of them be of the former description and some of the latter ;

The wives of a prior marriage, and a subsequent marriage, are alike in this respect.

2. Measure of partition :

But it is for the husband to determine the time of partition ; that is to say, if he likes, he may fix it at one day of cohabitation with each of his wives, successively, or more ; and it is also to be noted that by the equality of the partition necessary for the husband, is to be understood simply residence, but not sexual intercourse which is not within the power of the husband ;

3. Division between free and slave wives :

If a man have married two wives, one of them is a free woman, and the other a slave, he must divide his time in three portions, living two portions with the free wife and one portion with the slave. The Mukatibah, the Mudabbarah and the Umm-e-Walad all come under the category of slaves as regards partition;

4. No partition during journey :

Partition is not necessary during the journey. The husband may take any wife with him in journey, but it is better to choose between them by drawing the lots.

* Mishkaat, Kitab-un-Nikah, Baab-ul-Qasame.

5. Time of journey :

The time of a journey is not to be counted against the husband ; because, he is not under any obligation, on his return, to make up for the partition which is not observed within that time, by proportionate cohabitation with the wife or wives whom he had left at home. They have no claim to his living with them during the period of journey ;

6. Wife may bestow her turn

If one wife bestows her turn (of living with the husband) upon another, it is lawful ; and the woman who gives up her turn in favour of another is not entitled to resume it ;

BOOK – II
RAZA'AT
(FOSTERAGE)

(FOSTERAGE)
(*Hidayah, Kitab-ur-Raza'*)

Note

Raza'at, literally, means a child suckling milk from the breast of a woman for a certain time, which is known as the period of fosterage.

Fosterage, as regards the prohibitions caused by it, is of two kinds : Firstly, where a woman takes a strange child to suckle, by which all future matrimonial connections between that child and the woman or her relations within the prohibited degrees, becomes illegal ; and Secondly, where a woman suckles two children, male and female, upon the same milk, which prohibits the future matrimonial connections between them.

1. Fosterage which causes the prohibition :

Prohibition is attached to fosterage, in whatever degree, if it is within the usual period of infant's suckling.

2. The period of Fosterage :

According to Imam Abu Hanifah, the period of fosterage is thirty months. Imam Abu Yusuf and Imam Muhammad are of the view that is two years. Imam Zufar says that it is three years.

The opinion of Abu Yusuf and Imam Muhammad is based on Qur'anic text that, "His (i.e. child's) mother bears him with faintings upon faintings, and his weaning takes two years" (Ch. 31, *Luqmaan*, verse 14) ; and "the bearing of him and the weaning of him is thirty months" (Ch. 46, *Ahqaaf*, verse 15). Thus the smallest period of pregnancy is six months, and hence two years remain for fosterage. The Holy Prophet has also said, "that after two years there is no fosterage."

* Qur'an, Ch. 2 (*Baqarah*), verse, 233 ; Ch. 31 (*Luqmaan*), verse 14 ; Ch. 46 (*Ahqaaf*), verse, 15 ; Ch. 65 (*Talaq*), verses, 6 and 7 ; *Ainul Hidayah*, vol. II, pp 145 to 169

3. Suckling after the period of Fosterage :

Suckling after the period of fosterage does not occasion prohibition. If a child continues to suck even after the period of suckling no prohibition is caused thereby .

4. Child forsaking the breast:

If a child withholds from suckling before the period of fosterage has elapsed, and there is still milk in the mother's breast, and other infant sucks it before the expiration of that period, prohibition by fosterage is caused between those children ;

As regards suckling after the expiration of the period of fosterage, upon this point there are different opinions. Some say that it is not allowable, because the act of suckling is permitted out of necessity, and therefore the milk being a constituent part of the woman's body, the use of any portion of it, except on account of necessity, is prohibited ; and this necessity finishes upon the expiration of the period of fosterage.

5. Exceptions to the prohibition by Fosterage :

(I) Whatever is prohibited by consanguinity is also prohibited by fosterage, except ;

- (a) **Sister's Foster – Mother** : i.e. real sister's foster – mother, or foster – sister's real mother ; or foster – sister's another foster – mother provided there is no affinity between him and his foster – sister ;
- (b) **Sister of Foster – son** : although it be not lawful for a man to marry the sister of his son by blood, as she must be either his own daughter, or the daughter of his enjoyed wife, both of whom are prohibited to him.

(2). It is not lawful for a man to marry the wife of his foster – father, or of his foster – son.

(3). Prohibition is attached to the milk of the man. If, for example, a woman suckles a female child, the latter is prohibited to her husband, and to his father and son, because the husband, through whom the woman's breasts have been filled with milk, is a father to that child.

(4). A man may lawfully marry the sister of his foster-brother.

(5). It may be noted as a rule that :

- (a) when a male and female infant suck from one breast, they are prohibited to each other in marriage, because they have one common mother, and are therefore as brother and sister ;
- (b) it is not lawful for a female to marry any of the son of the woman who has suckled her, because they are her brothers, – nor the sons of those sons, because they are her nephews ;
- (c) it is not lawful for a man to marry the sister of the husband of the woman who has suckled him, as she is paternal aunt by fosterage.

(6). Milk mixed with foreign substance :

1. If the milk is drawn from the woman's breast, and mixed with water still prohibition is attached to it, if the milk exceeds the water in quantity ; but if the water exceeds the milk, prohibition is not attached to it.

2. If the milk is mixed with other food, prohibition is not attached to it, even though the milk exceeds the food in quantity. This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad hold that if the milk exceeds, prohibition is attached ;

3. If the milk is mixed with medicine, in a proportion exceeding the medicine in quantity, prohibition is attached to it ;

4. If the milk is mixed with the milk of an animal, in proportion exceeding the milk of the animal in quantity, prohibition is attached to it ;

5. If the milk of one woman is mixed with the milk of another woman, Imam Abu Yusuf holds that regard is to be had to the excess, while Imam Muhammad and Imam Zufar are of the view that prohibition is attached to both.

(7). Prohibition is occasioned :

1. If the breast of a virgin happens to produce the milk, prohibition is attached to it ;

2. If milk is drawn from the breast of a deceased woman, prohibition is attached to it.

(8). Prohibition is not occasioned :

1. If a woman's milk be administered to a child in a glyster, prohibition by fosterage is not attached to it ;

2. If a man's breast produces milk, prohibition is not attached to it ;

3. Prohibition by fosterage is not attached to the milk of a goat (or any other animal).

(9). One of the two wives suckling the other :

If a man marries an infant and an adult, and the adult suckles the infant, both wives become prohibited to that man ;

It may also be noted that if the husband had no sexual intercourse with the adult wife, she is not entitled to any dower because the separation has proceeded from her, before consummation ; but the infant is entitled to half dower, because the separation has not proceeded from her.

(10). Evidence of Fosterage :

The evidence of woman alone is not sufficient to establish fosterage ; nor can it be established except on the testimony of two men, or one man and two women.

BOOK – III

TALAQ

(DIVORCE)

TALAQ *

(DIVORCE)

(*Hidayah, Kitab-ut-Talaq*)

Note

Talaq (divorce) is of three kinds, viz., Ahsan (most laudable), Hasan (laudable), and Bid'at (irregular).

Ahsan and Hasan are two forms of Talaq-al-Sunnah or Regular Divorce, and Talaq-al-Bid'at is an Irregular Divorce.

CHAPTER 1

TALAQ-AL-SUNNAH

(*Hidayah, Kitab-ut-Talaq, Baab Talaq al-Sunnah*)

1. Talaq-al-Ahsan :

The Talaq-al-Ahsan, or most laudable divorce, is where the husband divorces his wife by a single pronouncement within a "Tuhr" (term of purity), during which he had no sexual intercourse with her, and then leaves her to observe the 'Iddat or period of probation.

2. Talaq-al-Hasan :

The Talaq-al-Hasan, or laudable divorce, is where the husband divorces his wife, by three pronouncements of divorce, in three "Tohrs" (terms of purity).

3. Talaq-al-Bid'at :

The Talaq-al-Bid'at, or Irregular Divorce, is where the husband divorces his wife by three pronouncements of Talaq at one and the same time.

* Qur'an, Ch. 2 (*Baqarah*), verse, 226 to 242 ; Ch. 65 (*Talaq*), verse 1 to 7 ; 'Ainul Hidayah, vol. II, pp. 169 to 418

4. Points to be considered in adhering to the Sunnah Divorce ;

Adhering to Sunnah in divorce is in two ways, viz., adhering to number and adhering to time ; to the former, by restricting the pronouncement to one single revocable divorce, in which the enjoyed and unenjoyed wife are equal ; and to the latter (which applies to the enjoyed wife only), by pronouncing the divorce in a "Tohr" during which the husband had no sexual intercourse with her.

As regards an unenjoyed wife, the "Tohr" and the course are equal, that is to say, the pronouncement of divorce upon her while she is in the latter situation is not irregular, nor reprobated, any more than while she is in the former.

5. Mode of adherence to Sunnah in divorcing the wife not subject to courses :

If the wife due to extreme youth or age, is not subject to the courses, and her husband be desirous to divorce her by three pronouncements of divorce in the regular way, he should first pronounce a single divorce upon her, and at the expiration of one month another, and similarly a third at the expiration of the next succeeding month.

It may be noted that if the first divorce is given in the beginning of the month, the three months from that period are to be counted by the lunar calendar, and if in the middle of it, by the number of days, with respect both to the completion of divorce and of the 'Iddat. This is the rule with Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad hold that the second and the third months are to be invariably counted by the lunar calendar, the deficiency of the first month should be taken from the fourth succeeding month, so as to complete it.

6. The woman who is pregnant :

If a man wants to divorce his pregnant wife by three divorces in the regular way (that is according to Sunnah),

he should first pronounce a single divorce upon her, and at the expiration of one month another, and similarly a third at the expiration of the next succeeding month. This is according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad and Imam Zufar hold that the Talaq-al-Sunnah, with respect to a pregnant woman, consists in giving her a single divorce only.

7. Divorce during menstruation :

If a man divorces his wife during her menses, it is valid ; because, although divorce within the term of menses is disapproved, yet since the disapproval is not on account of anything important, but merely because a divorce given during menses causes the enlargement of the 'Iddat, this kind of disapproval is termed as "Nehi Le Ghairehi" and does not forbid legality, and accordingly the divorce given during the menses is valid. It is however laudable that the husband should revoke it, as when Abdullah, the son of Hazrat Umar divorced his wife during menstruation, the Holy Prophet asked Umar to command his son to take her back. (*Mishkaat, Kitab-un-Nikah, Baab-ul-Khula wa Talaq*)

8. Three Divorces according to Sunnah :

If a man says to his wife, "you are divorced thrice, according to Sunnah", and he has no specific intention to this effect, then if the wife is the one with whom he had sexual intercourse, and she is also subject to menses, she will be divorced once, and each of the two succeeding "Tohrs"; and if the husband had specific intention in so saying, either that three divorces should take place collectively, or, that one single divorce should take place at the end of each succeeding month, the divorce will take effect, according to his intention, whether she is in her menses or in her "Tohr" at the end of the period thus taking effect.

And if her 'Iddat is to be calculated by month (as, for instance, a woman whose menses have stopped on account of

age) and the husband has no specific intention addressing her as such, in such a case one single divorce takes effect, the second at the expiration of a month, and the third at the expiration of the next succeeding month, because the term of a month corresponds, in such cases, with the "Tohr" of a woman who is subject to the menses, as has previously been observed; or if his intention was that three divorces should take place collectively, the three divorces will take place accordingly, in the stated earlier.

But if the husband only says, "you are divorced according to the Sunnah", and does not mention the word "thrice", the intention of three divorces collectively will not be effective.

Section

PERSONS COMPETENT TO PRONOUNCE DIVORCE

(Fasl-ul-Mutliq)

1. **Every Husband** : The divorce by every husband is effective, if he is of sound mind, and of mature age ; but not of a minor, or a lunatic, or one talking in sleep ;
2. **Under compulsion** : The divorce by a man under compulsion, on account of threats, is effective ;
3. **Under intoxication** : Divorce by a man, while he is in a state of inebriety due to drinking any fermented liquor, such as wine, is effective. But if a man drinks wine to the extent of producing a delirium or inflammation of the brain, and thereby suspending his reason, the divorce by him will not be effective ;

4. **By a dumb** : The divorce by a dumb person is effective, if it is expressed by positive and intelligible signs ;
5. **Number of divorces** : The maximum number of divorces, as regards the female slave, is two, whether her husband is a slave or a free man ; and the same as regards the free woman is three ;
6. **Divorce of slave** : The divorce by a slave upon his wife is effective, but that of a master upon the wife of his slave is not effective .

THE EXECUTION OF DIVORCE
(*Hidayah, Kitab-ut-Talaq, Baab Eiqa' at-Talaq*)

Note

Divorce, as regards its execution, is of two kinds, viz., "Sareeh" i.e. express, and "Kinayah" i.e. by implication.

1. "Sareeh" or Express Divorce :

Talaq-e-Sareeh, or Express divorce, is where a husband pronounces it in direct and simple terms, as if he says, "I have divorced you", or "you are divorced", which causes a "Talaq-e-Raj'ee" or Revocable Divorce, i.e. a divorce which lawfully entitles the husband to take back his wife at any time before the expiration of 'Iddat.

But if a man says, "you are divorced irrevocably" or "you are divorced to a certainty," an irrevocable divorce takes place, whether the wife so addressed may have been enjoyed or not.

Note : According to Imam Abu Hanifah, divorce pronounced with a smile is always irrevocable.

2. Either party possessed by the other :

If a husband is the owner of his wife (as a slave), either wholly or in part ; or a wife the owner of her husband, separation takes place between them, because possession by bondage and possession by matrimony are irreconcilable ; - in the latter case, because, if separation were not to take place, it would follow that the wife is at once the possessor and the possessed (she falling under the latter description by virtue of marriage) ; and in the former case, because possession by matrimony is established by necessity, and when the husband becomes actual possessor of his wife's person, this necessity ends, and consequently also the possession by matrimony ;

If a man purchases his own wife (as a slave), and thereafter divorces her, divorce does not take place, because without the continuance of marriage it cannot exist, and in the instant case the marriage has ceased in every shape whatever, as it does not continue even with respect to 'Iddat, and similarly, when a wife becomes possessor of her husband, either wholly or in part, if the latter divorces her, his divorce does not take place, because in this case also his marriage has ended, for the reasons given before ;

If a man marries the female slave of another, and says to her, "you are divorced twice upon the manumission of your owner", and her owner thereafter emancipates her, the divorce takes place ; but it is still in the husband's power to revoke it, because he has suspended the divorce upon the manumission of the master, and that is the condition of it (as a condition is a thing not existing at present, but the occurrence of which is probable, and this actually takes place on manumission, wherefore that is the condition and divorce is suspended upon it); and divorce taking place after the occurrence of the condition, it follows that it takes place upon her as a free woman, and therefore she is not, by two divorces, rendered prohibited by a rigorous prohibition.

3. Divorce before cohabitation :

When a man divorces his wife before consummation by saying to her, "you are divorced thrice", three divorces take place, because he has here given three collectively ; but if he pronounces the three divorces separately, saying, "you are divorced, divorced, divorced", one irrevocable divorce takes place by the first, and nothing by the second and the third, because each repetition of the word "divorce" is a separate execution of divorce ; and the first of them having already rendered the woman decisively and irrevocably divorced, it follows that the second and the third have no effect upon her.

4. "Kinayah" or by Implication :

Talaq-e-Kinayah, or Divorce by Implication, is where a man divorces his wife not in express terms, but by the something from which divorce is understood ; and divorce does not take place from this but by intention or circumstantial proof, because the implication is not used to express divorce alone, as it may mean divorce, and also something else, and therefore intention or circumstantial proof is necessary to determine the construction in which it is to be taken ;

In Implied Divorce there are three forms which effect a revocable divorce and seventeen forms which effect an irrevocable divorce.

CHAPTER 3

TAFWEEZ

(Delegation of Divorce)

*(Hidayah, Kitab-ut-Talaq, Baab Tafweez al-Talaq)*Note

“Tafweez-al-Talaq”, or delegation of divorce, is where the husband delegates the power of pronouncing the divorce to his wife, and it is in three different ways, viz., “Option”, “entitled” and “Will”.

Tafweez-al-Talaq is based in “Ijmaa’-e—Sahalah”, i.e. consensus of opinion of the companions of the Holy Prophet Muhammad (peace be upon him) (Tabrani and Behaqi) (Ainul-Hidayah, vol. II, pp.240).

To give the option to the wife is also proved by verse, 28 of chapter, 33 (Ahzaab) Holy Quran, according to which Allah the Almighty asked the Holy Prophet to, “say to your wives : If you desire this worldly life and its adornment, come I will give you a provision, and allow you to depart a goodly departing.”

Section (1)

OPTION

*(Fasl Fil Ikhtiyar)***1. Restricted to place or situation :**

Delegation by Option (Ikhtiyar) given the wife a power of divorcing herself ; but this right of option is restricted to specific place or situation in which she receives it ;

2. Rising from the seat :

Therefore the right of option of the woman is finished, upon the instant of her rising from her seat, as that proves her rejection of it ;

3. Intention of husband : Intention of the husband is necessary to constitute a delegation ;

4. Single divorce :

Under this form only one single divorce takes place, irrespective of the intention ;

5. Personal pronoun to be used :

To effect the divorce, it is necessary that the personal pronoun (viz., yourself or myself) is mentioned by one or the other party. Thus if a man says to his wife, "choose yourself", and she says, "I have chosen", an irrevocable divorce takes place. Similarly, if the man says to his wife, "choose", and she says, "I have chosen myself", divorce takes place, if that is the intention of the husband ;

6. Use of common tense by wife :

Divorce takes place although the woman's expression of it is expressed in the "Muzare'" or common tense (indicating present as well as future) ;

7. Three divorces :

Where the husband gives a power of option, repeated, three times, and the wife gives only one single reply, yet three divorces take place from it, irrespective of the husband's intention ;

8. One revocable divorce :

If a man says to his wife, "one divorce is at your option", or "choose with respect to a single divorce", and she replies, "I have chosen myself", one revocable divorce will take place.

Section (2)

Entitled

(*Fasl Fil Amr Bil Yad*)

1. Intention of wife is important :

In a delegation of Entitlement (Amr bil Yad) divorce takes place according to the number mentioned by the wife, irrespective of the husband's intention, and the divorce which follows is irrevocable ;

2. Restricted to time or times :

Delegation of Entitlement may be restricted to a particular time, or to several different specific periods of time ;

3. Until the time or times expire :

And it is not finished by the wife's rejection of it until the time or times mentioned fully expire ;

4. Any specified event :

The time of it may also be fixed for the occurrence of any specified event ;

5. Not finished by delay :

It is not finished by delay (where there is no specification of time), nor until wife rises from her seat ;

6. Her rising from the seat :

But it is finished on her rising from her seat ;

7. Change of posture :

It is not finished by a change of posture from a mere active to a mere quiescent position ;

8. Consultation by wife :

A wife may express her wish to consult her friends, without prejudice to her Entitlement ;

9. Wife riding upon an animal :

If the woman is riding upon an animal or in a camel – litter, and stops the animal on her husband's offer of Entitlement, still the Entitlement will not finish ; but if she proceeds upon her journey, it will be finished ;

10. Boat or Ship :

A boat or a ship is the same as a house, and therefore, by going on the vessel the woman's Entitlement is not finished.

Section (3)**WILL**

(Fasl Fil Mashiyat)

1. Revocable divorce :

Where a man gives the power to his wife to divorce herself in express terms, the divorce which follows will be revocable ;

2. Wife's expression immaterial :

Although her reply is expressed in the form of an irrevocable divorce ;

3. Cannot be taken back :

The power, when thus granted, cannot be taken back ;

4. Granted generally :

The power may be granted generally, e.g., "divorce yourself when you please";

5. Power of wife :

(a) A wife empowered to give herself three divorces may give herself only one divorce ;

(b) But if she is empowered to give herself one divorce only, she cannot give herself three divorces ;

6. Declaration of husband :

Where the wife's reply is different from the husband's declaration, as regards the nature of divorce, it will take place according to his declaration, and not according to her reply ;

7. Conditional :

(a) Where the power depends upon the pleasure of the wife, it will be finished by her reply being different from the husband's declaration ;

(b) And so also, by the wife suspending her will upon the will of her husband ;

8. Unrestricted particle :

(a) When the power is expressed with an unrestricted particle as regards the time, it is perpetual, and extends to all times, and places ; e.g., "when you please", or, "whenever you please" ;

(b) But not when it is expressed with an unrestricted particle as regards the place, e.g., "wherever you please" ;

CHAPTER 4

Note**DIVORCE BY “AIMAAN” OR CONDITIONAL VOWS***(Hidayah, Kitab-ut-Talaq, Baab-ul-Aimaan Fit Talaq)*

“Aimaan” is the plural of “Yameen”, which, literally, means “oath”, but according to the jurists, with respect to divorce, it is understood as the dependence of divorce upon an event which amounts to a condition, and, accordingly, on the happening of that event, or, in other words, fulfillment of the condition, divorce takes place.

1. Condition of marriage :

Where a man annexes divorce to marriage, by saying to any strange woman, “if I marry you, you are divorced”, or by declaring, “any woman whom I marry is divorced”, the divorce takes place on the event of such marriage ;

2. Condition of any other event :

Or upon the happening of any other event on which it is conditionally suspended, e.g., a man says to his wife, “if you enter this house, you are divorced”;

3. Provided :

Provided it is pronounced during an actual, or an eventual, possession of authority ;

4. Conditional particles :

The conditional particles are five, viz., “if”, “when”, “whenever”, “Whensoever”, and “as often as”, and of these “if” is solely conditional, while in the other four the condition is implied ;

5. Annulment :

A conditional divorce is not finished by destruction of the property. Thus, if a man says to his wife, “if you enter the house, you are divorced”, and then himself gives her divorce and she also completes her 'Iddat, still her right to divorce will exist until she will enter the house ;

6. If husband and wife differ :

If the husband and wife differ regarding the occurrence of the condition, the assertion of the husband is to be credited, unless the wife produces evidence in support of her assertion, and if the case is of such a nature that no evidence except her own is competent to the ascertaining of the condition, her assertion is to be credited in preference to that of her husband ;

7. Suspension of divorce :

(a) If a husband suspends divorce, saying, “upon the coming of your courses”, then divorce does not take place until the menses continue for three days ; and if he says, “upon one term of your courses”, then divorce does not take place until she becomes clear from her next succeeding courses ;

(b) If a man says to his wife, “if you talk with Zaid and Umar, you are under three divorces”, and he afterwards gives her a single divorce, and she after completing her 'Iddat talks with Zaid, and thereafter again marries her former husband, and then talks with Umar, she falls under two divorces together with the first ;

(c) If a man says to his wife, “if you enter this house, you are under three divorces”, and he afterwards divorces her by two divorces, and she after completing her 'Iddat marries another man who after sexual intercourse with her divorces her, and she again marries her former husband, and thereafter she enters the

house, three divorces take place upon her, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad and Imam Zufar say that only one divorce remaining after the two (which she had already received) takes place ;

(d) If a man says to his wife, "you are under three divorces if you enter this house", and he afterwards divorces her by three divorces, and she after 'Iddat marries another man, and after being divorced by him again marries her former husband, and then enters the house, it is of effect at all ;

(e) If a man says to his wife, "when I have sexual intercourse with you, you are under three divorces", and he thereafter has sexual intercourse with her, divorce takes place ; and here, although he should not forthwith cease such connection, yet he does not become liable for either an 'Aqar (fine) or a proper dower; but the 'Aqar (fine) or dower becomes obligatory upon him if, after the shortest cessation, he again has sexual intercourse with her.

Section

EXCEPTION

(Fasl Fil Istisna)

1. "Istisna" – that is Reservation or Exception – divorce, with a reservation of the Will of Allah, does not take place ;

2. Unless it is pronounced with a pause between the divorce and the reservation ;

3. Divorce pronounced with an exception in point of number takes place accordingly ; e.g., "you are under three divorces all but one", or "all but two."

CHAPTER 5

DIVORCE BY THE SICK

(Hidayah, Kitab-ut-Talaq, Baab-ut-Talaq al-Mareez)

1. Wife inherits :

(a) A wife divorced by a dying husband is entitled to inherit if he dies before the expiration of her 'Iddat ;

(b) Unless the divorce is at her own request, or on account of her own option, or for a compensation ;

2. Collusion :

In the case of any collusion between the parties, if the husband, after declaration of the divorce, acknowledges himself indebted to her, or bequeathes her a legacy, she is entitled to receive what-ever may be of the least value, inheritance, debt, or legacy ;

3. During danger :

Divorce pronounced in a situation of imminent or sure danger cuts off the wife from her inheritance ;

4. Conditional divorce :

(a) A conditional divorce pronounced in sickness does not disentitle the wife from inheritance, unless the condition is on account of her own act ;

(b) Provided her act is of an avoidable nature (e.g., speaking with Zaid) ;

5. Recovery :

Where recovery (from sickness) intervenes between a sick – bed divorce and the death of husband, the wife will be disentitled to inheritance ;

6. Apostacy :

And so also where her apostacy intervenes ;

7. Incest :

But not where her incest intervenes ;

8. Slander of dying husband :

Divorce occasioned by the slander of a dying husband does not disentitle the wife from her inheritance ;

9. Death – bed divorce by Eila :

And so also of a death – bed divorce on account of an Eila ;

10. Revocable death – bed divorce :

Where the death – bed divorce is revocable, the wife inherits in every case.

Note : In every case the phrase that “wife inherits”, means, “in case of the death of the husband before the expiration of her ‘Iddat”.

CHAPTER 6

RAJ'AT, OR RETURNING TO A DIVORCED WIFE *

(*Hidayah, Kitab-ut-Talaq, Baab-ur-Raj'at*)

Literally, "Rajat", means restitution. But legally it signifies a husband taking back, his wife after divorce, and restoring her to her former situation, in a case where she was not liable to separation from the passing of her menses, or of the time corresponding to their periods. In other words, it means continuance of the marriage.

1. Husband may take back :

If a man gives his wife one or two revocable divorces, he is entitled to take her back any time before the expiration of her 'Iddat, whether she agrees to it or not ;

2. Kinds of Raj'at :

Raj'at is of two kinds, (a) express, e.g., by saying, "I have taken you back"; or (b) implied, e.g. by having sexual intercourse with her ;

3. Evidence :

The evidence of witnesses to Raj'at is laudable, but not necessary ;

4. Notice of Raj'at :

The wife should have proper notice of it ;

5. Previous Raj'at :

(a) A declaration of previous Raj'at, made after the expiration of the 'Iddat, is valid if both parties agree to it ;

(b) But not if they disagree ;

* Qur'an Ch - 2 (*Baqarah*), verses 231 and 232

6. Declaration of slave – wife :

If the husband of a female slave, after expiry of her 'Iddat, declares that he had taken her back during her 'Iddat, and although her owner (also) confirms his declaration, but she herself denies it, her statement is to be credited ;

7. Termination of Raj'at :

(a) When the menstrual discharge, in the third courses after divorce, continues for ten days, or more, the power of Raj'at finishes upon its stoppage, even though the woman has not yet taken the usual bath; but if it stops within less than ten days, the power of Raj'at does not finish till such bath is taken, or the hour of prayer has passed away ;

(b) But in case of the Kitabiyah the power of Raj'at finishes on the stoppage of the menstrual discharge in the third courses after divorce, even though it happens within ten days, because in the case of such woman no other sign is required to prove purification, as they are subject to the law in this respect ;

(c) The power of Raj'at finishes where the woman performs the Ablution (Tayammum) (in lieu of bath) and offers the usual prayers, according to Imam Abu Hanifah and Imam Abu Yusuf, but Imam Muhammad is of the view that it finishes immediately on performance of Ablution (Tayammum) ;

(d) but if the woman, in taking the bath, leaves any part, being a complete limb (e.g., hand or foot) or more, the power of Raj'at does not finish ; but if the leftover part is less than a limb (e.g., a finger), it finishes. According to Imam Abu Yusuf and Imam Muhammad, leaving of mouth or nostrils also is the same as leaving of a complete limb ;

8. Husband divorcing during pregnancy :

If a man divorces his wife while she is pregnant, or while

she has brought forth a child, and declares that he has never had sexual intercourse with her, he is still entitled to take her back ;

9. Husband acknowledging no consummation :

(a) The man who acknowledges that he had never consummated with his divorced wife has no power of Raj'at, although he had been in Khilwat-e-Saheeh (retirement)

(b) If a man divorces his wife after Khilwat-e-Saheeh (retirement), and again takes her back, and thereafter says that he had no sexual intercourse with her, and she gives birth to a child within a day short of two years after divorce, the Raj'at is valid irrespective of his assertion ;

10. Birth of a child :

Raj'at may be established by the birth of a child ;

11. Woman may adorn herself :

A woman under revocable divorce is entitled to adorn herself ;

12. Husband not to approach :

A man is not entitled to approach an irrevocably divorced wife without intimating her ;

13. Divorced wife not to be carried on journey :

A divorced wife cannot be carried upon a journey until Raj'at is established ;

14. Sexual intercourse :

Sexual intercourse is not rendered illegal by a revocable divorce.

Section**DIVORCED WIFE BECOMING LAWFUL TO HER
HUSBAND**

(Fasl Fee Maa Tahallo Beh al-Mutallaqah)

1. Remarriage allowed :

A man can marry again a wife divorced by him by one or two divorces, either during her 'Iddat or after its completion ;

2. Remarriage not allowed :

But if she is divorced by three divorces, he cannot marry her again until she is married to another man and is divorced by him ;

3. Remarriage with another man must be consummated :

In order to make lawful her remarriage to her first husband, her marriage with her second husband must be consummated, even though her second husband is a youth under puberty and is able to perform sexual intercourse ;

4. Slave – wife :

A female slave, whom her husband has divorced by the two divorces, is not lawful to him by the sexual by her master, because that which is necessary for her legality (i.e., marriage) does not exist here ;

5. Pre-planned marriage with another man :

Second marriage, if contracted with the sole purpose of legalizing the woman to her husband, is not allowed. It is rather condemned by the Holy Prophet, but still the woman is rendered legal by it for her first husband ;

6. Remarriage gives full power to the husband :

The first husband, re-marrying his wife after an intervenient marriage, gets full power of divorce upon her. The one or the two divorces formerly pronounced upon her by him are cancelled and obliterated by her marriage with the second husband ;

7. Wife's declaration :

The wife's declaration of her legalization is to be accepted.

CHAPTER 7

EILA *

(*Hidayah, Kitab-ut-Talaq, Baab-ul-Eila*)

Literally, "Eila", means a vow. But legally it implies a husband swearing to abstain from sexual intercourse with his wife for more than four months, if she is free, or two months, if she is a slave.

1. Proof of Eila :

If a man swears that he will not have sexual intercourse with his wife, or that he will not have sexual intercourse with her within four months, Eila is established ;

2. The Expiation :

For the breach of Eila, expiation is necessary ; and even if Eila, collectively announced upon all the wives, is broken in respect of all of them, only one expiation is necessary ;

3. Irrevocable divorce takes place :

But if Eila is observed, irrevocable divorce result at its termination ;

4. Eila not proved :

A vow of abstinence for a term short of four months does not amount to Eila ;

5. Abstinence under penalty :

A vow of abstinence, under a penalty annexed to it, amounts to an Eila ;

* Qur'an Ch - 2 (*Baqarah*), verse 226

6. Wife under revocable or irrevocable divorce :

If a man observes an Eila with respect to a wife under revocable divorce, the Eila is established ; but if he observes an Eila with respect to a wife under irrevocable divorce, it is not established ;

7. Eila before marriage :

An Eila made with respect to a woman before marriage is not valid ;

8. Eila observed at a distance :

An Eila in respect of a wife at a distance can be orally finished ;

9. Husband's interpretation :

An equivocal expression of divorce takes effect according to the husband's interpretation of his intention.

CHAPTER 8

KHULA' *

(*Hidayah, Kitab-ut-Talaq, Baab-ul-Khula'*)

Note

Literally, Khula' means "to draw off" or "to take out". But legally, it signifies an agreement of dissolving the marriage against compensation to be paid by the wife to her husband out of her property.

1. Release of wife from the bondage of marriage :

Whenever enmity arises between the husband and the wife to the extent that they both apprehend that the ends of marriage are not likely to be fulfilled by their union, the woman is entitled to get released herself from the bondage of her husband, against compensation as he may agree to receive to liberate her ;

2. Single irrevocable divorce :

Khula result in a single irrevocable divorce ; (Ibne Majaah)

3. The compensation :

The wife is responsible to pay the compensation to her husband ;

4. Khula' and divorce :

There is difference between a wife asking for Khula' in lieu of an illegal article (e.g., wine) and asking for divorce in lieu of the same in express terms. In the former case irrevocable divorce takes place, while in the latter case revocable divorce takes place ;

* Qur'an Ch - 2 (*Baqarah*), verse 229

5. Lawful thing :

The compensation for Khula' can be of anything which is permissible in dower ; (Qaduri)

6. What is in hand :

If a woman says to her husband, "grant me Khula' for what is in my hand", and he accepts it, and afterwards it is known that there was nothing in her hand, khula takes place, and nothing is due upon her as she had not mentioned any specific property ; but if she says, "grant me Khula' for the property which is in my hand", and he grants it, and afterwards it is known that she had nothing in her hand, she will be bound to return to him her dower ;

7. Property unspecified :

If a man agrees for Khula' with his wife, in lieu of an absconded slave, on the condition that, if the slave is recovered, she will hand him over to him, but if not, she will not be responsible ; but still she will not be released from the responsibility, and it will remain due upon her either to hand over the slave or his value ;

8. Property specified :

(a) If a woman says to her husband, "give me three divorces for one thousand Dirhams", and he gives only one divorce, there is due upon her one-third of the thousand Dirhams ; but the single divorce pronounced by him will be irrevocable as it is in lieu of property ;

(b) But, if a woman says to her husband, "give me three divorces, upon my paying you one thousand Dirhams", and he gives her one divorce, in such a case according to Imam Abu Hanifah, nothing will be due upon the woman and the husband will be entitled to take her back. But Imam Abu Yusuf and Imam Muhammad hold that irrevocable divorce will take place against payment of one-third of the thousand Dirhams ;

(c) On the contrary, if a man says to his wife, "divorce yourself by the three divorces for (or upon payment of) one thousand Dirhams", and she gives herself one divorce, it is of no effect at all ;

(d) If a man says to his wife, "you are divorced upon payment of one thousand Dirhams," and she accepts it, divorce will take place, and the husband will be entitled to get one thousand Dirhams from her ;

(e) If a man says to his wife, "you are divorced, and there is against you one thousand Dirhams, and she agrees to it ; or, if a man says to his slave, "you are free, and there is against you one thousand Dirhams, and the slave agrees to it, the slave will be free, and divorce will take place upon the wife, but according to Imam Abu Hanifah nothing will remain due upon either ; and the rule is the same even if they do not agree. But Imam Abu Yusuf and Imam Muhammad hold that if they will agree, the specified sum is due upon them ; and if they do not agree, neither divorce will take place nor emancipation ;

(f) If a man says to his wife, "you are divorced for one thousand Dirhams, on the condition of option to me (or, to you) for three days", and she agrees to it, then according to Imam Abu Hanifah the option is not valid if it is reserved for him but valid if it is for her ; and if she rejects his proposal within three days, there will be no *Khula'* ; but if she does not reject it within that time, divorce will take place, and the sum specified by the husband will be due upon her. Imam Abu Yusuf and Imam Muhammad hold that the option is void in either case, and that divorce will take place upon the woman, and the sum specified will be due upon her ;

(g) If a man says to his wife, "I divorced you yesterday for one thousand Dirhams, but you did not agree to it", and the woman says that she had agreed, the assertion of the husband is to be accepted ;

9. Mubari'at as Khula'

A "Mubari'at" or mutual discharge (signified by a man saying to his wife, "I am discharged from the marriage between you and me," and she agrees to it), is the same as Khula', and every claim which each had upon the other finishes, so far as those claims are with respect to their marriage. This is according to Imam Abu Hanifah. But Imam Muhammad holds that nothing finishes from either except what is specifically mentioned by both of them. Imam Abu Yusuf agrees with Imam Muhammad as to Khula', but with Imam Abu Hanifah as to the mutual discharge ;

10. Khula' entered into by father :

(a) Khula' entered into by a father on behalf of his minor daughter, but if he agrees to pay compensation out of her property, it will be invalid ;

(b) But if he makes himself responsible for payment of the compensation, then the Khula' will be valid, and the compensation will be due upon him personally ;

(c) Or if he refers it to his daughter's consent, if she is competent to give the consent ; and she gives the consent, Khula' will take place, but still, being minor, she will not be responsible for the compensation, nor even to return the dower. The compensation in any case will be due upon the father.

CHAPTER 9

ZIHAAR *

(*Hidayah, Kitab-ut-Talaq, Baab-ul-Zihaar*)

Note

“Zihaar” is derived from “Zahr”, which means the back. But legally, it signifies a man comparing his wife to any of his female relations, within prohibited degree, which makes marriage with them unlawful – as if he says to his wife, “you are to me like the “Zahr” (back) of my mother.”

It is necessary in Zihhaar that the person compared by the man should be his wife, because Zihhaar does not apply to a female slave ;

Moreover, Zihhaar applies only to a Muslim, adult, and of sound mind. Zihhaar pronounced by a Zimmi, or a minor, or a lunatic, is not valid ;

Zihhaar prohibits the husband from sexual intercourse with his wife, until he performs an expiation for it.

1. Wife becomes prohibited :

If the husband says to his wife, “you are to me like the back of my mother”, she becomes prohibited to him, and his sexual intercourse with him becomes unlawful, as well as every other conjugal relationship, until he performs the expiation for the same as laid down by the Shari’ah ;

2. Prohibition is temporary :

Zihhaar is a temporary prohibition, which remains till the performance of expiation, but without dissolving the marriage ;

* Qur’an Ch – 33 (*Ahzaab*), verses 4 and 5 ; Ch. 58 (*Mujadalah*), verse 2 to 4

3. Forgiveness and expiation :

If inspite of Zihaar the husband commits sexual intercourse with his wife, nothing is incumbent upon him, except seeking forgiveness from Allah, and performance of the expiation ;

4. Does not occasion Talaq :

Zihaar does not occasion Talaq (divorce) ;

5 . Comparison with any part of the body :

Zihaar applies to comparison with any part of the body which implies the whole person, e.g., the thigh, the pudendum, the head, the waist, because by these parts the whole person is figuratively expressed ;

6. Comparison with any other kinswoman :

Zihaar is also applies to likening the wife to any other woman related within the prohibited degree, with whom marriage unlawful, such as sister, aunt, foster – mother ;

7. General comparison :

(a) General comparison takes effect according to the husband's intention. If he says to his wife, "you are to me like my mother", it may be Zihaar, or Talaq, or mere respect, according to his intention. But in case of no intention, according to Imam Abu Hanifah and Imam Abu Yusuf , neither Zihaar nor Talaq takes effect. Imam Muhammad is of the view that Zihaar takes place, while according to Imam Abu Yusuf, if the intention is prohibition, then it will be Eila ;

(b) Same will apply to comparison as regards of prohibition. If a man says to his wife, "you are to me prohibited, like my mother," it will be Zihaar or Talaq, according to his

intention. But if he has no intention, then, according to Imam Abu Yusuf, it will be Eila, while according to Imam Muhammad, Zihhaar ;

(c) And if he says, "You are to me prohibited like the back of my mother", and his intention is of Talaq or Eila, according to Imam Abu Hanifah, it will be Zihhaar. Imam Abu Yusuf and Imam Muhammad say that it will be what he intends, while according to Imam Muhammad, where Talaq is intended, no Zihhaar takes place ; whereas according to Imam Abu Yusuf, Talaq and Zihhaar both will take place ;

8. Effect of Zihhaar :

(a) Zihhaar does not apply to anybody except a wife, not even to the female slave ;

(b) If a man marries a woman without her consent, and thereafter he pronounces Zihhaar upon her before her consent, and she afterwards gives her consent, even then Zihhaar is not valid ;

9. Collective Zihhaar :

Zihhaar collectively pronounced by a husband upon all his wives takes place upon every individual wife to whom it is addressed ; but the expiation will be due upon him in respect of each wife separately.

Section

EXPIATION

(Fasl Fil Kaffarah)

1. The Expiation :

The expiation of a Zihhaar is the emancipation of a slave, or, if one has no slave, by keeping the fast for two successive months, or, if such fasting is not possible for him, then by feeding sixty poor persons, one morning and evening ;

2. Slave of any description :

1. Emancipation may be of a slave of any description, viz., Muslim, infidel, major, minor, male, or female ;
2. But such slave should not be defective in one of his or her faculties, viz., blind of both the eyes, or maimed of both the arms or both the feet ;
3. Emancipation of a deaf slave will suffice ;
4. But not of the one who has lost both of his thumbs ;
5. Nor of the insane, unless the insanity is occasional ;
6. Nor of a Mudabbir, nor of an Umm-e-Walad, nor of a Mukatib who has paid parts of his ransom ;
7. Emancipation of a slave kept for a parent or a child suffices ;
8. But not that of a share in a coparcenary slave ;
9. Partial emancipation of a slave, when followed by the emancipation of the remainder, suffice ;
10. But not if he has sexual intercourse with his wife between the two emancipations ;

3. Expiation by fasting :

1. Zihhaar can be expiated by fasting two successive months, if one has no slave. The two successive months should not include the month of Ramazan nor the 10th to 13th days of the month of Zul Hijjah. Further, the fasting should be without break, otherwise it will have to be resumed again and continued for complete two consecutive months ;
2. There should be no sexual intercourse during the fasting, otherwise the fasting will again have to be resumed and continued for complete two consecutive months ;
3. As regards the slave husband, if he pronounces a Zihhaar upon his wife, fasting for two consecutive months is the only expiation for him , because he does not possess property within his own right and therefore cannot expiate in any other way. Even his master cannot emancipate any slave on his behalf nor feed the poor ones on his behalf, by way of expiation ;

4. Expiation by feeding or distributing the alms :

1. Instead of serving the food to sixty persons, one morning and evenings, expiation may also be by giving alms to sixty persons, which is half a *Saa* of wheat, or one *Saa* of barley or dates, or the value thereof, to each of the sixty poor persons ;

2. Feeding of sixty poor persons one morning and evening, will suffice, where they are filled, whether they eat more or less ;

But if among the poor ones there is also an infant who is suckled from the breast, it will not suffice, because an infant is not able to eat the food ;

3. If the feeding is with barley bread some usual provision should also be given so that it can be easily eaten ; but with the wheat bread it is not necessary ;

4. If one poor person is fed morning and evening for sixty days, or given the alms for sixty days, it will also suffice. But it will not suffice if food of sixty days, or alms of sixty poods, is given to only one man on one and the same day ;

5. Sexual intercourse during expiation by alms does not require that the alms should be distributed anew ;

6. If a man, by way of expiation for two Zihars, distributes double alms to each of sixty poor ones this will not suffice for more than one Zihar, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that it will suffice for both ;

5. Two expiations for two Zihars :

If a man upon whom two expiations of two Zihars are due emancipates two of his slaves, it will suffice, although he has no specific intention with regard to the slave or the Zihars. But if he emancipates one slave in part of expiation of two Zihars, it is for him to specify to which of the two Zihars he intends the manumission of that slave to apply.

LA'AAN

*(Hidayah, Kitab-ut-Talaq, Baab-ul-La'aan)*Note

Literally, "La'aan", means "accusation", but legally, it signifies testimonies on oath, by the husband and, the wife (where the testimony is to result by an imprecation of the curse of Allah on the part of the husband, and of the wrath of Allah on the part of the wife), in the case of husband accusing the wife of adultery.

12. The Imprecation :

If a husband accuses his wife of adultery, or denies the descent of a child given birth by her, and she asks him to prove his accusation, imprecation becomes necessary upon him ;

But both parties should be competent to give evidence, i.e. both should be of sound mind, adult, free and Muslim ; and the wife should be a "Mohsinah", i.e. lawfully married ;

13. The Curse and the Wrath of Allah :

La'aan, on the husband, if his accusation is false, is the Curse of Allah ; and on the woman, if the accusation is true, is the Wrath of Allah ;

14. No La'aan upon slaves or infidels :

(a) There is no La'aan upon the slaves or the infidels ;

15. Nor, upon the wife when she is a slave, or an infidel, or a Kitabiyah, or a convicted slanderer ;

16. Nor, where both husband and wife are convicted slanderers ;

(d) Nor, where the accusers are not subject to punishment, i.e., minors, idiots, or adulteresses ;

* Qur'an Ch - 24 (*Noor*), verses 6 to 9 and 23

17. The manner of imprecation :

The manner of imprecation is as follows :- the Qazi will first ask the husband to testify, four times, by saying, "I call Allah to witness to the truth of my testimony regarding the adultery with which I have charged this woman"; and again, a fifth time, "may the Curse of Allah be upon me if I have spoken falsely regarding the adultery with which I have charged this woman." After this the Qazi will ask the woman to testify four times, by saying, "I call Allah to witness that my husband, words are totally false, regarding the adultery with which he has charged me", and again, a fifth time, "may the Wrath of Allah be upon me if my husband is true, in bringing a charge of adultery upon me."

According to Abu Hanifah, in the imprecation, the husband should address in the second person, saying, "by Allah, I speak truly regarding the adultery with which I have charged you";

18. Separation takes place :

When both the parties have made the imprecation, separation is to take place between them, but not till the Qazi passes a decree to that effect ;

6. Receding from imprecation :

The husband, on receding from his imprecation, may again marry his wife, without her marriage with another, according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf holds that she will be forever prohibited to him, and he cannot marry her again ;

7. Decree of basterdy :

Imprecation results in a decree of bastardy, in the case where the husband denies the descent of the child ;

8. Charge of adultery and denial of the descent of the child :

If a husband accuses his wife both by a charge of adultery as well as by denying the descent of the child given birth by her, it is necessary that both these accusations be mentioned in the imprecation, after which the Qazi will issue a decree, denying the descent of the child from the husband, and fixing it upon the mother ;

9. Decree of separation :

A decree of separation between the parties also amounts to a decree of bastardy in respect of the child ;

10. If husband contradicts himself after imprecation :

If a husband, after the imprecation, contradicts himself, and acknowledges that he had accused his wife falsely, the Qazi should punish him, and afterwards it will be lawful for the husband to marry her again according to Imam Abu Hanifah and Imam Muhammad;

19. Imprecation is not necessary :

20. Imprecation is not necessary, where the husband or the wife is a minor, or an idiot ;

21. Or, where the husband is a dumb ;

22. Or, where the accusation is not direct, as for example, a man says, "your pregnancy is not of me". This is according to Imam Abu Hanifah and Imam Zufar. But Imam Abu Yusuf and Imam Muhammad are of the view that imprecation is necessary in such a case, if the woman gives birth to a child within six months ;

23. But if he says to his wife, "you are an adulteress, and your pregnancy is on account of adultery", imprecation is necessary upon both parties, as accusation is here very clear

in the mention of adultery. But the Qazi is not in such a case to pass any decree relating to the descent of the foetus ;

24. Posterior to the birth of a child :

Imprecation made after the birth of a child is of no effect as regards the child's descent ;

25. Birth of two children :

If two children are born at one birth, and the husband denies the descent of the first – born, and admits that of the second, the parentage of both is established in him, because they are both supposed to be begotten from one seed ; and punishment becomes due upon the husband ; and same will be case in which he admits the first and denies the second ;

CHAPTER 11

IMPOTENCE

(Hidayah, Kitab-ut-Talaq, Baab-ul- 'Ineen)

1. Term of one year should be appointed :

If a husband is impotent ('Ineen), the Qazi should fix one year from the time of litigation, within which if the husband does sexual intercourse with his wife, it is well ; and if not, the Qazi should pronounce divorce between them, if the wife desires it;

The separation in this case amounts to one irrevocable divorce ;

This separation amounts to irrevocable divorce, because it is for the woman's relief from a hardship, which can only be by a complete divorce ;

The wife is entitled to full dower, if the husband had "Khilwat-e-Saheeh" (complete retirement) with her ; and 'Iddat is necessary for her ;

2. Claim of separation is defeated :

The claim of the wife for separation can be defeated by the husband if he takes an oath that he had sexual intercourse with her. But if he declines to take an oath, the term of one year should be fixed. This is where the wife was a "Sayyibah". But if she was a virgin, she should be examined by another women, and if she declares her to be still a virgin, the term of one year should be fixed. But if she declares her to be otherwise, then the Qazi should ask the husband to make the statement on oath, which if he does, the right of the wife for separation will be defeated ; and if he does not, then decision is to be delayed for one year.

3. If the husband be a "Majboob"

If the husband is a "Majoob" (complete eunuch), the Qazi should declare separation immediately, and if he is a "Khasi" (simple eunuch), decision should be delayed by one year ;

4. The case of a virgin :

Where the term of one year is fixed, in case of a virgin, if on expiration of that term, the husband declares that he had sexual intercourse with her within that term, and she denies, she should be examined by another woman, and if she declares her to be a virgin, she has the option to continue with her husband or be separated from him. But if she declares her otherwise, then the husband should be asked to make the statement on oath, which, if he does not, she has the option as above ; but if he makes the statement on oath, then she has no option ;

5. The case of a "Sayyibah"

But if she is a "Sayyibah" and the husband declares that he had sexual intercourse with her during that term, and she denies, his declaration on oath is to be accepted, and she has no option. But if he does not, she then has the option as above. And if she chooses to continue with him, she has no subsequent option, as by doing so she assents to giving up of her right ;

6. The year of probation :

The year of probation should be calculated by the lunar calendar ;

7. Defect in the wife :

If the defect is in the wife, the husband has no right to finish the marriage ;

8. If the husband is lunatic, etc.

If the husband is lunatic, leprous, or scrophulous, his wife has no option, as she has in case where he is eunuch or impotent, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that she is entitled to an option in order to remove an evil from herself;

CHAPTER 12

'IDDAT *

*(Hidayah, Kitab-ut-Talaq, Baab-ul-'Iddat)*Note

By “ 'Iddat ” is meant the period of waiting, which is incumbent upon the woman after dissolution of her marriage after sexual intercourse, in order to make a new marriage lawful for her

1. Divorce or separation of free woman :

When a man divorces his wife, being a free woman, either by a revocable or an irrevocable divorce, or when separation takes place between a husband and wife, without divorce, after sexual intercourse, the 'Iddat or woman's period of waiting is three terms of her courses, if she is subject to menstruation.

The separation, without divorce, may be on account of the woman admitting the son of her husband to sexual intercourse, or due to her apostatizing the faith ;

2. Woman not subject to courses :

The 'Iddat of a woman who, on account of minority or old age, is not subject to the menstruation, is three months;

3. Pregnant woman :

The 'Iddat of a pregnant woman is upto the delivery of the child, whether she is free or slave ;

4. Female slave :

The 'Iddat of a female slave is two terms of her courses ; and if she is not subject to courses, on account of minority or old age, her 'Iddat is one and a half month ;

* Qur'an Ch - 2 (*Baqarah*), verses 228 and 234 ; Ch. 33 (*Ahzaab*), verse 49
Ch- 65 (*Talaq*), verses 1 to 4 and 6 and 7

5. Widow :

The 'Iddat of a free woman on account of death of her husband is four months and ten days ;

6. Divorce on death-bed :

If a man divorces his wife upon his deathbed, and she is still entitled to inherit from him, then according to Imam Abu Hanifah and Imam Muhammad her 'Iddat, in case of his death, is four months and ten days, if she completes three terms of her menses within that period ; but if the three terms of her menses be not complete, and they take a longer term (five months for instance), her 'Iddat in that case is three terms of her menses, whatever time they may take.

Imam Abu Yusuf is of the view that the 'Iddat of such a woman is three terms of menses. This difference of opinion is where the sick person has divorced his wife by one irrevocable divorce, or by three divorces ; but where the divorce is revocable, the 'Iddat is four months and ten days, according to all doctors ;

7. Husband put to death for apostasy :

If a man is put to death on account of apostasy, and his wife is to inherit from him, there is the same difference of opinion in respect of her 'Iddat as mentioned above. Some commentators say that her 'Iddat is held to be three terms of her menses by all the doctors, as her marriage is not accounted to continue till the time of her husband's death with reference to inheritance, since a Muslim woman cannot inherit of an infidel ; but yet the wife does here inherit, because her claim to inheritance is established upon the event of her husband's apostasy ; her 'Iddat, therefore, is three terms of her menses ;

8. Female slave freed during 'Iddat :

If a master emancipates his female slave, during her 'Iddat, from a revocable divorce, she is in that case, under 'Iddat

as a free woman, and should count it accordingly. But if a master emancipates his female slave, during her 'Iddat by an irrevocable divorce, or from the death of her husband, her 'Iddat does not change by such emancipation ;

9. Aayisah :

If an "Aayisah" (i.e. a woman whose menses have stopped, and as a result she is supposed to be past child – bearing), be in her 'Iddat, counting it by months, and menses start coming to her, in such a case all regard to that portion of the 'Iddat, which has been counted by months, drops, and her 'Iddat is to commence again, to be counted by the terms of her menses. This, however, applies where the "Aayisah" had been subject to menses before she become despair of child – bearing, but not if menses had never occurred to her before ;

If a woman is in her 'Iddat, counting by her menses, and after two menses, they stop, and she becomes an "Aayisah", her 'Iddat commences again to be counted by months ;

10. Invalid marriage :

The 'Iddat of a woman wedded by an invalid marriage is to be counted by her menses, both in case of her husband's death, and as well as separation taking place between them ; and similarly of that woman with whom a man has had sexual intercourse erroneously ;

11. Umm-e-Walad :

If the master of an Umm-e-Walad dies, or emancipates her, her 'Iddat is of three menses ;

If the Umm-e-Walad is not subject to menses, her 'Iddat is of three months ;

12. Widow of minor :

If a minor dies, leaving a wife pregnant, her 'Iddat is till delivery, according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf says that it is of four months and ten days ;

13. Divorce during menstruation :

If a man divorces his wife during her menses, that term is not to be counted in her 'Iddat, because the 'Iddat should be of three complete menses ;

14. Divorced woman having sexual intercourse :

If a man has erroneous sexual intercourse with a woman who is in her 'Iddat on account of divorce, another 'Iddat becomes necessary for her, and the two are to be joined together, that is to say, her ensuing menses are accounted in both 'Iddats, and if the former 'Iddat is complete before the latter, completion of the latter will still remain necessary for her ;

15. Widow having sexual intercourse :

If a man has sexual intercourse with a woman who is in her 'Iddat on account of the death of her husband, she is to complete 'Iddat of four months and ten days, being the 'Iddat of widowhood ; at the same time counting such terms of her menses as may occur during the remainder of that time, so as that the two 'Iddats may be counted together as far as is possible ;

16. Commencement of 'Iddat :

The 'Iddat of divorce starts immediately upon divorce, and that of widowhood upon the death of the husband. If, therefore, a woman is not informed of her divorce or widowhood till expiry of the term of her 'Iddat, her 'Iddat will then be held as accomplished ;

In an invalid marriage the 'Iddat starts immediately the Qazi passes the decree of separation or upon the husband's determination, expressly signified, to keep away from sexual intercourse ;

17. Accomplishment :

If a woman under 'Iddat declares that it is complete, and the husband denies it, her declaration on oath is to be accepted ;

18. Re-marriage and re-divorce :

If a man, having divorced his wife by irrevocable divorce, marries her again during her 'Iddat, and then again divorces her before consummation, a complete dower will be due upon him, and upon the woman the 'Iddat *de novo*, according to Imam Abu Hanifah and Imam Abu Yusuf. But Imam Muhammad is of the view that there will be due upon the man only one half of the dower, and upon the woman completion of the first 'Iddat ;

19. Zimmi or Infidel :

If a Zimmi, or infidel subject, divorces his wife who is also an infidel subject, no 'Iddat is necessary for her ; and the same rule applies to an alien woman who, after having been converted to the faith, comes from the foreign territory into the Muslim territory. It is, therefore, lawful for such a woman to marry before completion of the 'Iddat, unless she is pregnant. This is the view of Imam Abu Hanifah with respect to such infidel subjects as do not hold or believe in the obligation of Iddat. But Imam Abu Yusuf and Imam Muhammad are of the view that 'Iddat is necessary for the woman of either description;

Section

MOURNING

*(Fasl-ul-Hidaad)*Note

“Hidaad” signifies abstaining of a woman from the use of perfumes, scented or not scented oils ; or of ornaments, or dyeing the edge of eyelids with antimony, and so forth, except on account of a particular pretext, such as aches or pains which they may cure.

1. Incumbent : “Hidaad” or mourning is necessary for a woman whose husband dies, where she is major and a Muslim ; and it is necessary even if he dies during her 'Iddat from an irrevocable divorce ;

2. Not incumbent : “Hidaad” or mourning is not necessary for an infidel women or minors ; nor upon Umm-e-Walad, nor upon a widow from an invalid marriage ;

3. Proposal of re-marriage : It is not approved any person, publicly or expressly, to solicit or seek marriage with a woman under 'Iddat ; but it matters not if this is done in an indirect and ambiguous manner ; but they should make any secret promise of marriage to each other ;

4. Behaviour during 'Iddat : It is not lawful for a woman during 'Iddat on account of divorce to go abroad, either in night or day, whether the divorce be revocable or irrevocable ; but a woman under 'Iddat of widowhood is at liberty to go forth during the whole day, and also for a short part of night, but she is not pass the night elsewhere, except in her apartment ;

It is necessary for upon a woman under 'Iddat that she observes and completes it in the place where she was resident at the time of divorce, or death of her husband, whether it is her own usual dwelling, or a house where she was upon a visit (that of her parents, for instance) ;

A widow may remove from her husband's house, if she is feeling inconvenient there ;

A wife under irrevocable divorce should be accommodated in a separate apartment ;

If a woman is with her husband upon a journey, or pilgrimage to Mecca, and he gives her three divorces on the way, or dies, leaving her in an uninhabited place, she should return to her own city, if the distance is of three days journey; but if the distance is of more than three day's journey, she is at liberty to return to home or proceed upon the pilgrimage, whether her guardian is with her or not ;

But if the divorce or death occurs in a city or other inhabited place, the woman should not go forth from that place until her 'Iddat be complete, after which she may leave it, if she is accompanied with any male relation within the prohibited degrees. This is according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad hold that, if the woman be accompanied by a relation within the prohibited degrees, she may leave the place even before the 'Iddat is complete ;

CHAPTER 13

PROOF OF PARENTAGE

(*Hidayah, Kitab-ut-Talaq, Baab Suboot-un-Nasab*)

1. Child born after Six Months of marriage :

If a man says, "if I marry such a woman, she is divorced", and then marries her, and she gives birth to a child after six months from the date of the marriage (i.e. between six months and two years which is the longest time of pregnancy), the parentage of the child is established in him, and the dower is due upon him ;

2. Child born after Two Years of marriage :

If a man divorces his wife by a revocable divorce, and she gives birth to a child at the end of two years, or more, from the time of divorce, the parentage of the child is established in him, and the divorce is revoked if she had not before declared the completion of her 'Iddat, because it is possible that her pregnancy may have taken place during 'Iddat. But if she gives birth to a child within less than two years from the time of divorce, she will be completely separated from her husband, on account of the completion of her 'Iddat by delivery ; and in such a case also the parentage of the child is established in the husband, because it is possible that conception may have taken place prior to divorce, or after divorce within the 'Iddat, but in such a case revocation is not established ; but where she does not give birth to the child until after two years, revocation is established ;

Parentage of the child born within two years after three, or irrevocable, divorce, is also established.

And similarly of the child born to a minor wife within nine months after either irrevocable or revocable divorce ;

3. Child born of a widow within two years :

The parentage of a child given birth by a widow within two years after the death of her husband is established in him ;

4. Child born within Six Months :

Similarly the parentage of a child born within less than six months, after the wife has declared that her 'Iddat has expired, is established, becomes it is clear that her declaration was unfounded, and is therefore void. But if she gives birth to the child after six months of her declaration, the parentage is not established, because nothing appears in such a case to annul her declaration, because it is possible that her pregnancy may have occurred after that.

Note : The above reasoning applies to every woman who is under 'Iddat, irrecoverable of the fact that the divorce is revocable or irrevocable, or the death of her husband, or it is counted by months or by menses ;

5. Birth must be proved :

Where a woman under 'Iddat gives birth to a child, the parentage is not established, unless the birth is proved by the evidence of two male witnesses or one male and two female witnesses. This however applies where pregnancy is not clear, or it is not acknowledged by the husband. This is the view of Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that in either case the parentage can be established even upon the testimony of one woman only ;

6. When uncontroverted :

The parentage of a child given birth by a widow, under 'Iddat, when it remains uncontroverted, is established, in her deceased husband, even without evidence ;

7. Child born within less than Six Months after marriage :

The child born within less than six months after the marriage is not the outcome of that marriage ; but if it is born after six months it is the outcome of the marriage, over without the husband acknowledgment ; or upon the evidence of one woman if he does not acknowledge it ; and La'an will be incumbent upon him, if he persists in his denial ; and the wife's statement is to be accepted as regards the date of marriage. The statement of the woman, according to Imam Abu Yusuf and Imam Muhammad, should be on oath ; but according to Imam Abu Hanifah, oath is not necessary ;

8. Divorce suspended upon child-birth :

If a man suspends divorce upon child-birth, saying, "upon the delivery of the child you are divorced", and the woman thereafter gives the statement regarding her being delivered, still divorce will not take place, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad are of the view that divorce will take place because while evidence of one woman is accepted as to the birth, so also it is to be accepted with respect to whatever results from it. According to Imam Abu Hanifah, evidence of one woman regarding the birth is on account of necessity, and therefore it cannot be accepted as regards the divorce because for it two witnesses are necessary ;

9. Term of pregnancy :

The longest term of pregnancy is two years, and the shortest term of it is six months ;

10. Slave – wife divorced and then purchased :

If a man marries a female slave, and then divorces her, and then purchases her, and she gives birth to a child within less than six months from the date of purchase, the parentage is established in him ; but if she gives birth to the child after six months, the parentage is not established in him, as it is not of a wife, but of a slave – woman ;

BOO K - IV

HIZANAT

(CUSTODY OF THE CHILDREN)

(CUSTTODY OF CHILDREN)

(*Hidayah, Kitab-ut-Talaq, Baab-ul-Hizanat al-Walad Wa Mann Ahaqqo Behi*)

1. Right of Hizanat :

In case of separation between the husband and his wife, who have a minor child, the right of nursing and keeping it is of the mother ;

2. Order of precedence :

If the mother of a minor dies, the right of Hizanat goes to the maternal grandmother in preference to the paternal ; and if she is also not alive, then to the paternal grandmother ; and if she is also not alive, then to the sister in preference to the maternal or paternal aunt ; and a full sister has preference over the half – sister (maternal or paternal) ; and a maternal sister has preference over the paternal sister ; and so also of the paternal aunts ;

If, however, any of these women, who has the right of Hizanat, marries an stranger, her right finishes thereby ;

But any woman, whose right of Hizanat is finished by her marriage with an stranger, gets again the right if her marriage with the stranger is dissolved.

In case of defeat of the maternal, relation, the right of Hizanat goes to the nearest paternal relation ; but the child is not be handed over to any relation beyond the prohibited degrees, as far instance the “Maula” or emancipator of a slave, or the son of the paternal uncle ;

3. Length of Hizanat :

The right of Hizanat, in respect of a male child, finishes at the end of seven years of his age ; and the right of Hizanat, in respect of a girl, continues till her attaining the age of puberty ;

* 'Ainul Hidayah, Vol. II, pp. 387 to 394

4. Slave – mother :

A slave - mother has the right of Hizanat upon her child after obtaining freedom ;

5. Infidel – mother :

The Zimmi or an infidel, married to a Muslim, is entitled to the Hizanat of her child, but only upto the time when the child is incapable of forming an opinion about the religion ; and so far there is no apprehension of his having an attachment to infidelity ; otherwise, the child is to be taken from the mother ;

6. After the term of Hizanat :

After the term of Hizanat, the child is to remain totally under the care of his or her father ;

Section**REMOVAL OF THE CHILD**

A mother cannot go away with the child to a strange place. If a divorced woman desires to go with her child out of a city, she is not entitled to do so ; but yet if she goes with her to her native place, where she had been married, her going will be lawful. But if she goes to a place where she had been married, but which is not her native place, she is not entitled to do so. This, however, will apply where the places are very distant ; but if the places are so near that the father can easily go there to see his child, there is no objection if the wife goes and lives there. There is also no objection if the woman goes away from a village to a city, but not otherwise.

BOOK – V
NAFAQAH
(MAINTENANCE)

(MAINTENANCE)

*(Hidayah, Kitab-ut-Talaq, Baab-un-Nafaqah)*Note

Legally, 'Nafaqah', signifies all those things which are necessary for the support of life, such as food, clothing, and lodging.

SECTION – I

*(Fasl-un-Nafaqat-uz-Zauj)***1. Maintenance of the wife :**

When a woman entrusts herself unto her husband, it is obligation upon him to supply her with food, clothing, and lodging, whether she is a Muslim, or a non-Muslim ;

2. Proportion :

In the fulfilment of the obligation of Nafaqah, regard is to be had for the status and condition both of her as well as of her husband ;

3. Withholding herself on account of dower :

If a woman refuses to entrust herself unto her husband, due to non-payment of dower, her right of Nafaqah does not finish, but is incumbent upon the husband, even though she is not under his custody ;

4. Disobedience :

If a wife is disobedient or refractory, and goes abroad without her husband's permission, she is not entitled to maintenance from him, until she returns and submits to him. But this will not apply when she lives in the house of her husband, and refuses sexual intercourse, because then she is in his power, and he can forcibly have sexual intercourse with her ;

* Qur'an, Ch – 2 (*Baqarah*), verses 240 and 241 ; Ch. 65 (*Talaq*), verses 6 and 7; 'Ainul Hidayah, Vol. II, pp. 394 to 418

5. Wife incapable of generation :

If a man's wife is so minor as to be incapable of sexual intercourse, her maintenance is not binding upon him ; because her custody by the husband is not a "custody of having sexual intercourse" with her ;

6. Sick woman :

But inspite of her incapability, for sexual intercourse a sick wife is entitled to Nafaqah from her husband ;

7. Minor husband :

Nafaqah is binding upon a minor husband, to his adult wife, inspite of the fact that he is incapable of doing sexual intercourse with her ;

8. Wife imprisoned :

If a wife is imprisoned on account of debt, here husband is not bound to provide her maintenance ;

9. Forcibly carried off :

Similarly, if the wife is forcibly seized and carried away by any person, she is not entitled to maintenance from her husband ;

10. Pilgrimage :

Similarly, if a wife goes upon a pilgrimage under the charge of a relation within the prohibited degrees, she is not entitled to maintenance from her husband ;

Imam Abu Yusuf, however, is of the view that a wife who is upon an obligatory pilgrimage is entitled to maintenance from her husband ; but he is to give her only a "Nafaqah-tul-Hazar" (as at home) and not the Nafaqah-tus-Safar", which means that he is not bound to provide her with conveyance ;

But if she is accompanied by her husband, then according to all scholars, it is binding upon him to provide her with Nafaqah-tul-Hazar, and not Nafaqah-tus-Safar ;

11. Sickness of wife :

If a wife falls sick in her husband's house, she is still entitled to maintenance from her husband ;

12. Wife's servant :

The maintenance of the wife's servant is binding upon her husband, as well as that of the wife herself, if he is in good circumstances ;

13. Poverty of husband :

If the husband is poor to the extent that he is unable to provide maintenance to his wife, the Qazi will order her to arrange necessaries for herself upon her husband's credit, and the amount will remain a credit upon him. The Qazi will fix the amount at a fixed rate, subject to be changed according to the circumstances of the husband ;

14. Arrears of maintenance :

Arrears of maintenance will not be due unless the maintenance has been ordered by the Qazi, or the rate of it has been previously fixed by the parties themselves ;

Arrears of a decreed maintenance will drop in case of the death of either party ;

15. Advance :

If a man gives his wife maintenance for any period in advance, and then dies before expiry of that period, there can be no claim against the wife for return of any part of it ;

16. Slave husband may be sold :

A slave husband of a free woman may be sold for her maintenance, if the marriage has been with the permission of his master ;

17. Maintenance of slave wife :

If a man marries a female slave of another, with permission of her owner, and she resides in her husband's house, her maintenance is binding upon the husband ;

It will be lawful for the master to ask for the service of his female slave, even if he has permitted her to reside with her husband ;

Even if the female slave voluntarily serves her master without his requiring her to serve him still her right of maintenance from her husband does not finish.

Note : These Rules also apply to Umme-Walad.

SECTION – II

(Fasl Fee Yuskanaha Fee Daril Mufradah)

1. Separate apartment :

It is binding upon a husband to arrange for a separate apartment for his wife's residence, solely and exclusively fit for her use, so that none of the husband's family, or anyone else, may enter without her permission and desire. The apartment can be in his own family house ;

But a husband is entitled to prevent the parents of his wife, or other relations, or her children from her former husband, from entering the apartment, because her apartment is his property ; but he cannot stop them from seeing and talking to her whenever they please ;

2. Maintenance of the wife of an absentee :

If a wife's husband is absent, leaving his assets in the hands of any other person, and that person acknowledges the assets, and also admits that the woman is the wife of the absentee, the Qazi can order for her maintenance out of the assets left with that person ; and similarly also for the parents and minor children of the absentee ; and the same rule applies where the Qazi himself is acquainted with the above two facts ;

But the assets so left should be money, grain, or cloth, otherwise maintenance cannot be granted out of it, because it will require the sale of the property, and property of an absentee cannot be sold ;

The wife should however, give security that she has not already received anything in advance ;

Maintenance, under this rule, can be granted only to the wife, minor children, or the parents of the absentee, and to no other relative ;

If the Qazi himself is not sure that the woman is the wife of the absentee, and the trustee, or debtor, do not admit her to be so, and she offers to produce witnesses to prove that she is so ; or if the absentee has left no assets, and she offers to prove her marriage by evidence, to obtain a decree for her maintenance upon the absentee's credit, still the Qazi cannot pass a decree accordingly, because this will be a decree against an absentee, which is not permissible ;

SECTION III

(Fasl-un-Nafaqah Wal Sakana Fee Iddateha)

1. Maintenance of divorced wife during 'Iddat :

Where a man divorces his wife, her maintenance and lodging are binding upon him during the period of her 'Iddat, irrespective of the fact the divorce is revocable or irrevocable ;

2. Maintenance of widow during 'Iddat :

A women is not entitled to maintenance after her husband's death, because her 'Iddat, in such a case, is not on account of the right of her husband, but on account of the law ;

3. Maintenance after separation :

Where the separation originates from the woman, on account of anything which can be imputed to her as a crime, such as apostatizing from the faith, or having sexual intercourse or dalliance with the son of her husband, she is not entitled to maintenance during 'Iddat ;

But if the separation originates from the woman on account of a circumstance which cannot be imputed to her as a crime, as in the case of option of puberty or manumission, or a separation demanded by her on account of inequality, she is entitled to maintenance during 'Iddat ;

If a woman apostatizes from the faith after prominent of three divorces, her right of maintenance finishes ; but if she under the same circumstance admits the son of her husband to sexual intercourse, her right to maintenance will continue ;

SECTION IV

(Fasl-un-Nafaqatul-Aulad-is-Saghaar)

1. Maintenance of minor children :

A father is bound to provide maintenance for his minor children ;

The maintenance of minor children is binding upon the father, even if he is of a different religion ;

But maintenance of children is binding upon the father if they possess no independent property ;

2. Suckling of the child :

A mother is not under an obligation to suckle her infant child, except where a nurse cannot be procured. But if a nurse

can be available, the father is bound to arrange for a nurse for suckling his infant child, and the nurse is to stay near the mother if she so desires ;

But it is not lawful for the father to hire the mother of the child as its nurse, if she is his wife, or is divorced from him and in her 'Iddat ;

The divorced mother of the child can, however, be hired to suckle the child after the expiry of her 'Iddat

The father can also hire any of his other wives for suckling his child ;

SECTION V

(Fast-un-Nafaqat-ul-Abawai Wal Ajdaad)

1. Maintenance of parents :

A man is bound to provide maintenance for his indigent parents ; the parents include the father, mother, grandfathers and grandmothers, even if they are of a different religion ;

Difference of religion finishes the obligation to the maintenance of any relative except a wife, parents, children and grandchildren ; and to them also it is not due if they are aliens ;

The maintenance of parents is binding upon on the child ; and the obligation to maintain the parents is binding upon the daughter as upon the son ;

2. Christian and Muslim brothers :

If a Christian and a Muslim are brothers of each other, none of them is liable to provide maintenance to the other ;

3. Maintenance of other relations :

It is the duty of a man to provide maintenance to all his poor minor male relatives, within the prohibited degrees, and

and also to all female relatives, within the prohibited degrees, whether minors or adults, where they are in necessity ; and also to all male relatives (minors as well as adults), within the prohibited degrees, who are poor, disabled, or blind ; but there is no obligation in respect of other relatives ;

Maintenance is due to relatives within the prohibited degrees in proportion to inheritance from them ;

4. Maintenance of adult daughters :

A father and mother are bound to provide maintenance to their adult daughters (and also to their disabled adult sons) in proportion to their respective entitlements to inheritance from them ;

5. Maintenance of indigent brother by sister :

The obligation of maintenance of a brother in poverty is on his full paternal and maternal sisters, in proportion to their claims of inheritance from them ;

6. Maintenance by heirs :

The maintenance of a relative within the prohibited degrees is not obligatory upon his heirs, if they are of different religion, because they are not of inheriting from him ;

7. Maintenance by a poor man :

A poor man is not bound to provide maintenance to any of his relatives except his wife or minor children ;

8. Maintenance of the parents of an absentee :

Maintenance of the parents of an absentee can be ordered out of his assets, and according to Imam Abu Hanifah, his assets, but not the landed property, can also be sold by the father for his maintenance ;

The parents of an absentee may take their maintenance out of his assets, but a trustee has no right to provide it without an order of the Qazi ;

9. Arrears of maintenance :

If a Qazi orders for maintenance in respect of children, or parents, or relatives within the prohibited degrees, and some time passes without their receiving it, their right to it finishes ; but in respect of a wife it does not finish ; unless it has been ordered to be provided upon the absentee's credit ;

Note : The time here referred to is the period beyond a month, and therefore if it is short of one month, maintenance does not cease.

SECTION VI

1. Maintenance of slaves :

The maintenance of slaves, male as well as female, is binding upon their owner ; But if the owner does not provide maintenance, to them and they are capable of doing the labour, they should be allowed to work for their own subsistence ; But if the slave is not capable of doing the labour, the owner should be compelled either to provide maintenance to them or sell them ;

2. Maintenance of cattle :

The owner is not to be compelled to the above alternative in respect of the cattle, as in respect of the slaves, but he is to be directed to furnish his cattle with subsistence on principle of piety.

BOOK – VI *

WIRASAT

(INHERITANCE)

* Taken from Chapter VII (Sections 61 to 86) of "Principles of Mahomedan Law", by Sir Dinshah Fardunji Mulla, 14th Edition (1955), India, pp. 57 to 97, after slight modifications, viz., Sections 61 to 86 renumbered as 1 to 26, the word "Muslim" substituted for the word "Mahomedan" and "Mussalmans", and the word "Imam" added before the names of Abu Hanifah and Abu Yusuf. Further, unlike the other chapters, keeping in view its importance and its day to day need by the students, lawyers, and courts of law, in this chapter, with the exception of few, I have also reproduced the Illustrations and Notes.

(INHERITANCE)

*A – Three Classes of Heirs.***1. Classes of Heirs :**

There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred :

- (1) "Sharers" are those who are entitled to a prescribed share of the inheritance ;
- (2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied ;
- (3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries ;

2. Definitions :

(a) "True grandfather" means a male ancestor between whom and the deceased no female intervenes.

Thus the father's father, father's father's father and his father how high soever are all true grandfathers.

(b) "False grandfather" means a male ancestor between whom and the deceased a female intervenes.

Thus the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all false grandfathers.

(c) "True grandmother" means a female ancestor between whom and the deceased no false grandfather intervenes.

* Qur'an, Ch.2 (Baqarah), verses 75,180,181; Ch.4 (Nisa), verses 7 to 9, 11 to 14,19,20,33,176; Ch.33 (Ahzaab), verse 6; Ch.89 (Al-Fajr), verses 17 to 20; Mishkaat, Baab-ul-Fara'iz; 'Ainul Hadiyah, Vol. IV, pp. 944 to 988

Thus the father's mother, mother's mother, father's mother's mother father's father's mother, mother's mother's, mother, are all true grandmothers.

(d) "False grandmother" means a female ancestor between whom and the deceased a false grandmother intervenes.

Thus the mother's father's mother is a false grandmother. False grandmothers and false grandmothers belong to the class of distant kindred.

(e) "Son's son how low soever" includes son's son, son's son's son and the son of a son how low soever.

(f) "Son's daughter how low soever" includes son's daughter, son's son's daughter and the daughter of a son how low soever.

B – Sharers.

3. Sharers :

After payment of funeral expenses, debts and legacies, the first step in the distribution of the estate, of a deceased Muslim is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share, in the order set forth in the following :

TABLE OF SHARERS

(1)	(2)		(3)	(4)
Sharers	Natural Share		Conditions under which the normal Share is inherited	This column set Shares of Sha 3,4,5,8 & 12 special circumsta Conditions und Sharers Nos. 1, 12 succeed as Res
	of one	of two or more collectively (b)		
1. Father	1/6	=	When there is a child or child of a son h.l.s.	(when there is a child of a son father inherits residuary : see T **, No. 3)
2. True Grand-Father (sec.2cl (a))	1/6	=	When there is a child or child of a son h.l.s and no father or nearer true grandfather	(when there is no child of a son Tr. G.F *** inh residuary provide no father or near see Tab Of Res. 1
3. Husband	1/4	=	When there is a child or child of a son h.l.s	½ when no child a son h.l.s
4. Wife	1/8	1/8	When there is a child or child of a son h.l.s	¼ when no child a son h.l.s

(b) The collective share is always divided equally among those to whom it is allotted .

(c) A Muslim can have as many as four wives at a time.

(cl) If there be a son's son and a son's son's daughter, the former is a higher son's son in relation to the latter. If there be a son's son's son and a son's daughter, the former is lower son's son in relation to the latter. And if there be a son's son and a son's daughter or a son's son's son and a son's son's daughter, the former is an equal son's son in relation to the latter, both being equally removed from the deceased.

* how low soever

** Table of Residuaries

*** True Grandfather

5. MOTHER	1/6	..	(a) when there is a child or child of a son h.l.s., or (b) when there are two or more brothers or sisters, or even one brother and one sister, whether full consanguine or uterine.	1/3 when no child or child of a son h.l.s., and not more than one brother or sister (if any); but if there is also wife or husband and the father, then only 1/3 of what remain after deducting the wife's or husband's share.
6. TRUE GRAND MOTHER [sec 2, cl. (c)]	1/6	1/6	A. Maternal – when no mother, and no nearer true grandmother either paternal or maternal B. Paternal – when no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandfather.	
7. DAUGHTER	1/2	2/3	when no son	[with the son she becomes a residuary : see Tab. of Res, No. 1.]
8. SON'S DAUGHTER h.l.s [sec 2, cl. (f)] e.g.,	1/2	2/3	when no (1) son, (2) daughter, (3) higher son's son, (4) higher son's daughter, or (5) equal son's son (cl).	when there is only one daughter, or higher son's daughter but no (1) son, (2) higher son's son, or (3) equal son's son, the daughter or higher son's daughter will take 1/2 and the son's daughter h.l.s. (whether one or more) will take 1/6, (i.e., 2/3-1/2). [with an equal son's son she becomes a residuary : see Tab. of Res., No. 2].

(i) Son's	:	1/2	:	2/3	:	when no (1) son, (2) :	when there is only one
Daughter	:	:	:	:	:	daughter, or (3) son's :	daughter, the son's daugh-
	:	:	:	:	:	son :	ter (whether one or more)
	:	:	:	:	:		: will take 1/6, if there be
	:	:	:	:	:		: no son or son's son [with
	:	:	:	:	:		: the son's son she becomes
	:	:	:	:	:		: a residuary : see Tab. of
	:	:	:	:	:		: Res., No. 2.]
(ii) Son's	:	:	:	:	:	when no (1) son, (2) :	when there is only one
Son's	:	1/2	:	2/3	:	daughter, (3) son's :	daughter or son's daugh-
Daughter	:	:	:	:	:	son, (4) son's daugh- :	ter, the son's son's daugh-
	:	:	:	:	:	ter, or (5) son's son's :	er (whether one or more)
	:	:	:	:	:	son	: will take 1/6, if there be
	:	:	:	:	:		: no (1) son, (2) son's son
	:	:	:	:	:		: or (3) son's son's son.
	:	:	:	:	:		: [with the son's son's son
	:	:	:	:	:		: she becomes a residuary
	:	:	:	:	:		: see Tab. of Res., No. 2.]
9. UTERINE	:	:	:	:	:	when no (1) child, (2) :	
10. } BROTHER:	1/6	:	1/3	:	:	child of a son h.l.s (3) :	
or SISTER	:	:	:	:	:	father, or (4) true - :	
	:	:	:	:	:	grandfather .	
11. FULL	:	1/2	:	2/3	:	when no (1) child, (2) :	[with the full brother she
SISTER	:	:	:	:	:	child of a son h.l.s, (3) :	becomes a residuary : see
	:	:	:	:	:	father, (4) true grand- :	Tab. of Res., No. 5.]
	:	:	:	:	:	father or (5) full	
	:	:	:	:	:	brother.	
12. CONSA-	:	:	:	:	:	when no (1) child, (2) :	but if there is only one
NGUINE	1/2	:	2/3	:	:	child of a son h.l.s (3) :	full sister and she succeeds
SISTER ...	:	:	:	:	:	father (4) true grand - :	as a sharer, the consanguine
	:	:	:	:	:	father, (5) full broth- :	sister (whether one or more)
	:	:	:	:	:	er, (6) full sister, or :	: will take 1/6, provided she
	:	:	:	:	:	(7) consanguine brot- :	is not otherwise excluded
	:	:	:	:	:	her.	: from inheritance. [with the
	:	:	:	:	:		: consanguine brother she
	:	:	:	:	:		: becomes a residuary : see
	:	:	:	:	:		: Tab. of Res. No. 7.]

Illustrations

FATHER, HUSBAND AND WIFE

(a) Father	1/6	(as sharer, because there are daughters)
Father's father .. ..	..	(excluded by father).
Mother	1/6	(because there are daughters)
Mother's mother .. ..	..	(excluded by mother)
Two daughters	2/3	
Son's daughter .. ..	..	(excluded by daughter)
 (b) Husband	1/2	
Father	1/2	(as residuary)
 (c) Four widows	1/4	(each taking 1/16)
Father	3/4	(as residuary)

MOTHER

(d) Mother	1/3	
Father	2/3	(as residuary)
 (e) Mother	1/6	(because there are two sisters)
Two sisters .. ..	..	(excluded by father)
Father	5/6	(as residuary)

Note : It is important to note that though the sisters do not inherit at all, they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (*Sir.* * 28). In the present case the exclusion is partial, that is, the share of the mother is reduced, she taking 1/6 instead of 1/3, which latter share she would have taken if the deceased had not left sisters. In ill. (g) also, the exclusion of the mother is partial. III (q) is a case of total exclusion.

(f) Mother	1/3	
Sister .. ..	..	(excluded by father)
Father	2/3	(as residuary)

* i.e. "al-Sirajiyah," by Shaikh Sirajudin – the most prominent work on Hanafi Law of Inheritance, translated in English by Sir William Jones (Mr. Rumsey's edition), and "al-Sharifiyah", by Sayyed Shariff, is a commentary on it. Sir D.F. Mulla's work is based on both these books.

(g) Mother	..	1/6	(because there is a brother and also a sister)
Brother (f., c., or u. *)	..		(excluded by father)
Sister (c., or u.)	..		(excluded by father)
Father	..	5/6	(as residuary)

Note : The mother takes 1/6, and 1/3, where there are two or more brothers or two or more sisters, or one brother and one sister, or two or more brothers and sisters. The brother and sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. See note to ill. (e).

(h) Husband	..	1/2
Mother	..	1/6
Father	..	1/3 (as residuary)

Note : But for the husband and father, the mother in this case would have taken 1/3, as there are neither children nor brothers nor sisters. As the deceased has left a husband and father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2, and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residue for the father would only be $1 - (1/2 + 1/3) = 1/6$, that is, half the share of the mother, while as a general rule, the share of a male is twice as much as that of a female of parallel grade (Sir. 22). For the case where the deceased leaves a widow and father, see ill. (j) below.

(i) Husband	..	1/2
Mother	..	1/3
Father	..	1/6 (as residuary)

Note : The mother takes 1/3, for the father's father does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

(j) Widow	..	1/4
Mother	..	1/4 (= 1/3 of 3/4)
Father	..	1/2 (as residuary)

Note : In this case, the mother would have taken 1/3 but for the widow and father, for there are neither children nor brothers nor sisters. As the widow and father are among the surviving heirs, the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is 1/4. See ill. (h) above and the note thereto.

(k) Widow	..	1/4
Mother	..	1/3
Father's father	..	5/12 (as residuary)

* (full, consanguine, or uterine)

Note : The mother takes 1/3, for the father's father does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

TRUE GRANDFATHER AND TRUE GRANDMOTHER

(l) Father's mother	..		(being a true pat. grandmother, is excluded by father)
Mother's mother	..	1/6	(being a true mat. Grandmother, is not excluded by father)
Father	..	5/6	(as residuary)
(m) Father's mother	}	..	1/6 (each taking 1/12)
Mother's mother			
Father's father				..	5/6 (as residuary)

Note : The father's mother is not excluded by the father's father, for the latter is not an intermediate, but an equal, true grandfather.

(n) Father's father's mother	..	..	(excluded by father's father)
Father's father	..	..	(takes the whole as residuary)

Note : The father's father's mother is excluded by the father's father, for he is an intermediate true grandfather, the father's father's mother being related to the deceased through him.

(o) Father's mother's mother	..	..	1/6
Father's father	..	..	5/6 (as residuary)

Note : The father's mother's mother (who is a true pat. grandmother) is not excluded by the father's father (who is a true grandmother), for though he is nearer in degree he is not in relation to her an intermediate true grandmother, as the father's mother's mother is not related to the deceased through him, but through the father.

(p) Father's mother	..	..	1/6
Mother's mother's mother	..	..	(excluded by father's mother who is a nearer true grandmother)
Father's father	..	..	5/6 (as residuary)
(q) Father's mother	..	..	(excluded by father)
Mother's mother's mother	..	..	(excluded by father's mother who is a nearer true grandmother)
Father	..	..	takes the whole as residuary

Note : This illustration is taken from Barlie. 706. The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (e) : in that case the exclusion of the mother by the sister was partial, for she did take a share, namely, $1/6$. In the present case, however, the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken $1/6$, for being a true maternal grandmother, she is not excluded by the father.

DAUGHTERS AND SON'S DAUGHTERS h.l.s

(r) Father	..	..	$1/6$	(as sharer)
Mother	..	..	$1/6$	
3 son's daughters, of whom one is by one son and the other two by another son	..	..	$2/3$	(each taking $2/9$)

Note : The son's daughters take per capita and not per stripes. The two-thirds is not therefore divided into two parts, one for the son's daughter by one son, and other for the other two by another son, but it is divided into as many parts as there are son's daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Sunni Muslim law does recognize any right of representation, and the son's daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of son's sons, brother's sons, uncles sons, etc. see Table of Residuaries.

(s) Father	..	..	$1/6$	(as sharer)
Mother	..	..	$1/6$	
Daughter	..	..	$1/2$	
4 son's daughters	..	..	$1/6$	(each taking $1/24$)

Note : There being only one daughter, the son's daughters are not entirely excluded from inheritance, but they take $1/6$, which, together with the daughter's $1/2$, makes up $2/3$, the full portion of daughters.

(t) Father	..	..	$1/6$	(as sharer)
Mother	..	..	$1/6$	
2 son's daughters	..	..	$2/3$	
Son's son's daughter	..	..	..	(excluded by son's daughters)

(u) Father	..	..	$1/6$	(as sharer)
Mother	..	..	$1/6$	
Son's daughter	..	..	$1/2$	
Son's son's daughter	..	..	$1/6$	

Note : The rule of succession as between daughters and son's daughters applies, in the absence of daughters, as between higher son's daughters and lower son's daughters (Sir. 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits $1/6$, which together with the son's daughter's $1/2$, makes up $2/3$, the full share of son's daughters in the absence of daughters.

SISTERS.

(v) Mother	..	..	$1/6$	
2 full sisters	..	..	$2/3$	(each taking $1/3$)
C. sister	..	..	..	(excluded by full sister)
U. sister (or u. brother)	..	..	$1/6$	
(w) 2 full sisters, (or c. sisters)			$2/3$	(each taking $1/3$)
2 u. sisters (or u. brothers)			$1/3$	(each taking $1/6$)
(x) Full sister	..	..	$1/2$	
2 c. sisters	..	..	$1/6$	(each taking $1/12$)
U. brother	}	..	$1/3$	(each taking $1/6$)
U. sister		..		

Note : There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit $1/6$ which, together with the sister's $1/2$, make up $2/3$, the collective share of full sisters in the inheritance (Sir. 21).

Note : The sharers are twelve in number. Of these there are six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. See the list of Residuaries given in sec. 5 below, and the notes on that section.

4. Increase (Aul) :

If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity, the share of each Sharer is proportionately diminished by reducing the fractional shares to a common denominator, and **increasing** the denominator so as to make it equal to the sum of the numerators.

Illustration *

Husband . .	$1/2 = 3/6$	reduced to $3/7$
2 Full Sisters .	$2/3 = 4/6$	reduced to $4/7$
	$7/6$	1

* This is illustration (a) of Sir D.F. Mulla's work ; illustrations (b) to (q), being on the same point, have not be reproduced (Anwer Ali)

Note : The sum total of $1/2$ and $2/3$ exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fractions $3/6$ and $4/6$. By so doing the total of the shares equals unity. The doctrine of “**Increase**” is so called because it is by increasing the denominator from 6 to 7 so that the sum total of the shares is made equal to unity.

C – Residuaries.

5. Residuaries :

If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue as the case may be, devolves upon Residuaries in the order set forth in the following :

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION

I. – DESCENDANTS :

1. SON.

Daughter takes as a residuary with the son, the son taking a double portion.

2. SON'S SON h.l.s.* – the nearer in degree excluding the more remote. Two or more son's sons inherit in equal shares. Son's daughter h.l.s. takes as a residuary with an equal son's son. If there be no equal son's son, but there is a lower son's son, she takes as a residuary with him, provided she cannot inherit as a sharer. In either case, each son's son h.l.s. takes double the share of each son's daughter h.l.s

Note : When the son's daughter h.l.s. becomes a residuary with a lower son's son, and there are son's daughter h.l.s. equal in degree with the lower son's son she shares equally with them, as if they were all of the same grade.

* How low soever

II. – ASCENDANTS :

3. FATHER.

4. TRUE GRANDFATHER h.h.s.* – the nearer in degree excluding the more remote.

III. – DESCENDANTS OF FATHER :

5. FULL BROTHER.

Full Sister. – takes as a residuary with full brother, the brother taking a double portion.

6. FULL SISTER. – In default of full brother and the other residuaries above – named, the full sister takes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s

7. CONSANGUINE BROTHERS.

Consanguine Sister. – takes as a residuary with consanguine brother, the brother taking a double portion.

8. CONSANGUINE SISTER. – In default of consanguine brother and the other residuaries above- named, the consanguine sister takes the residue, if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s. or even if there be (3) one daughter and a son's daughter or daughters h.l.s.

9. FULL BROTHER'S SON

10. CONSANGUINE BROTHER'S SON

11. FULL BROTHER'S SON'S SON.

12. CONSANGUINE BROTHER'S SON'S SON

* How high soever

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12, and so on in like order.

IV. – DESCENDANTS OF TRUE GRANDFATHER h.h.s.

13. FULL PATERNAL UNCLE.
14. CONSANGUINE PATERNAL UNCLE.
15. FULL PATERNAL UNCLE'S SON
16. CONSANGUINE PATERNAL UNCLE'S SON.
17. FULL PATERNAL UNCLE'S SON'S SON.
18. CONSANGUINE PATERNAL UNCLE'S SON'S SON.

Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of No. 11 and 12.

MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHER – In like order and manner as the deceased's paternal uncles and their sons and son's sons.

Illustrations

[Note. – The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

No. 1 Sons and Daughters

(a)	Son	2/3	}	(as residuaries)
	Daughter	1/3		

Note: The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a sharer will take 1/2, and the son's son as a residuary will take the remaining 1/2.

- | | | | | |
|-----|----------------|----|-----|--|
| (b) | 2 Sons .. | .. | 4/7 | (as residuaries, each son taking 2/7) |
| | 3 Daughters .. | .. | 3/7 | (as residuaries, each daughter taking 1/7) |

(c) Widow	..	..	1/8 (as sharer)	
Son	..	..	2/3 of (7/8) = 7/12	} (as residuaries)
Daughter	..	..	1/3 of (7/8) = 7/24	

Note : The residue after payment of the widow's share is 7/8.

(d) Husband	..	..	1/4 (as sharer)	
Mother	..	..	1/6 (as sharer)	
Son	..	..	2/3 of (7/12) = 7/18	} (as residuaries)
Daughter	..	..	1/3 of (7/12) = 7/36	

Note: The residue in the above case is $1 - (1/4 + 1/6) = 7/12$. If there were two sons and three daughters, each son would take $2/7$ of $7/12 = 1/6$, and each daughter $1/7$ of $7/12 = 1/12$.

No. 2 Son's Sons h.l.s. and Son's Daughters h.l.s.

(e) Son's son	2/3	} (as residuaries)
Son's daughter	1/3	

Note : Where there is a son's son, the son's daughter cannot inherit as a sharer but she inherits as residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

(f) 2 daughters	..	..	2/3 (as sharers)	
Son's son	..	..	1/3 (as residuaries)	
Son's son's son	..	..	..	(excluded by son's son)
Son's son's daughter	..	..	..	(excluded both by daughters and Son's son. See Tab. of Sh., No. 8)

(g) 2 daughters	..	..	2/3 (as residuaries)	
Son's son	..	..	2/3 of (1/3) = 2/9	} (as residuaries)
Son's daughter	..	..	1/3 of (1/3) = 1/9	

(h) Daughter	..	..	1/2 (as sharer)	
Son's son	..	..	2/3 of (1/2) = 1/3	} (as residuaries)
Son's daughter	..	..	1/3 of (1/2) = 1/6	

Note : There being only one daughter, the son's daughter would have taken 1/6 as sharer (see Tab. of Sh., No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can inherit only as a residuary with the son's son.

(i) Son's daughter	..	..	1/2 (as sharer)	
Son's son's son	..	..	1/2 (as residuary)	

Note : In this case the son's daughter is not precluded from inheriting as a sharer for there is no relation who would preclude her from succeeding as a sharer (see Tab. of Sh., No. 8, 3rd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a lower son's son) is where she is precluded from succeeding as a sharer [see ill. (k) below].

(j) Daughter	1/2	(as sharer)
Son's son's son	1/6	(as sharer see Tab. of Sh., No.8)
Son's son's son	2/3 of (1/3)=2/9	} (as residuaries)
Son's daughter	1/3 of (1/3)=1/9	

Note : There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a lower son's son).

(k) 2 daughters	2/3	(as sharers)
Son's daughter	1/3 of (1/3)=1/9	} (as residuaries)
Son's son's son	2/3 of (1/3)=2/9	

Note : There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a lower son's son).

(l) 2 Son's daughters	2/3	(as sharers)
Son's son's son	2/3 of (1/3)=2/9	} (as residuaries)
Son's son's daughter	1/3 of (1/3)=1/9	

Note : The son's daughters in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m) 2 daughters	2/3	(as sharers)
Son's son's son	2/4 of (1/3)=1/6	} (as residuaries)
Son's daughter	1/4 of (1/3)=1/12	
Son's son's daughter	1/4 of (1/3)=1/12	

Note: There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a lower son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an equal son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a lower son's son.

If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, a result directly opposed to the principle that the nearest of blood must take first (*Sir.* 18-19).

No. 3 – Father.

(n)	Father	..	..	1/6	(as sharer)
	Son (or son's son h.l.s.)	..	..	5/6	(as residuary)

Note : Here the father inherits as a sharer. See Table of Sh., No. 1

(o)	Mother	..	..	1/3	(as sharer)
	Father	..	..	2/3	(as residuary)

Note : Here the father inherits as a residuary, as there is no child or child of a son h.l.s. See Table Sh. No. 1

(p)	Daughter	..	..	(as sharer) = 1/2
	Father	..	1/6	(as sharer) + 1/3 (as residuary) = 1/2

Note : Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter, and he inherits the residue 1/3 as a residuary, for there are neither sons nor son's sons h.l.s. The father may inherit both as a sharer and residuary. He inherits simply as a sharer when there is a son or son's son h.l.s. [see ill. (n) above.] He inherits simply as a residuary when there are neither children nor children of sons h.l.s. [see ill. (o) above.] He is both a sharer and a residuary when there are only daughters or son's daughters (h.l.s.), but no sons or son's sons h.l.s. as in the present illustration. The same remarks apply to the true grandfather h.h.s. In fact the father and the true grand-father are the only relations who can inherit in both capacities simultaneously.

No. 4 – True Grandfather h.h.s.

Note : Substitute "true grandfather" for "father" in ilk. (n) , (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

Nos. 5 & 7 – Brothers and Sisters.

(q)	Husband	..	..	1/2	(as sharer)
	Mother	..	..	1/6	(as sharer)
	Brother	..	..	2/3 of (1/3)=2/9	
	Sister	..	..	1/3 of (1/3)=1/9	(as residuaries)

Note : The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

Full brother (c)	..	2/3	(as residuary)
Full sister	..	1/3	(as residuary)
Con. Sister	..	0	(excluded by full brother)

No. 6 – Full Sisters with Daughters and Son's Daughters.

(r) Daughter (or son's daughter h.l.s.)	..	1/2	(as Sharer)
Full sister	..	1/2	(as residuary No. 6)
Brother's son	..	0	(excluded by full sister who is a nearer residuary)

Note : The full sister inherits in three different capacities : (1) as a sharer under the circumstances set out in the Table of Sharers ; (2) as a residuary with full brother when there is a brother ; and, failing to inherit in either of these two capacities, (3) as a residuary with daughters, or son's daughters h.l.s. or one daughter and a son's daughter h.l.s. provided there is no nearer residuary. Thus in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h.l.s.). And as there is no brother, she cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue 1/2 as a residuary with the daughter (or son's daughter), for there is no residuary nearer in degree. If this were not so, the brother's son, who is a more remote relation, would succeed in preference to her.

(s) 2 daughters (or son's daughters h.l.s.)	..	2/3	(as sharers)
Full sister	..	1/3	(as residuary No. 6)
(t) 2 daughters (d)	..	2/3	(as sharers)
Husband	..	1/4	(as sharers)
Full sister	..	1/12	(as residuary No. 6)
Father's pat. uncle's son	..	0	(excluded by full sister who is a nearer residuary)
(u) Daughter	..	1/2	(as sharer)
Son's daughter	..	1/6	(as sharer)
Full sister	..	1/3	(as residuary No. 6)
(v) Daughter	..	1/2	(as sharer)
Son's daughter	..	1/6	(as sharer)
Mother	..	1/6	(as sharer)
Full sister	..	1/6	(as residuary No. 6)
(w) Daughter	..	1/2	(as sharer)
Son's daughter	..	1/6	(as sharer)
Husband	..	1/4	(as sharer)
Full sister	..	1/12	(as residuary No. 6)

(x) Daughter ..	1/2	(as sharer) = 6/12	reduced to 6/13
Son's daughter ..	1/6	(as sharer) = 2/12	" 2/13
Husband ..	1/4	(as sharer) = 3/12	" 3/13
Mother ..	1/6	(as sharer) = 2/12	" 2/13
Full sister ..	0	(excluded)	
	-----		-----
	13/12		1
	-----		-----

Note : Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But the residuary succeeds to the residue, if any, after the claims of the sharers, are satisfied, and in the present cast there is no residue. The sum total of the sharers exceeds unity, and the case is one of "Increase."

No. 8 – Consanguine Sisters with Daughters and Son's Daughters h.I.s.

Note : Consanguine sisters inherit as residuaries with daughters and son's daughters in the absence of full sisters. Substitute "consanguine sister" for "full sister" in ill. (r) to (x) , and the sharers of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substitute also in the note to ill. (r) "consanguine brother" for "full brother".

Other Residuaries

(y) Full sister ..	..	1/2	(as sharer)
C. sister ..	..	1/6	(as sharer)
Mother ..	..	1/6	(as sharer)
Father ..	..	1/6	(as residuary)
(z) Widow ..	..	1/4	(as sharer)
Mother ..	..	1/3	(as sharer)
Pat. uncle ..	..	5/12	(as residuary)
(aa) Full sister ..	..	1/2	(as sharer)
Pat. uncle's sons ..	..	1/2	(as residuaries)

Note *

From the above it is clear that :-

- (i) All residuaries are related to the deceased through a male ;
- (ii) Since the uterine sister and brother are related to the deceased through a female, namely, the mother, they are therefore not included among residuaries ;

* Since here the Note by Sir D.F. Mulla is a bit lengthy , I have noted these main points in short from it (Anwer Ali)

- (iii) Six Sharers, viz., the father, the true grandfather h.h.s, the daughter, the son's daughter h.l.s., the full sister and consanguine sister, in some circumstances, inherit as residuaries ;
- (iv) Of these six, only the father and true grandfather inherit, in certain events, both as sharers and residuaries (see ill. (p) above and the Note thereto) ; they are the only heirs who inherit at the same time in double capacity ;
- (v) The other four, of these six, who are females, inherit either as sharers or residuaries, as mentioned in the Table of Sharers ; they inherit as residuaries alone when they are combined with male relations of a parallel grade ;
- (vi) Of the four female residuaries, two, namely, the daughter and the son's daughter h.l.s. are descendants of the deceased, and two, namely, the full sister and the consanguine sister are descendants of the deceased's father ;
- (vii) All these four females inherit as residuaries with males of equal grade, and none of them, except the son's daughter h.l.s. can inherit as residuary with a male of lower degree than herself (see ill. (m) and the Note thereto) ;
- (viii) Some heirs exclude entirely others from inheritance ; this proceeds on the following principles :-
 - (a) Whoever is related to the deceased through any person shall not inherit while that person is alive. (Sir. 27) ; thus father excludes brothers and sisters
 - (b) The nearest of relations must take (Sir. 27) , i.e. the nearer in degree exclude the remoter ; thus father excludes the grandfather ;
- (ix) Five heirs, namely, the child (son or daughter), father, mother, husband, and wife, are always entitled to some share of the inheritance ; they may be called the "Primary Heirs" ;
 - (a) Of these, the child, the father, and the mother have as their substitutes the child of a son h.l.s., the true grandfather, and the true grandmother, respectively ; there are no substitutes to the husband or the wife ;
 - (b) No substitute is entitled to inherit in the presence of his or her primary heir ; except when there is no son, but a daughter and a son's daughter in which case the daughter gets $\frac{1}{2}$ and the son's daughter (though a substitute) gets $\frac{1}{6}$ (see Table of Sharers, No. 8);
- (x) All relations who are excluded by primary heirs are also excluded by their substitutes ; thus full and consanguine sisters and uterine brothers and sisters, who are excluded by the child and the father respectively, are also excluded by the child of a son h.l.s. and by the true grandfather;

- (xi) The shares are so arranged and the rules of succession are so framed that when the son, and so also when the true grandfather (in absence of the father), is a surviving heir, the doctrine of "Increase" does not apply.

6. Return (*Radd*):

If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return" or *Raad*.

Exception. – Neither the husband nor the wife is entitled to the Return so long as there is any other heir, whether he be a Sharer or a Distant Kindred. But if there be no other heir, the residue will go to the husband or the wife, as the case may be by *Return*.

Illustration

(a) A Muslim dies leaving a widow as his sole heir. The widow will take $\frac{1}{4}$ as sharer, and the remaining $\frac{3}{4}$ by Return. The surplus $\frac{3}{4}$ does not escheat to the Crown :

(b) Husband	..	$\frac{1}{2}$
Mother	..	$\frac{1}{2}$ ($\frac{1}{3}$ as sharer and $\frac{1}{6}$ by Return)

Note. – The husband is not entitled to the Return, as there is another sharer, the mother. The surplus $\frac{1}{6}$ will therefore go to the mother by Return.

(c) Husband	..	..	$\frac{1}{4}$
Daughter	..	..	$\frac{3}{4}$ ($\frac{1}{2}$ as sharer and $\frac{1}{4}$ by Return)
(d) Wife	..	..	$\frac{1}{4}$
Sister (f. or c.)	..	..	$\frac{3}{4}$ ($\frac{1}{2}$ as sharer and $\frac{1}{4}$ by Return)
(e) Wife	..	..	$\frac{1}{8}$
Son's daughter	..	..	$\frac{7}{8}$ ($\frac{1}{2}$ as sharer and $\frac{3}{8}$ by Return)
(f) Mother	..	..	$\frac{1}{6}$ increased to $\frac{1}{4}$ $\frac{1}{2}$
Son's daughter	..	..	* $\frac{3}{6}$ I $\frac{3}{4}$

			$\frac{4}{6}$ 1

Note : In this and in illustrations (g) to (k) it will be observed that neither the husband nor the wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares when reduced to a common denominator, are $1/6$ and $3/6$. The total of the numerators is $1+3=4$, and the ultimate shares will therefore be $1/4$ and $3/4$ respectively.

(g)	Father's mother } Mother's mother } 2 daughters ..	}	$1/6$ increased to $1/5$ (each taking $1/10$) $2/3 = 4/6$ " $4/5$ ----- ----- $5/6$ 1
(h)	Mother .. Daughter .. Son's daughter ..	}	$1/6$ increased to $1/5$ $1/2 = 3/6$ " $3/5$ $1/6$ " $1/5$ ----- ----- $5/6$ 1
(i)	Father's mother .. Mother's mother ..	}	$1/6$ increased to $1/5$
(j)	Full sister .. C. sister ..	}	$1/2 = 3/6$ increased to $3/5$ $1/6$ " $1/5$ ----- ----- $5/6$ 1
(j)	Full sister .. C. sister .. U. sister ..	}	$1/2 = 3/6$ increased to $3/5$ $1/6$ " $1/5$ $1/6$ " $1/5$ ----- ----- $5/6$ 1
(k)	Mother ..	}	$1/6$ increased to $1/5$
(l)	Full sister .. U. brother ..	}	$1/2 = 3/6$ " $3/5$ $1/6$ " $1/5$ ----- ----- $5/6$ 1
(l)	Husband .. Mother .. Daughter ..	}	$1/4$ = $4/16$ $1/6$ increased to $1/4$ of $(3/4) = 3/16$ $1/2 = 3/6$ " $3/4$ of $(3/4) = 9/16$ ----- ----- $11/12$ 1

Note : In this and in ill. (m) to (r), it will be observed that either the husband or the wife is one of the surviving heirs. Since neither the husband nor the wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the others will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional share so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are $1/6$ and $3/6$ respectively. The total of the numerators is $1+3=4$, and the new fractional shares will thus be $1/4$ and $3/4$ respectively. The residue after deducting the husband's share is $3/4$, and the ultimate shares of the mother and daughter will therefore be $1/4$ of $3/4 = 3/16$ and $3/4$ of $3/4 = 9/16$ respectively.

(m) Wife	..	..	$1/8$	=	$4/32$
Mother	..	..	$1/6$ increased to $1/4$ of $(7/8)$	=	$7/32$
Daughter	..	$1/2 = 3/6$	"	$3/4$ of $(7/8)$	= $21/32$
		-----			-----
		$19/24$			1

(n) Wife	..	..	$1/8$	=	$5/40$
Mother	..	..	$1/6$ increased to $1/5$ of $(7/8)$	=	$7/40$
2 son's daughter	..	$4/6$	"	$4/5$ of $(7/8)$	= $28/40$
		-----			-----
		$23/24$			1

(o) Husband	..	..	$1/2$	=	$2/4$
U. brother	..	..	$1/6$ increased to $1/2$ of $(1/2)$	=	$1/4$
U. sister	..	..	$1/6$ " $1/2$ of $(1/2)$	=	$1/4$
		-----			-----
		$5/6$			1

(p) Wife	..	..	$1/4$	=	$2/8$
U. brother	..	..	$1/6$ increased to $1/2$ of $(3/4)$	=	$3/8$
U. sister	..	..	$1/6$ " $1/2$ of $(3/4)$	=	$3/8$
		-----			-----
		$7/12$			1

(q) Wife	..	..	$1/4$	=	$4/16$
Full sister	..	$1/2 = 3/6$	increased to $3/4$ of $(3/4)$	=	$9/16$
C. sister	..	..	$1/6$ " $1/4$ of $(3/4)$	=	$3/16$
		-----			-----
		$11/12$			1

(r) Wife	..	..	1/4	= 1/4
U. brother	..	..	1/6 increased to 1/3 of (3/4)	= 1/4
U. sister	..	..	1/6 " 1/3 of (3/4)	= 1/4
Mother	..	..	1/6 " 1/3 of (3/4)	= 1/4
			-----	-----
			9/12	1
(s) Husband	..	..	..	1/2
Daughter's son	..	..	..	1/2

Note : The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return and the same will go to the daughter's son as a distant kinsman.

(t) Wife	..	..	..	1/4
Brother's daughter	..	..	..	3/4

Note : The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return. *Sir.* 37-40.

Residuaries for special cause. A residuary for special cause is a person who inherits from a freed man by reason of the manumission of the latter. According to Muslim law proper, if a manumitted slave dies without leaving any residuary heir by relation, the manumitter is entitled to succeed to the residue in preference to the right of the sharers to take the residue by Return (*Sir.* 25-26). But residuaries for special cause have no place in Muslim law as administered by the Courts since the abolition of slavery in 1843 A.D.

Husband and wife. The rule of law as stated in the exception as regards the right of the husband and wife to Return is different from that set out in the *Sirajiyah*. According to the latter authority, neither the husband nor the wife is entitled to the Return in any case, not even if there be no other heir, and the surplus goes to the public Treasury (*Sir.* 37). "But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred," and this practice has been adopted by the Courts (in India and Pakistan).

"Return" distinguished from "Increase". Return is the converse of Increase. The case of Return takes place when the total of the shares is less than unity ; the case of Increase, when the total is greater than unity. In the former case the shares undergo a rateable increase ; in the latter a rateable decrease.

Father and true grandfather. When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a residuary, for he cannot inherit as a sharer when there is no child or child of a son h.l.s. (see Table of Sh., No. 1). The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

*D. – Distant Kindred***7. Distant Kindred :**

(1) If there be no Sharers or Residuaries, the inheritance is divided amongst Distant Kindred.

(2) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

8. Four Classes :

(1) Distant Kindred are divided into four classes, namely,
 (1) descendants of deceased other than sharers and residuaries ;
 (2) ascendants of the deceased other than sharers and residuaries ;
 (3) descendants of parents other than sharers and residuaries ; and
 (4) descendants of ascendants how high soever other than residuaries.

The descendants of the deceased succeed in priority to the ascendants, the ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.

(2) The following is a list of Distant Kindred comprised in each of the four classes :-

I. Descendants of the Deceased :

1. Daughter's children and their descendants.
2. Children of son's daughter h.l.s. and their descendants

II. Ascendants of the Deceased :

1. False grandfathers h.h.s.
2. False grandmothers h.h.s.

III. Descendants of Parents :

1. Full brother's daughters and their descendants.
2. Con.* brother's daughters and their descendants.
3. Uterine brother's children and their descendants.
4. Daughters of full brother's sons h.l.s. and their descendants.
5. Daughters of con. brother's sons h.l.s. and their descendants.
6. Sister's (f., c., or ut.) *** children and their descendants.

IV. Descendants of Immediate Grandparents (true or false) :

1. Full pat.**** Uncles' daughters and their descendants.
2. Con. pat. Uncles' daughters and their descendants.
3. Uterine pat. Uncles' and their children and their descendants.
4. Daughters of full pat. Uncles' sons h.l.s. and their descendants.
5. Daughters of con. pat. Uncles' sons h.l.s. and their descendants.
6. Pat. Aunts (f., c., or ut.) and their children and their descendants.
7. Mat.***** Uncles and aunts and their children and their descendants.

and

Descendants of remoter ancestors h.h.s
(true or false).

(3) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in 9 to 19.

* Consanguine.

** (full, consanguine, or uterine)

*** Paternal

**** Maternal

Class I of Distant Kindred

Difference between doctrines of Imam Muhammad and Imam Abu Yusuf.

When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the shares. In each class we have first to determine which of the relations are entitled to succeed ; this is done by applying certain rules which are called Rules of Exclusion. After so doing, we have to assign shares to those relations, this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Imam Abu Yusuf and Imam Muhammad, the two great disciples of Imam Abu Hanifa. The doctrine of Imam Abu Yusuf is very simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India and this doctrine is much too complicated. Moreover, the doctrine of Imam Muhammad is followed by the author of the *Sirajiyyah*, and apparently by the author of the *Sharifiyyah*. The *Fatawa Alamigiri* does not express any preference either way. Since the opinion of Imam Abu Yusuf is not followed in India, (and Pakistan) we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only those cases where the intermediate ancestors are :

- (i) of different sexes as where some are males and others in the same generation are females ; or where they are
- (ii) of different blood, as where some are of whole blood and others in the same generation are of half blood.

Imam Abu Yusuf declines to take any notice of the sex or blood of intermediate ancestors or, as they are called "roots." According to him, regard should be had to the sex and blood of the actual claimants, or, as they are called, "branches." The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughters as residuaries, that is to say, *per capita*, each male claimant taking a share double that of each female claimant.

According to Imam Muhammad regard should be had not only to the sex and blood of the actual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their sexes, the two systems differ as to the shares to be allotted to the claimants. This difference in the shares manifests itself when claimants are descendants whether they be descendants of the deceased as in class I or of brothers and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in blood, the two systems differ as to the order of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among Residuaries there cannot be any difference of blood or sex among intermediate ancestors as may happen among *Distant Kindred*.

9. Rules of Exclusion :

The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order (*Sir.47*) :-

Rule (1). – The nearer in degree excludes the more remote.

Sir. 7. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

Rule (2) . – Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

Sir. 47. Thus a son's daughter's son, being a child of a sharer (son's daughter) succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

10. Order of Succession :

The rules set forth in section 9 lead to the following order of succession among Distant Kindred of the first class :-

- (1) Daughter's children.
- (2) Son's daughters' children.

- (3) Daughters' grandchildren.
- (4) Sons' sons' daughters' children.
- (5) Daughters' great-grandchildren and sons' daughters' grandchildren.
- (6) Other descendants of the deceased in like order.

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos. (4) and (5) to the fourth generation. No. (2) excludes No. 3 by reason of sec. 9, rule (2). For the same reason No. (4) excludes No. (5).

11. Allotment of Shares :

After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. the distribution in this class is governed by the following rules :-

Rule (1) – If the intermediate ancestors do not differ in their sexes, the estate is to be divided among the claimants *per Capita* according to the rule of the double share to the male. (*Sir. 47*)

Illustrations.

- | | | | | |
|-----|---------------------------|----|----|-----------------------|
| (a) | Daughter's son | .. | .. | 2/3 |
| | Daughter's daughter | .. | .. | 1/3 |
| (b) | Daughter's son's son | | | 2/3 |
| | Daughter's son's daughter | .. | .. | 1/3 |
| (c) | 2 sons of daughter A | | | 4/5 (each taking 2/5) |
| | 1 daughter of daughter B | | | 1/5 |

Note. – To divide the estate *per stripes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, A and B.

- | | | | | |
|-----|--|----|----|-----------------------|
| (d) | 2 sons of a daughter's daughter A | .. | .. | 4/6 (each 2/6 or 1/3) |
| | 2 daughters of a daughter's daughter B | .. | .. | 2/6 (each 1/6) |

Note. – To divide the estate *per stripes* is to assign 1/2 to the two sons, and 1/2 to the two daughters.

Doctrine of Imam Abu Yusuf. The distribution will be the same according also to Imam Abu Yusuf. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's daughter's son and a daughter's son's daughter, the case is one in which the intermediate ancestors differ in their sexes. In such a case also, according to Imam Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female, will take 1/3 ; the reason being that according to Imam Abu Yusuf regard is to be had solely to sexes of the claimants (see "Difference between doctrines of Imam Muhammad and Imam Yusuf" p. 146). According to Imam Muhammad, regard should be had also to the sexes of the intermediate ancestors, and the distribution is to be made according to rule (2) below, which, it will be seen, is a distribution *per stripes*, though not entirely such as in the Shia law.

Rule (2) – If the intermediate ancestors differ in their sexes, the estate is to be distributed according to the following rules. (Sir. 48 – 50)

(a) The simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of a male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

Illustrations

A Muslim dies leaving a daughter's son's daughter and daughter's daughter's son, as shown in the following table :

	Propositus.	
	I	
	I	I
1 st line	daughter	daughter
	I	I
2 nd line	son	daughter
	I	I
3 rd line	daughter	son

In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied. This is done by assigning $\frac{2}{3}$ to the daughter's son and $\frac{1}{3}$ to the daughter's daughter. The $\frac{2}{3}$ of the daughter's son will go to his daughter, and the $\frac{1}{3}$ of the daughter's daughter will go to her son. Thus we have

Daughter's son's daughter	..	$\frac{2}{3}$
Daughter's daughter's son	..	$\frac{1}{3}$

According to Imam Abu Yusuf, the shares will be $\frac{1}{3}$ and $\frac{2}{3}$ respectively.

Note : Where the deceased leaves descendants in the fourth or remoter generation the rule of the double share to the male is to be applied in every successive line in which the intermediate ancestors differ in their sexes. See ill. (b) to sub - rule (c) below.

(b) The next case is where there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

Illustration

(a) A Muslim dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table : -

Propositus.		
I		
I	I	I
daughter	daughter	daughter
I	I	I
son	daughter	daughter
I	I	I
daughter	son	daughter

In this case, the ancestors differ in their sex in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

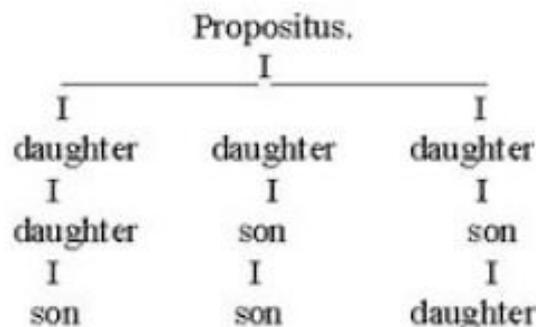
Daughter's son ..	1/2	
Daughter's daughter..	1/4	} 1/2 (collective share of female ancestors)
Daughter's daughter..	1/4	

The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely, the daughter's daughters, form a group, and their collective share is 1/2, which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter, in the proportion again of two to one, the former taking $\frac{2}{3} \times \frac{1}{2} = \frac{1}{3}$ and the latter $\frac{1}{3} \times \frac{1}{2} = \frac{1}{6}$. Thus we have

Daughter's son's daughter ..	$\frac{1}{2} = \frac{3}{6}$
Daughter's daughter's son ..	$\frac{1}{3} = \frac{2}{6}$
Daughter's daughter's daughter	$\frac{1}{6} = \frac{1}{6}$

According to Imam Abu Yusuf, the shares will be 1/4, 1/2 and 1/4 respectively.

(b) A Muslim dies leaving a daughter's daughter's son, a daughter's son's son and a daughter's son's daughter, as shown in following table :-



[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.]

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

Next, assume the relations in that line to be so many children of the deceased and determine their shares upon that footing. The shares therefore will be, daughter's daughter 1/5, and each daughter's son 2/5, the collective share of the two daughter's sons being 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the $4/5$ of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes $2/3 \times 4/5^* = 8/15$, and the daughter's son's daughter $1/3 \times 4/5 = 4/15$. Thus we have

daughter's daughter's son	..	$1/5 = 3/15$
daughter's son's son	..	$8/15$
daughter's son's daughter	..	$4/15$

According to Imam Abu Yusuf, the shares will be $2/5$, $2/5$, and $1/5$ respectively.

(c) A Muslim dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table :-

Propositus			
I			
I	I	I	I
daughter	daughter	daughter	daughter
I	I	I	I
son	son	daughter	daughter
I	I	I	I
son	daughter	son	daughter

Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is $4/6$, and that of the two females is $2/6$. The $4/6$ of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking $2/3 \times 4/6 = 8/18$, and the latter $1/3 \times 4/6 = 4/18$. The $2/6$ of the daughter's daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking $2/3 \times 2/6 = 4/18$, and the latter $1/3 \times 2/6 = 2/18$. Thus we have

daughter's son's son	..	..	$8/18$
daughter's son's daughter	..	..	$4/18$
daughter's daughter's son	..	..	$4/18$
daughter's daughter's daughter	..	..	$2/18$

According to Imam Abu Yusuf the shares will be $2/6$, $1/6$, $2/6$ and $1/6$ respectively.

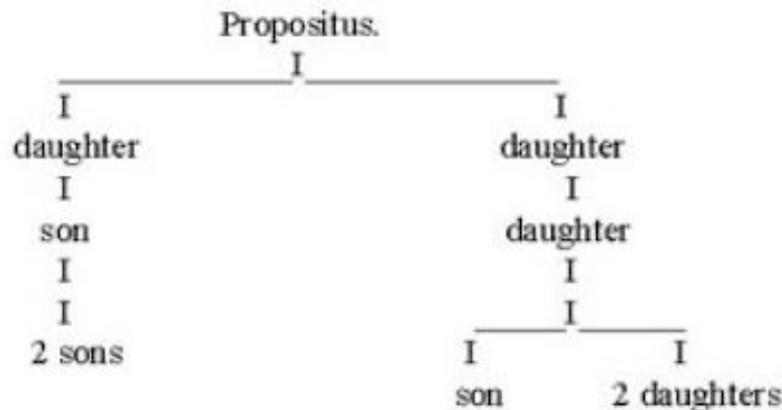
Note : When a person dies leaving descendants in the fourth or remoter generation "the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line ; but the descendants of any individual or group, once separated must be kept separate throughout, in other words they must not be united in a group with those of any other individual or group" * See ill. (b) to sub-rule (c).

* Rumsey's Moohummudan Law of Inheritance, pp. 68 - 69.

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

Illustration

(a) Muslim dies leaving 5 great-grandchildren as shown in the following diagram :



Here the ancestors first differ in their sex in the second line, and in that line we have one male and one female. The daughter's son will count as two males by reason of his having two descendants among the claimants, and the daughter's daughter will count as three females by reason of her having three descendants. Thus we have

daughter's sons	..	..	..	4/7
daughter's daughter..	..	..	..	3/7

The 4/7 of the daughter's son will go to his two sons. The 3/7 of the daughter's daughter will go to her descendants, the son taking $2/4 \times 3/7 = 6/28$ and each daughter taking $1/4 \times 3/7 = 3/28$. Thus we have

daughter's son's sons	..	..	..	4/7 = 16/28 (each 8/28)
daughter's daughter's son	..	..	..	6/28
daughter's daughter's daughters	..	..	..	6/28 (each 3/28)

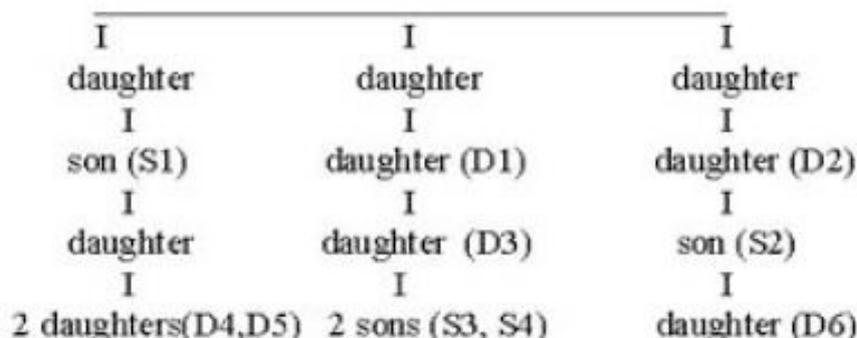
According to Imam Abu Yusuf, the shares will be as follows :

each daughter's son's son	..	..	..	2/8
daughter's daughter's son	..	..	..	2/8
each daughter's daughter's daughter	..	..	..	1/8

Note. – When the deceased leaves descendants in the fourth or remoter generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. See the next illustration.

The following case taken from the Sirajiyah illustrates the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the fourth generation. See notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill (a) above

(b) A Muslim dies leaving 5 descendants in the fourth generation as shown in the following diagram [Sir. 49]:-



Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D2 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows :-

$$\left. \begin{array}{l} S1 = 4/7; \\ D1 = 2/7 \\ D2 = 1/7 \end{array} \right\} 3/7 \text{ (collective share of female ancestors)}$$

S1 being by himself, his share 4/7 will pass to his two descendants D4 and D5 in equal moieties, each taking 2/7.

The collective share 3/7 of D1 and D2 will descend to their immediate descendants D3 and S2 ; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share 3/7 will be divided into 4 parts as follows :-

$$\begin{aligned} D3 &= 2/4 \times 3/7 = 3/14 ; \\ S2 &= 2/4 \times 3/7 = 3/14 ; \end{aligned}$$

The share of D3 will pass to her descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendant D6. The ultimate shares will therefore be :

$$D4 = 2/7 ; D5 = 2/7 \cdot S3 = 3/28 ; S4 = 3/28 ; D6 = 3/14$$

According to Imam Abu Yusuf, the shares will be as follows :-

$$D4 = 1/7 ; D5 = 1/7 \cdot S3 = 2/7 ; S4 = 2/7 ; D6 = 1/7$$

Class II of Distant Kindred.

12. Order of Succession :

(1) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class.

(2) If there be no mother's father, the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and of these two, the former, as belonging to the paternal side, will take 2/3, and the latter, as belonging to maternal side, will take 1/3 [see rules (2) (3) below].

Note that the father's mother and the mother's mother are sharers.

If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to see 11, rule (1) [*Sir.* 51-52]

Note that the two ancestors mentioned in sub-sec. (3), are both related to the deceased through a distant kinsman, namely, mother's father.

Rules of succession. – Succession among Distant Kindred of the second class is governed by the following rules :-

Rule (1). – The nearer in degree excludes the more remote.

Rule (2). – Among claimants in the same degree, those connected with the deceased through sharers are preferred to those connected through distant kindred.

Rule (3). – If there are claimants on the paternal side as well as claimants on the maternal side, assign $\frac{2}{3}$ to the paternal side, and $\frac{1}{3}$ to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 11.

Doctrine of Imam Abu Yusuf : It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the two disciples as there is in class I. Anyhow, no such difference can arise until ancestors in the fourth degree are reached.

Class III of Distant Kindred.

Rules of exclusion :

If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following three rules in order. (*Sir.* 52 – 54)

Rule (1) . – The nearer in degree excludes the more remote.

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters. A sister's son excludes a brother's son's daughter.

Rule (2). – Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a Residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

Rule (3) . – Among claimants in same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the test of blood laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order : See notes to sec. 18 under the head “Rules of succession among descendants” [rules (3) and (4)].

Order of Succession :

The above rules lead to the following order of succession among Distant Kindred of the third class :

- (1) Full brothers' daughters, full sisters' children and children of uterine brothers and sisters.
- (2) Full sisters' children, children of uterine brothers and sisters, consanguine brothers' daughters and consanguine sisters' children, the consanguine group taking the residue (if any).
- (3) Consanguine brothers' daughters, consanguine sisters' children, and children of uterine brothers and sisters.
- (4) Full brothers' sons' daughters (children of Residuaries).
- (5) Consanguine brothers' sons' daughters (children of Residuaries).
- (6) Full brothers' daughters' children, full sisters' grand-children, and grandchildren of uterine brothers and sisters.
- (7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).
- (8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.
- (9) Remoter descendants of brothers and sisters in like order.

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are Residuaries ; hence it is that they do not find any place in the above list.

Doctrine of Imam Abu Yusuf : According to Imam Abu Yusuf also, there are three rules of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Imam Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Imam Abu Yusuf would have regard to the "blood" of the *claimants* while Imam Muhammad looks to the "blood" of the *Roots*. The result is that the order of succession according to Imam Yusuf is different from that according to Imam Muhammad.

Allotment of Shares :

After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [*Sir.* 53-54] :

Rule (1) : First, divide the estate among the Roots, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to Roots, but there are no Residuaries among the Roots [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 6. The hypothetical claimants being brothers and sisters, no case of increase is possible at all (S.4).

The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full, consanguine and uterine. The brothers and sisters are therefore the Roots. Of these, uterine brothers and sisters always inherit as sharers, one taking $1/6$, and two or more $1/3$. Full and consanguine brothers always inherit as residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking $1/2$, and two or more $2/3$; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. See Table of Sharers, Nos. 9 to 12; Table of Residuaries Nos. 5-7.

If the claimants be a uterine brother and a full brother, the former takes $1/6$, and the latter the residue $5/6$. But if the claimants be two or more descendants of a uterine brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be $1/3$, that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue $2/3$.

If the claimants be a uterine sister and a full sister, the former will take $1/6$, and the latter $1/2$, and the residue $1/3$ will go to them by Return, the former taking $1/4$ and the latter $3/4$. But if the claimants be 5 descendants of a uterine sister, and 9 descendants of a full sister, the hypothetical share of the uterine sister will be $1/3$, that being the share of two or more uterine sisters, and that of the full sister will be $2/3$, that being the share of two or more full sisters. [see ill. (b) to Rule (3) below].

If the claimants be a full brother and a full sister, they will inherit as Residuaries, the former taking $2/3$, and the latter $1/3$. But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being $6/10$, and that of the full sister $4/10$. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister. [compare ill. (e) to Rule (3) below.]

As to the application of the doctrine of Return to the *Roots*, see ill. (d) to rule (3) below.

Rule (2) : After determining the hypothetical shares of the Roots, the next step is to assign its share to the uterine group. If there be only one claimant in that group, assign $1/6$ to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more

uterine brothers or sisters, assign $1/3$ to them, that being the hypothetical share of their parent or parents, and divide it equally among them without distinction of sex.

Rule (3) : Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their respective descendants as among Distant Kindred of the first class [see s. 11].

Doctrine of Abu Yusuf : According to Imam Abu Yusuf, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male.

A Sunni Muslim dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram :-

Common ancestors.

I	I	I	I	I	I	I	I	
F.B.	F.S.	C.B.	C.S.	U.B.	U.S.			
I	I	I	I	I	I	I	I	
I	I	I	I	I	I	I	I	
I	I	I	I	I	I	I	I	
D(1/3)	S (2/9)	D(1/9)	D(0)	S(0)	D(0)	D(1/9)	S(1/9)	D(1/9)

The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter [see s. 13, rule (3)]. The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is $1/3$, and this will be divided among their three descendants equally without distinction of sex, each taking $1/9$.

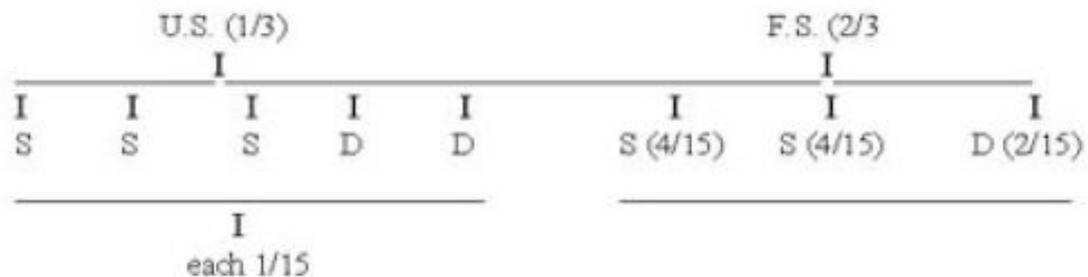
This leaves a residue of $2/3$, and this is to be divided in the first instance between the full brother and the full sister as Residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant, counts as one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking $2/4 \times 2/3 = 1/3$, and the full sister also $2/4 \times 2/3 = 1/3$.

The full brother's share $1/3$ will go to his descendant. The full sister's share $1/3$ will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking $2/3 \times 1/3 = 2/9$, and the daughter taking $1/3 \times 1/3 = 1/9$.

Note : On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Imam Abu Yusuf, the whole estate will be divided among the children of the *full* brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take $1/4$, the full sister's son $1/2$, and her daughter $1/4$. On failure of children of the full brother and sister, the estate will be divided in like manner among the children of *consanguine* brother and sister. And on failure of them, it will be distributed in like manner among the children of the *uterine* brother and sister).

A Sunni Muslim dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram :-



As there are five claimants in the uterine group, the share of the uterine sister is $1/3$, and this will be divided among her five children equally without distinction of sex, each taking $1/5 \times 1/3 = 1/15$.

The full sister, having three descendants, will count as three sisters, and she will take $2/3$, that being the share of two or more full sisters [see Tab. of Sh., No. 11]. This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take $2/5 \times 2/3 = 4/15$, and the daughter will take $1/5 \times 2/3 = 2/15$.

[According to Imam Abu Yusuf, the whole estate will be divided among the children of the *full* sister according to the rule of the double share to the male, so that each son will take $2/5$, and the daughter will take $1/5$].

A Sunni Muslim dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram :-

I	I	I	I
U.B.	U.S.	F.S.	C.B.
I	I	I	I
D (1/6)	S (1/6)	S (1/2)	D (1/6)

Here there is no descendant of a full brother ; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

As there are two descendants in the uterine group, the collective share of the uterine brother and sister is $1/3$, and this will be divided equally between their children without distinction of sex, each taking $1/6$.

The full sister, having only one descendant, counts as one full sister, and her share therefore is $1/2$. This will descend to her son.

This leaves a residue of $1/6$ which will go to the consanguine brother as a Residuary. This will descend to his daughter.

[According to Imam Abu Yusuf, the whole estate will go to the *full* sister's son.]

(d) A Sunni Muslim dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram :

I	I	I
U.S.	C.S.	
I	I	I
I	I	I
D (3/15)	S (8/15)	D (4/15)

The uterine sister has only one descendant : her share therefore is $1/6$. The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is $2/3$ [Tab. of Sh., No. 12]. This leaves the residue $1/6$, and since there is no Residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be :

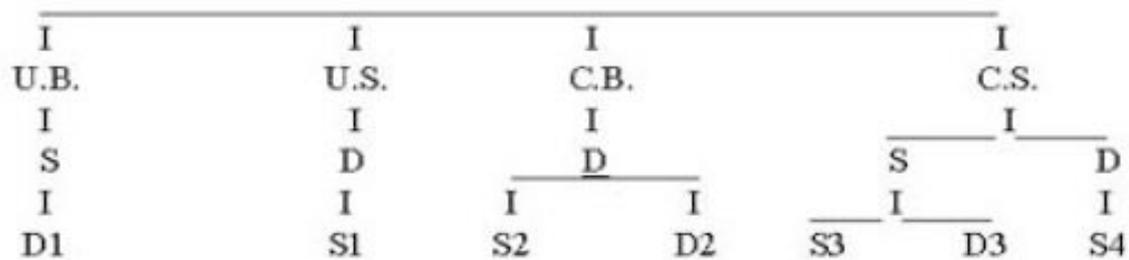
Uterine sister	..	..	1/6 = 1/6 increased to 1/5
Consanguine sister	..	..	2/3 = 4/6 " " 4/5

The uterine sister's share $1/5$ will pass to her daughter.

The consanguine sister's share $4/5$ will be divided between her son and daughter, the son taking $2/3 \times 4/5 = 8/15$, and daughter $1/3 \times 4/5 = 4/15$.

[According to Imam Abu Yusuf, the whole estate will go to the children of the consanguine sister, the son taking $2/3$, and the daughter $1/3$]

(e) A Sunni Muslim dies leaving four grandnephews, S1, S2, S3, and S4, and 3 grandnieces, D1, D2 and D3, as shown in following diagram :-



As there are two claimants in the uterine group, the collective share of the uterine brother and sister is $1/3$, and this will pass to D1 and S1, each taking $1/6$.

This leaves a residue $2/3$, and this is to be divided in the first instance between the consanguine brother and sister as Residuaries according to the number of claimants descended from each of them.

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females. The residue will therefore be divided into seven parts, the consanguine brother taking $4/7 \times 2/3 = 8/21$, and the consanguine sister taking $3/7 \times 2/3 = 6/21$.

The consanguine brother's share $8/21$ will be divided between his two descendants S2 and D2, S2 being a male taking $2/3 \times 8/21 = 16/63$, and D2 being a female taking $1/3 \times 8/21 = 8/63$.

The consanguine sister's share $6/21$ is to be divided in the first instance between her son and her daughter. The son, having two claimants, descended from him, counts as two males or four females. The daughter, having only one claimant descended from her, counts as one female. The son will therefore take $4/5 \times 6/21 = 8/35$, and the daughter will take $1/5 \times 6/21 = 2/35$.

The son's share $8/35$ will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking $2/3 \times 8/35 = 16/105$, and D3 taking $1/3 \times 8/35 = 8/105$.

The daughter's share $2/35$ will pass to her son S4.

The shares will therefore be :-

$D1 = 1/6$; $S1 = 1/6$; $S2 = 16/63$; $D2 = 8/63$; $S3 = 16/105$; $D3 = 8/105$; and $S4 = 2/35$. The total of these shares is unity.

[According to Imam Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines, so that S2, S3, and S4 will each take $2/8$ or $1/4$, and D2 and D3 will each take $1/8$].

Class IV of Distant Kindred.

16. Order of Succession :

(a) If there are no Distant Kindred of the first, second, or third class, the estate will devolve upon Distant Kindred of the fourth class in the order given below :

(i) Paternal and maternal uncles and aunts of the deceased, other than his full and consanguine paternal uncles who are Residuaries.

(ii) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h.l.s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.

(iii) Paternal and maternal uncles and aunts of the parents, other than the full and consanguine paternal uncles of the father who are Residuaries.

(iv) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the parents, other than sons h.l.s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.

(v) Paternal and maternal uncles and aunts of the grandparents, other than the full and consanguine paternal uncles of the father's father who are Residuaries.

(vi) The descendants h.l.s of all the paternal and maternal uncles and aunts of the grandparents, other than sons h.l.s. of full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.

(vii) Remoter uncles and aunts and their descendants in like manner and order.

(b) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Doctrine of Imam Abu Yusuf : The only difference between Imam Abu Yusuf and Imam Muhammad, as regards succession of the Distant Kindred of the fourth class, is as to the allotment of shares among the descendants. See sec 18 below.

17. Uncles and Aunts :

To distribute the estate among the uncles and aunts of the deceased, proceed as follows :

(1) First, assign $\frac{2}{3}$ to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and $\frac{1}{3}$ to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) Next, divide the portion assigned to the paternal side, that is, $\frac{2}{3}$ of the estate, among

- (a) full paternal aunts in equal shares ; failing them, among
- (b) consanguine paternal aunts in equal shares ; and, failing them, among
- (c) Uterine paternal uncles and aunts, according to the rule of the double share to the male.

(3) Lastly, divide the portion assigned to the maternal side, that is, $\frac{1}{3}$ of the estate, among

- (a) full maternal uncles and aunts ; failing them among
- (b) consanguine maternal uncles and aunts ; and, failing them, among
- (c) uterine maternal uncles and aunts ; according to the rule, in each case, of the double share to the male.

(4) If there be no uncle or aunts on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

Sir. 55-56

Note that no claimant on the paternal side excludes any on the maternal side, and no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are Residuaries. Hence we are not concerned with them here.

Doctrine of Imam Abu Yusuf : There is no difference between Imam Abu Yusuf and Imam Muhammad as regards the succession of uncles and aunts.

Illustration

(a) $\frac{2}{3}$	{	Full paternal aunt ..	..	$\frac{2}{3} = \frac{6}{9}$
	{	Cons. Paternal aunt ..	..	(excluded by full paternal aunts)
$\frac{1}{3}$	{	Full paternal uncle ..	..	$\frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$
	{	Full maternal uncle ..	..	$\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$
	{	Cons. maternal uncle ..	..	(excluded by full maternal uncle and aunt)
(b) $\frac{2}{3}$	{	Cons. paternal aunt ..	..	$\frac{2}{3}$
	{	Ut. * paternal uncle ..	..	(excluded by cons. paternal aunt)
$\frac{1}{3}$	{	Full maternal aunt ..	..	$\frac{1}{3}$

* Uterine

(c) $\frac{2}{3}$ {	Ut. paternal uncle ..	$\frac{2}{3} \times \frac{2}{3} = \frac{4}{9}$
	Ut. paternal aunt ..	$\frac{1}{3} \times \frac{2}{3} = \frac{2}{9}$
$\frac{1}{3}$ {	Full maternal uncle ..	$\frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$
	Full maternal aunt ..	$\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$

Note : The result would be the same if the deceased left a uterine maternal uncle and aunt instead of a full maternal uncle and aunt.

(d) $\frac{2}{3}$	Ut. paternal aunt ..	$\frac{2}{3} = \frac{6}{9}$
$\frac{1}{3}$ {	Cons. maternal uncle	$\frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$
	Cons. maternal aunt	$\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$

Rules of succession : The present section is based upon the following rules :

- (1) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively $\frac{2}{3}$, and the latter $\frac{1}{3}$, and each side will then divide its own collective share according to the rule of the double share to the male.
- (2) Among claimants on the same side, those of the full blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations.

Order of Priority : The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two side inherit together, and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table given on page 178.

18. Descendants of Uncles and Aunts :

If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how low soever of full paternal uncles and consanguine paternal uncles who are Residuaries. To distribute the estate among these relations, proceed as follows (*Sir.* 56-58) :

- (1) First, assign $\frac{2}{3}$ to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and $\frac{1}{3}$ to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) Next, divide the portion assigned to the paternal side, that is, $\frac{2}{3}$ of the estate, among :

- (a) full paternal uncles' daughter ; failing them, among
- (b) full paternal aunts' children ; failing them, among
- (c) consanguine paternal uncles' daughters ; failing them, among
- (d) consanguine paternal aunt's children ; and failing them, among
- (e) children of uterine paternal uncles and aunts, the division among the members of each of the five groups above to be made as among Distant Kindred of the first class [see s. 11]

Note that (a) excludes (b) the reason being that (a) are children of Residuaries (full paternal uncles), while (b) are children of Distant Kindred (full paternal aunts).

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are Residuaries ; hence they do not find any place in the above list.

(3) Lastly, divide the portion assigned to the maternal side, that is, $\frac{1}{3}$ of the estate, among :

- (a) children of full maternal uncles and aunts ; failing them, among
- (b) children of consanguine maternal uncles and aunts ; failing them, among
- (c) children of uterine maternal uncles and aunts,

the division among the members of each of the three groups above to be made as among Distant Kindred of the first class [see s. 11]

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take the whole.

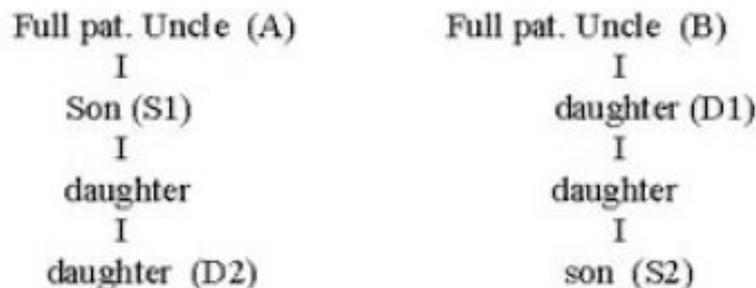
(5) If there be no children either of paternal uncles or aunts or of maternal uncles or aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after the illustrations.

Doctrine of Imam Abu Yusuf : The only difference between Imam Abu Yusuf and Imam Muhammad as to the succession of descendants of uncles and aunts is that, according to Imam Abu Yusuf, the portion assigned to each side is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations

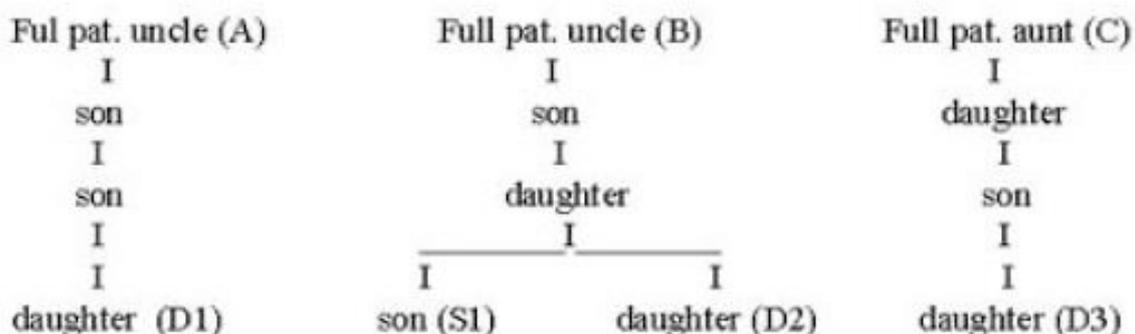
(a) The claimants are those indicated in the lowest line of the following diagram :



Here the first difference in the sex of the ancestors occurs in the second line of descent. Therefore S1 takes $\frac{2}{3}$, and D1 takes $\frac{1}{3}$. Therefore, the share of D2 is $\frac{2}{3}$ and that of S2 is $\frac{1}{3}$.

According to Imam Abu Yusuf, D2 being a female will take $\frac{1}{3}$, and S2 being a male will take $\frac{2}{3}$.

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram :-



Here all the descendants are *equal in degree* ; and they are also the same in blood, that is, they are all descendants of uncles and aunts of the *full blood*. But D1 is a child of a Residuary (full paternal uncle's son's son), while S1, D2 and D3 are children of Distant Kindred. Therefore D1 excludes S1, D2, and D3, and she will take the whole estate [see below "Rules of Succession"].

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows :-

Here the sexes differ first in the first line. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5 and C 1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take $2/3 \times 4/5 = 8/15$, and D2 will take $1/3 \times 4/5 = 4/15$. C's share 1/5 will descend to D3. Hence :

$$S1 = 8/15 ; D2 = 4/15 ; \text{ and } D3 = 1/5 = 3/15.$$

[According to Imam Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

Rules of Succession Among Descendants : To distribute the estate among descendants of uncles and aunts, apply the following rules in the order in which they are given below :

Rule (1) : The nearer degree excludes the more remote.

Rule (2) : If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

Rule (3) : Among claimants on the same side, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.]

Rule (4) : Among claimants on the paternal side, the children of Residuaries are preferred to those Distant Kindred. [Thus a full paternal uncle is a Residuary ; his daughter, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a Distant Kinswoman. Similarly, a consanguine paternal uncle is a Residuary ; his daughters therefore would be daughters of a Residuary, and they would be preferred to the daughter of a consanguine paternal aunt. Again, a full paternal uncle's son is a Residuary ; his daughters therefore would be children of a Residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughter of a consanguine paternal uncle's son would be preferred to the daughters of a consanguine

paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the maternal uncles is Residuary.]

Rule (5) : After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class [sec. 11].

The portion assigned to the maternal side is also to be distributed according to the same principle [sec. 11]

The whole of sec. 18 is based on the above rules.

Order of priority among descendants : The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides inherit together, and no claimant on either side excludes any claimant on the other side. The Table given on the previous page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

19. Other Distant Kindred of the Fourth Class :

If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given in sec. 16 above, the distribution among higher uncles and aunts being governed by the principles stated in sec. 17, and that among their descendants by those stated in sec. 18. (*Sir.* 58)

E. – Successors unrelated in blood.

20. Successor by Contract :

In default of Sharers, Residuaries, and Distant Kindred, the inheritance devolves upon the "Successor by contract," that, is, a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

21. Acknowledged Kinsman :

Next in succession is the "Acknowledged Kinsman," that is, a person of unknown descent in whose favour the deceased has made an acknowledgment of kinship, not through himself, but through another.

Such an acknowledgment confers upon the "Acknowledged Kinsman" the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the person acknowledged with all the rights of an actual kinsman.

Sir. 13. The kinship acknowledged must be kinship through another, that is, through the deceased's father or his grandfather. Thus, a person may acknowledge another to be his brother, for that is kinship through the father. But he may not acknowledge another to be his son, for that is kinship through himself. The acknowledgment by the deceased of a person as his son or daughter stands upon a different footing altogether, and it is dealt with in the chapter on "Parentage."

22. Universal Legatee :

The next successor is the "Universal Legatee," that is, a person to whom the deceased has left the whole of his property by will.

(Sir. 13). It is to be noted that the prohibition against bequeathing more than one-third of the net assets exists only for benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir.

23. Escheat :

On failure of the heirs and successors above specified, the property of a deceased Sunni Muslim escheats to the Government.

(Sir. 13). The rule of pure Muslim law in this respect is different, for, according to that rule the property does not devolve upon government by way of inheritance as *ultimus hoeres*, but falls into the *bait-ul-mal* (public treasury) for the benefit of Muslims.

*F. – Miscellaneous***24. Step – Children :**

Step-children do not inherit from step – parents, nor do step – parents inherit from step – children.

25. Bastard :

An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and her relations, and they inherit from such child. An illegitimate son cannot inherit from the legitimate son of the same mother.

Illustrations

[A Muslim female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2 and the sister's son, though illegitimate, will take the other 1/2 as a distant kinsman, being related to the deceased through his mother :

An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child.

26. Missing Persons :

When the question is whether a Muslim is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Note : Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth.

Table of uncles and aunts of the deceased and their descent following Table F stands for 'full,' C for 'consanguine,' and Ut for 'Maternal.' U stands for 'uncle' and A for 'aunt.' The small letter s stands for 'children.' The italics indicate Residuaries; the rest are Distant Kindred, not excluded by the paternal sides, but succeeds with members of that

Paternal side - 2/3.											
Line of	U.s & As.	F.P.U.	F.P.A.(1)	C.P.U.	C.P.A. (2)	Ut. P.U. & A.(3)					
1 st gen.	...	s	d (1)	ch (2)	(s)	d(4)	ch (4)	ch (5)			
2 nd gen.		s	d(1)	ch(2)	ch(2)	s	d(3)	ch (4)	ch (4)	ch (5)	
3 rd gen.		s	(1)	ch(2)	ch(2)	ch(2)	s	d (3)	ch (4)	ch (4)	ch (5)

* Line of uncles and aunts. In this line F.P.U. and C.P.U. are Residuaries. The rest among them is shown in the case of paternal uncles and aunts, by the Arabic numeral and aunts by the Roman figures (i), (ii) and (iii), See sec. 77.

* 1st generation. If there be no uncles or aunts, the estate devolves upon children. The rest are Distant Kindred, and the order of succession among them is shown, in the case of paternal uncles and aunts by the Arabic numerals (1), (2), (3), (4) and (5), and in the case of maternal uncles and aunts being the child of a residuary, is preferred to No. 2, though they are both of full blood (4), though they are both consanguine relations. See sec. 78.

* 2nd generation. If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the children of uncles and aunts. Of these, F. P. U.s and C. P. U.s are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. No. (1), being the child of No. (2) and No. (2), they being children of Distant Kindred, though they are all of full blood, is preferred to No. (3), though they are all consanguine relations together. Failing No. (3), No. (4) and No. (4) inherit together. Failing these No. (5) succeeds. See any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (3) and No. (4) and No. (3) excludes the group constituted by No. (4) and No. (4).

PART II
MAALIYAAT
(PROPERTY)

SYNOPSIS

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- Chapter – 2 – Claims to Shuf'ah and litigation relating it
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- Chapter – 3 – Properties regarding which Shuf'ah operates
- Chapter – 4 – Circumstances which finish the right of Shuf'ah
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- Chapter – 2 – Concerning the bequest of a third of the estate
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BOOK – I

SHUF'AH

PRE-EMPTION

SHUF'AH *

(PRE-EMPTION)
(*Hidayah, Kitab-ush-Shuf'ah*)Note

“Shuf'ah” is derived from “Shaf'a” , which, literally, “Shuf'ah” means conjunction, and legally it signifies the right of acquiring the land sold by a neighbour (for the price at which the purchaser has purchased it, although he may not agree to it) on account the land being conjoined to the land of the person claiming it.

CHAPTER 1

PERSONS ENTITLED TO THE RIGHT OF SHUF'AH

1. The right of Shuf'ah belongs to :

The right of Shuf'ah belongs to : (1) to a partner in the ownership of the land sold, (2) to a partner in the immunities and appendages of the land (such as the right to water and to road) ; and, (3) to a neighbour

The right of Shuf'ah in a partner is based on a saying of the Holy Prophet, that, “the right of Shuf'ah belongs to a partner who has not divided off and taken separately his share.”(*Muslim*)

The right of Shuf'ah in a neighbour is also based on a saying of the Holy Prophet that, “The neighbour of a house has a superior right to that house; and the neighbour of land has superior right to that land ; and if he is absent, the seller should wait his return; if they both participate in the same road;” and also, “A neighbour has a right, superior to that of a stranger, in the land adjacent to his own.” (*Abu Daud, Tirmizi, Nasai*)

* *Mishkaat, Kitab-ul-Buyoo, Bab-ush-Shuf'ah; 'Ainul Hidayah, Vol. IV; pp 1 to 70*

2. No person can claim shuf'ah during the presence of one who has a superior right :

A partner merely in the road or in the rivulet, or a neighbour, is not entitled to the right of Shuf'ah during the existence of a partner in the ownership of the land ; because his is the superior right ;

3. Unless he first gives it up :

If a partner in the ownership of the land gives up his right of Shuf'ah, it goes next to him who is a partner in the road; and if he also gives up his right, it goes to the person whose house is situated at the back of the house which is the object of Shuf'ah having the entry to it by another road.

Imam Abu Yusuf is of the view that during the existence of a partner in the ground, whether he gives up or insists upon his right, no other person is entitled to the right of Shuf'ah.

4. Joint owner of only a part of the property :

A person who is a joint owner of only a part of the property sold (such as a partner in a particular room or wall of a house), has a right superior to that of the neighbour as regards the particular part, and similarly he has a right superior to that of the neighbour as regards the rest of the house.

This is an approved maxim of Imam Abu Yusuf ; because the conjunction holds a stronger right in favour of a person who is a joint owner of only a part of the house, than in favour of merely a neighbour.

It is necessary that the road or the rivulet, the joint ownership of which gives a claim to the right of Shuf'ah, should be private.

By a private road is meant the road which is shut up at one end ; and by a private rivulet is meant a stream of water in which boats cannot pass and repass ; because in that case it will be a public river. This is according to Imam Abu Hanifah and Imam Muhammad. But Imam Abu Yusuf is of the view that a private rivulet is a stream which provides water to two or three pieces of land ; but if it exceeds that, it is a public one.

5. The relative situation of the property :

If a house is sold, which situated in a short lane which is shut up at one end, and connected with another lane, which is also shut up at one end, but is of a greater extent, in such a case the residents of the short lane only are entitled to the right of Shuf'ah ; and, if a house situated in the long lane is sold, then the residents of both lanes are entitled to the right of Shuf'ah.

The same rule also applies to the case of a small rivulet issuing out of another rivulet.

The laying of beams on the wall of a house gives a right of Shuf'ah on account of neighbourhood, but not on account of partnership, as this act does not amount to partnership in the ownership of the house.

Similarly a person who is a partner in the beam laid on the top of the wall is held to be entitled to Shuf'ah as a neighbour.

6. The right of all the Shafees claiming upon equal ground :

When there are many persons entitled to the right of Shuf'ah ; the right of all is equal, and no regard is to be given to the extent of their several properties.

If one of the parties gives up his right, it goes equally to the others, because even though the grounds of their right were complete, but they were obstructed from enjoying the entire

privilege due to intervention of his right ; and since that right has finished the obstruction does no longer remain.

7. If some are absent :

If some of the partners are absent, the whole of the Shuf'ah is to be equally ordered amongst the present ones.

If, however , the Qazi has ordered the whole of the Shuf'ah in favour of the one who is present, and an absentee afterwards comes and claims his right, the Qazi should order for him the half ; and similarly when a third one comes he should give him one third of the shares respectively held by the other two so that thus an equality may be created amongst them.

If the person present gives up his right of Shuf'ah after the whole has been ordered for him by the Qazi and the absentee afterwards comes, he is entitled to claim only one half, because the order which the Qazi has passed, giving the whole to the other, has absolutely extinguished one half of the absentee's right.

It will be otherwise if the person present gives up his right previous to the order passed by the Qazi, and afterwards the absentee comes ; because in this case he [the absentee] will be entitled to the whole of the Shuf'ah.

8. The right of Shuf'ah after the sale of the property :

The right of Shuf'ah is after the sale ; as it cannot take place until it be clear that the owner is no longer inclined to keep his house ; and this is clear from the sale of it. It is therefore sufficient, in to prove the sale and establish the right of Shuf'ah, that the seller acknowledges the sale, even if the buyer denies it.

9. It should be regularly demanded :

The right of Shuf'ah is not proved unless it is claimed regularly in the presence of witnesses ; and it is necessary that it is claimed as soon as possible after the sale is known ; because the right of Shuf'ah is a feeble right, as it is depriving another of his property merely to avoid an apprehended inconvenience.

It is therefore, necessary that the Shaf'ee should without delay disclose his intention, by making the claim, in the presence of witnesses, otherwise it cannot be after-wards proved before the Qazi.

10. On surrender by the buyer or decree of the Qazi :

Even if the claim has been regularly made in the presence of witnesses, still the Shafee' does not acquire ownership of the sold property until the purchaser surrenders it to him, or until the Qazi passes a decree in favour of the claimant.

CHAPTER 2

CLAIMS TO SHUF'AH AND LITIGATION RELATING TO IT
*(Hidayah, Kitab-ush-Shuf'ah, Baab Talab-ush Shuf'ah Wal
 Khasumat Feeha)*

1. Claims are of three kinds :

(a) The first made of claim is known as "Talab-ul-Mawasibat", or immediate claim, where the Shaf'ee claims his right the moment he is told of the sale being complete ; and this it is necessary because in case of any delay, his right is to be invalidated ; because the right of Shuf'ah is of a feeble nature ; liable to be finished due to delay.

It is immaterial in whatever words the Shuf'ah is claimed. It is sufficient if the claim is clear. Thus if a person says, "I have claimed my Shuf'ah" or "I shall claim my Shuf'ah", or "I do claim my Shuf'ah", all these are enough ; because in fact the meaning, and not the style, or mode, of expression, is to be considered.

When news of the sale is given to the Shaf'ee, it is not necessary, according to Imam Abu Hanifah, that he should claim the Shuf'ah before witnesses if the news is given to him by two men or one man and two women, or one upright man.

Imam Abu Yusuf and Imam Muhammad are of the view that he should declare his intentions before witnesses as soon as the news is given to him by one person, who is either a freeman or a slave, a woman or a child, if the person is in his belief, a true speaker .

If the person who gives the news to the Shafee is himself the buyer, it is not, according to Imam Abu Hanifah, necessary that he should be an upright man ; because he is the opponent ; and uprightness is not required of him.

(b) The second mode of claim of Shuf'ah is known as the "Talab-ut-Taqreer wal Ish-haad" or claim by affirmation and making witness ; and this is necessary ; because evidence will be required to establish it before the Qazi ; and it is possible that the claimant may not have witnesses to the "Talab-ul-Mawasibat", as it is expressed immediately on the news received of the sale. It is therefore necessary afterwards to make the Talab-ul- Ish-haad-wal Taqreer, which can be by the Shafee making some person as witness either against the seller, if the property sold is still in his possession, or against the purchaser, or upon the spot in dispute ; and upon the Shafee thus making somebody witness, his right of Shuf'ah is fully proved and confirmed. But if the seller has delivered the property to the buyer, the taking evidence against him is enough because he is no longer an opponent ; for having neither the possession nor the property, he is in fact a stranger.

The mode of claiming by affirmation and taking to witness is the claimant saying "such a person has bought such a property, of which I am the Shafee. I have already claimed my right of Shuf'ah and now again claim it, be therefore witness of it. According to Imam Abu Yusuf that it is necessary that the name of the property sold, and its specific boundaries, be specified ; because a claim its not valid unless the thing claimed is precisely known.

(c) The third mode of claim to Shuf'ah is known as "Talab-ul-Khasoomat", or claim by litigation, which is done by the Shafee' by a petition to the Qazi to order the purchaser to surrender the property to him.

2. Delay in the litigation does not invalidate :

If the Shafee delays in making the claim by litigation, still his right does not finish, according to Imam Abu Hanifah. This is also the general opinion ; and orders have been passed accordingly. Imam Abu Yusuf is also of the same view.

Imam Muhammad however says that if the Shafee' delays the litigation for one month after the taking of evidence, his right finishes. This is also the view of Imam Zufar ; and it is related from Imam Abu Yusuf also that the right of the Shafee' becomes defeated if he delays the litigation after the Qazi has held one court ; because, if he willingly and without any lawful excuse omits to commence the litigation at the first court held by the Qazi, it is presumed that he has abandoned it.

3. If it is due to the absence of the Qazi :

If it is proved that the Qazi was not in the city, and that on that account the litigation has been delayed, the right is not finished, according to the concurrent opinion of all the three above-mentioned jurists ; because litigation can only be made in the presence of the Qazi ; and the delay is therefore to be excused.

4. Rules to be observed by the Qazi :

When the Shafee goes to the Qazi and claims his right, saying that "such a person has purchased a house, in which he has the right of Shuf'ah," the Qazi should first ask the purchaser (the defendant in the cause) regarding the property on which the Shafee' claiming his right of Shuf'ah ; and if he admits it, this is sufficient for the Qazi to pass a decree ; but if he does not admit it, the Qazi should then order the Shafee' to bring evidence to prove his own property ; because the possession as it is apparent, may be due to some other causes than property ; and a thing which is thus doubtful cannot be admitted as a proof to the detriment of another.

Qadooree says that the Qazi, before he enquiring from the defendant, should ask the plaintiff regarding the situation of the house and its boundaries ; because a man claiming the ownership of a house he should describe its situation and boundaries ; and therefore he should also do the same in claiming his right of Shuf'ah. When he has done this, the Qazi should then ask him regarding the grounds on which he claims his right of Shuf'ah ; because the grounds of Shuf'ah are various, and it is possible that the grounds he may set forth are no ground at all . If he says that "he is the Shafee', because of his house is situated next to that which is the present object of dispute," his claim (as Khassaaf observes) is complete. According to the Fataawaa of previous Jurists, also he should describe the boundaries of the house from which he derives his right to the Shuf'ah.

5. The mode for his examining the parties :

If the Shafee', is not able to bring the evidence, and requires that the purchaser be put to his oath, it should be according to the best of his [the purchaser's] knowledge that is he should be required to say, "By Allah, I know not that the plaintiff is the owner of the house on account of which he has based his claim of Shuf'ah".

If the purchaser refuses to take the oath, or the Shafee' brings evidence, his ownership stands proved in that house on account of which he has based his claim of Shuf'ah, and the neighbourhood of that house to the house in dispute is also proved. The Qazi then ask the purchaser whether he has purchased the house in question or not_? and if he denies it, the Qazi should ask the Shafee' to bring witnesses to prove the purchase ; because the Shuf'ah cannot be proved until the sale is proved ; which should be done by witnesses.

If the Shafee' does not bring witnesses, the Qazi should then administer an oath to the purchaser to the effect, that "he has not purchased the house in question," or that "the plaintiff is not entitled to the right of Shuf'ah in the manner in which he has claimed it."

6. Claim may be litigated and decided independent of the price of the property in dispute :

The Shafee' can litigate his claim of Shuf'ah even without bringing in the court the price of the property in dispute ; but when the Qazi grants him the right of Shuf'ah, it is necessary for him to bring the price. This is the doctrine of the Zahir Rawayat, as quoted in the Mabsoot. Imam Muhammad says, that the Qazi should not pass the decree until the Shafee' brings the price ; and the same is also reported by Imam Hasan from Imam Abu Hanifah ; because it is possible the Shafee' may be indigent, and the Qazi therefore should delay the decree, so that the purchaser may not be deprived his property.

7. Defendant may retain the property till payment of the price :

If previous to the Shafee' bringing the price, the Qazi orders the purchaser to deliver up the property [to the Shafee'], still he is entitled to retain it in his own hand until the price is paid to him.

8. Delay in the payment of price :

If the Shafee' delays the payment of price to the purchaser after the Qazi has ordered him, still his right of Shuf'ah is not finished ; as it stands fully proved by the litigation and the order of the Qazi.

9. Seller may be sued while the property is in his possession :

If the Shafee' brings the seller into court when the house is still in his possession, he [the Shafee'] may proceed with his case against him, and the seller may keep the house in his own possession until he gets the price from the Shafee'.

The Qazi, however, should not hear the evidence until the purchaser also appears ;

10. Agent of the purchaser may be sued :

If an agent on behalf of another person purchases the property, the Shafee' should sue the agent. But if the agent has delivered the property to his principal, the Shafee' should not sue the agent, but the principal as the agent in that case stands as the seller, and his principal as the purchaser ; and when the seller delivers up the property to the purchaser, the Shafee' should sue the latter.

11. Agent of the seller, or an executor may be sued :

If the agent of a person who is absent sells the property on behalf of his principal, the Shafee' can claim his right and get the property from the agent, if it is in his possession. The same rule applies in the case of an executor authorized to sell the property.

12. The Shafee', after getting the decree, has option of inspection, and also option from defect :

If the Qazi decides in favour of the Shafee', while he has not yet seen the property in dispute, he [the Shafee'] also has the option of inspection; and if any defect is afterwards found in it, he also has the option from defect * and can, if he pleases, reject it, inspite of the fact that the purchaser already excepted such defect exempted the seller from its responsibility ; because since the transfer of property by Shuf'ah is the same as a transfer of property by sale, the Shafee' has under both the circumstances the right to reject has as any purchaser ; and this right of the Shafee' is not finished even if the purchaser has seen the property, or has exempted the seller ; because he [the purchaser] was not deputed by the Shafee' and his act, therefore, does not finish the Shafee's right of rejection.

* Option of inspection and option from defect are fully explained under the topic of Sale.

Section (1)**DISPUTE REGARDING THE PRICE**

(Fasl Fil Ikhtilaaf 'Fis Saman)

1. In disputes regarding the price, the assertion of the purchaser upon oath should be accepted :

If the purchaser and Shafee' differ as regards the price, and neither of them is able to bring any evidence in support of his assertion, in such a case the assertion of the purchaser on oath should be accepted in preference to that of the Shafee'.

2. Evidence produced by both :

If both the purchaser and the Shafee' produce the evidence, the evidence produced by the Shafee' should be accepted according to Imam Abu Hanifah and Imam Muhammad.

Imam Abu Yusuf, on the contrary, is of the view that the evidence produced by the purchaser should be accepted.

3. Difference between seller and purchaser :

If the seller and the purchaser differ as regards the price, and the seller alleges the smallest sum, the Shafee' can take the property for the price alleged by the seller, and the smallest sum alleged by him is to be considered as an abatement in favour of the purchaser, and the Shafee' is entitled to avail it.

If the seller has already received the price, the Shafee' can take the property for the amount admitted as the price by the purchaser ; and in such a case the allegation of the seller is of no credit at all.

4. Seller's assertion may be accepted :

If the Shafee' is not informed of the seller's having received the price and the seller says, "I have sold the property in question, say, for one thousand *Dirhams* which I have received," the Shafee' is entitled to take the property for one thousand *Dirhams*. but if the seller says, "I have sold the property in question and received the price," and then says, "which was one thousand *Dirhams*," his statement in respect of the amount cannot be admitted, as by the prior statement of his having received the price, he becomes like a stranger, and consequently has no further concern with the matter.

Section (2)

THINGS FOR WHICH THE SHAFEE' CAN TAKE THE SHUF' AH PROPERTY

(Fasl Fee Maa Yukhaz Behil Mashfoo')

1. Shafee' is entitled to the abatement in favour of the purchaser but not to the total remission :

If the seller abates a part of the price to the purchaser, the Shafee' is also entitled such abatement ; but if the seller, after the sale, remits the entire price in favour of the purchaser, the Shafee' is not entitled to such remittance.

2. Shafee' not liable for any increment in the price after the sale :

If the purchaser, after the sale is complete, agrees to an increment of the price in favour of the seller, the Shafee' is not liable for it, because his right of Shuf'ah stands established for the price originally settled ; and as such any subsequent increment would be a loss to him; whereas, any subsequent abatement amounts a benefit to him.

3. If the price consists of effects :

If a man sells a property for certain effects, the Shafee' is entitled to it for the value of such effects ; because effects fall under "Zawaat-al-Qiyam", or things which are estimable, and compensable by money.

But if a man sells a property against wheat, silver, or any other article estimable by measure or weight, the Shafee' is entitled to take it for an equal quantity of the same article ; because these fall under "Zawaat-al-Amsaal", and are compensable by equal quantity of like species.

4. If the price consists of land :

If a man sells a land for another land, in such a case, since each land is the price for which the other land is sold, the Shafee' of each land is entitled to take it for and the value of the other land, as land falls under "Zawaat-al-Qiyam", is compensable by money.

5. In case of a term of credit :

If a property is sold on credit, i.e. the price payable at a distant period, the Shafee' should either wait until expiry that period, and then take the property for the same price, or he may take it immediately, on paying the price in cash ; but he is not entitled to take it immediately and ask for respite upto the period settled by the purchaser for payment of the price.

Imam Zufar is of the view that the Shafee' is entitled to take the property immediately, and ask for respite for payment of the price and this is also the opinion of Imam Shaafe'ee.

6. Property subject to Shuf'ah purchased by a Zimmee against unlawful articles :

If a Zimmee purchases a property for wine or pork, and the Shafee' is also a Zimmee, he [the Shafee'] may take the property for an equal quantity of similar wine, or for the value of the pork, because such bargain is lawful amongst the Zimmees ; and since the right of Shuf'ah is available to both the Muslims and Zimmees, and wine, amongst the Zimmees, is held as vinegar amongst the Muslims, and hogs as sheep, it follows that vinegar falling under the "Zawaat-al-Amsaal", and sheep under the "Zawaat-al-Qiyam", the Shafee' is entitled to take the property for equal quantity of wine, or value of the pork.

But if, the Shafee' is a Muslim, he is entitled to take the property for the value of the wine as well as of the pork ; because the giving or receiving of wine amongst Muslims is prohibited by their religion, and wine is, therefore, with respect to them, reckoned as falling under the "Zawaat-al-Qiyam".

But if there are two Shafee', one a Muslim and the other a Zimmee, the Muslim is to take half of the property for half the value of the wine, and the Zimmee is to take the other half, of it for half the quantity of the wine.

If, the Zimmee Shafee' becomes a Muslim, since his right is strengthened, and not invalidated by his conversion, he is, therefore to take half of the property for half of the value of the wine ; because by his accepting Islam he is disallowed from giving the actual wine, which actually becomes non-existent with respect to him similarly, where a person purchases a house for a measure of green dates and a Shafee' therefore comes forward when the season for green dates is past ; and therefore he has to, take the house for the value of the dates, and so is the case in the present instance, as wine becomes, in effect non-existent with respect to the Muslims, they are not allowed to use it in any shape.

Section (3)**CONSTRUCTIONS OR PLANTATIONS BY THE
PURCHASER***(Fasl Fee Tasarrufaat-il-Mustari)***1. Shafee' may take the buildings or plantations on payment of the value or remove them :**

If the purchaser of land which is subject to a claim of Shuf'ah constructs buildings or plants trees upon it, and the Qazi afterwards orders it to be delivered to the Shafee' payment the Shafee' may take the land with the building or trees, on the value of both, or to allow the purchaser to remove them. This is according to the Zahir Rawayat.

Imam Abu Yusuf is of the view that the Shafee' cannot allow the purchaser to remove his buildings ; but he should take the land on payment of the value of the trees or building, or give up the whole. This is also the view of Imam Shaafe'ee . He, however ; says that the Shafee' can remove the buildings or the trees, on indemnifying the purchaser for the loss which he may suffer.

2. Shafee' not entitled to compensation for buildings erected or trees planted on the land belonging to another :

But if a Shafee' after getting possession of his Shuf'ah land construct buildings or plants trees upon it, and it afterwards appears that the land was wrongly sold, as it was the property of somebody else, the Shafee' may recover the price, from the seller, or from the purchaser, i.e. from whomsoever he had taken it. He is not, however, entitled to recover from the other party the value of his buildings or trees but he is entitled to carry them wherever he pleases.

Imam Abu Yusuf says that the Shafee' is also entitled to recover the value of the buildings or trees from the person from whom he had received the land.

3. Property having accidental or natural loss after sale :

If a man purchases a house or garden which is subject to a claim of Shuf'ah, and the building is destroyed, or the trees decayed, the Shafee' has the option either to leave the house or garden, or to take it and pay the full price because buildings or trees being mere appendages of the land (they are taken as included in the sale of land without mention of them), no particular part of the price is fixed for them, unless where the purchaser willfully destroys them in which case it is lawful for the purchaser to sell the appendages so destroyed and get the profit by them in addition to the full price of the land.

But if one half of the land is inundated ; in which case half of the thing itself is destroyed, the Shafee' can take the remainder against one half the original price.

4. Loss committed by the purchaser :

If the purchaser willfully destroys the constructions, the Shafee' may either give up his claim, or take the land for a proportional part of the original price. He is however not entitled to the ruins, because they form a separate property, and are no longer appendages of the land ; and the right of Shuf'ah extends only to the land, and the things attached to it as appendages.

5. Shafee' taking land with fruit trees :

If a man purchases the land having date trees upon it bearing fruit at the time, the Shafee' is entitled to take the fruit, if specific mention has been made of it in the sale, otherwise it is not comprehended.

The same rule applies where the land is purchased when there is no fruit upon the trees and the fruit is produced whilst the ground is still in the purchaser's possession.

In the two above cases if the purchaser has gathered the fruit and the Shafee' then comes and claims his Shaaf'ah, he is not entitled to the fruit gathered by the purchaser as it is no longer an appendage of the land.

According to the Mabsoot, if the purchaser has gathered the fruit, a proportional reduction is to be made in the price to the Shafee'.

The compiler of the Hidayah however, says that this is in the former only of the two above cases ; as the fruit produced at the time, and specifically included in the sale it is obvious that a part of the price was in consideration of the fruit but in the latter case the fruit was not available at the time of sale, and could only be included in the sale afterwards and therefore no part of the price could have been fixed for it.

CHAPTER 3

PROPERTIES REGARDING WHICH SHUF'AH OPERATES

*(Hidayah, Kitab-ush-Shuf'ah, Baab Maa Yujib Feeh-ish-Shuf'ah
Wa Maa Laa Yujib)*

1. Right of Shuf'ah is available in all immovable properties :

Shuf'ah takes place, in respect of immovable property, even if it is not capable of division, e.g., a bath, a mill or a private road.

Shuf'ah does not extend to household effects or boats ; because of a Hadees of the Holy Prophet that, "Shuf'ah applies only in respect of houses and gardens" and also, because the purpose of Shuf'ah is to prevent the nuisance arising from a bad neighbour it is not necessary to extend it to moveable properties.

2. Property sold separate from the land :

It is said in Qadooree, that Shuf'ah does not apply even to a house or trees when sold separately from the land. This is also approved by the Mabsoot because buildings and trees being not of permanent nature, are also to be held as movables properties.

The upper storey of a house however is subject to Shuf'ah – whence the owner of the under – storey is the Shafee' and also the owner of the upper – storey is the Shafee' of the under – storey even though their entries are by different roads.

3. Muslim and Zimmee have equal right to it :

Muslim as well as Zimmies ; are both equally affected by the right of Shuf'ah, and are equally interested in its application and are therefore on an equal footing in all cases of the right of Shuf'ah, and similarly, a man or a woman, an infant or an adult, a just man or a reprobate, a freeman or a slave (Mokatib or Mazoon) are all equal of regards Shuf'ah.

4. Property transferred in any shape for a consideration :

If a man acquires a land against consideration, the right of Shuf'ah takes place with respect to it, because it is in the power of the Shafee' to fulfil the stipulation.

5. Property assigned in dower, or as compensation for Khula' or as a hire, or in composition for murder, or as price of manumission :

Shuf'ah cannot take place in respect of a house assigned by a man as a dower to his wife or by a woman to her husband as compensation to grant her a divorce or which is agreed by a person as his hire or reward, or made over as composition for wilful murder, or assigned over as ransom of a slave.

6. Shuf'ah relating to a house sold for payment of the dower:

If a man marries a woman without fixing her dower, and afterwards fixes a house as her dower, the right of Shuf'ah does not take place, because the house is here to be considered as if it had been settled on the woman at the time of the marriage.

But this is not apply if a man sells his house in order to discharge his wife's dower, proper or stipulated ; as here it is an exchange of property for property.

If a man, on his marriage, settles a house as dower, to his wife, and stipulates that she shall pay back to him from the price of the house one thousand *Dirhams*, according to Imam Abu Hanifah, the right of Shuf'ah does not take place relating to that house ; but Imam Abu Yusuf and Imam Muhammad are of the view that it applies to a part of the house equivalent to one thousand *Dirhams*.

7. Shuf'ah relating to a house the possession of which is compromised by a sum of money :

Shuf'ah does not operate in respect of a house regarding which there is a dispute between two men, which is compromised by the defendant (being the possessor) on payment of the plaintiff a sum of money, after disputing his claim.

But if he confesses the justness of the plaintiff's claim, and then compromises with a sum of money, the right of Shuf'ah takes place.

8. Shuf'ah relating to a house made over in composition :

If a defendant compromises a suit by handing over the house to the plaintiff, after having either disputed his claim or admitted it, or refused to answer it, the right of Shuf'ah is proved with respect to the house.

9. Shuf'ah relating to property transferred by grant :

Shuf'ah is not admitted in the case of grants, unless the grant is against consideration, in which case it is, in effect, a sale.

Still, however, the right of Shuf'ah cannot be admitted, unless both the parties have obtained possession of the property transferred to them by the grant (nor if the thing granted on either side is an indefinite part of anything).

10. Shuf'ah relating to a property sold under a condition of option :

If a man sells his house under a condition of option, the right of Shuf'ah is not available with respect to that house, as the power reserved by the seller is an impediment to the finishing of his right of property but when he gives up that power, the impediment finishes, and the right of Shuf'ah takes place, provided the Shafee' claims it immediately.

11. Shuf'ah relating to property so purchased :

But if a man purchases a house under a condition of option, the right of Shuf'ah applies to it ; because such a power reserved by the purchaser is held, in the opinion of all the learned, to be no impediment to the finishes up of the seller's right of property ; and the right of Shuf'ah is founded and based upon the finishing of the seller's right of property.

12. Shafee' taking possession :

If the Shafee' takes the house during the purchaser's right of option (namely, three days), such right finishes, and the sale is fully concluded ; because the purchaser, not having the house in his possession is not capable of rejecting it ; and the Shuf'ah cannot pretend to claim the power of dissolving the bargain, as that power was on account of a condition, in favour of the purchaser only.

13. Sale upon option :

But if one of the parties either purchaser or seller, has the power of dissolving the bargain, the house adjoining to the house in question is sold, the one who possesses such power is the Shafee' of the adjoining house.

14. Right of Shuf'ah relating to property transferred under an invalid sale :

Shuf'ah cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser getting the possession of it.

15. Seller of property, under an invalid sale, is still entitled Shuf'ah in the adjacent property :

If the house adjacent to one which has been transferred by an invalid sale is sold, while the one so transferred is still in

the possession of the seller, the seller is the Shafee' of the adjacent house.

16. But if he delivers the property sold to the purchaser :

If the seller has handed over the first house, previous to the Qazi granting to him the Shuf'ah of the adjacent one, the purchaser, because of the property he has acquired in obtaining possession of the first house, because the Shafee' of the second house.

But it is otherwise if the seller hands over the first house after the Qazi has granted to him the Shuf'ah of the second ; house, because in such case his right of Shuf'ah is not invalidated ; because, after the decree the Qazi has passed, it is necessary that he should preserve his right of property in that house from which he has derived his right of Shuf'ah.

17. The seller resuming his property :

If the seller takes back the first house prior to the Qazi grants the Shuf'ah to the purchaser, the purchaser's right of Shuf'ah is finished.

But if the, the seller does not take back the first house until after the Qazi grants the Shuf'ah of the second house to the purchaser, the purchaser's right of Shuf'ah does not finish.

18. Shuf'ah is not created by the partners if they divide their joint property :

If two or more partners divide the land in which they have a joint property, the right of Shuf'ah cannot be claimed by any neighbour.

19. Relinquishment of the right of Shuf'ah :

If a man purchases a house, and the Shafee' gives up his right, and the purchaser afterwards rejects it, on option of inspection, or on condition of option, or by a decree of the Qazi on account of option from defect, the Shafee' is not entitled to claim his right, whether the man had taken possession of the house or not, and similarly, if the man, before taking possession, rejects the house on discovering a blemish, without a decree of Qazi.

But if the purchaser rejects the house on discovering a blemish in it, after having taken possession without a decree of the Qazi, or, if the seller and purchaser agree to dissolve the contract, the privilege of Shuf'ah is available to the Shafee'.

CHAPTER 4

CIRCUMSTANCES WHICH FINISH THE RIGHT OF
SHUF'AH

(Hidayah, Kitab-ush-Shuf'ah, Baab Maa Yubtilo Beh-ish-Shuf'ah)

1. Shafee' omitting to procure evidence in due time :

If the Shafee' omits to bring evidence of his claim of Shuf'ah on being informed of the sale, inspite of his ability so to do, his right of Shuf'ah is void, because of his neglecting to claim it.

Similarly, if he prefers the Talab-ul-Mawasibat, or immediate claim, and omits Talab-ul-Ish-haad wat-Taqreer, inspite of his ability to make it, his right of Shuf'ah is void.

2. Shafee' offering to compound it :

If the Shafee' agrees to compound his right of Shuf'ah for a compensation, he thereby invalidates his right, and is not entitled to the compensation.

3. Death of the Shafee' before the Qazi passes the decree :

If the Shafee' dies, his right of Shuf'ah is finished.

4. Not invalidated by the death of the purchaser :

If the purchaser dies, the right of Shuf'ah does not finish, because the Shafee' who is entitled to it still exists, and no alteration has taken place in the grounds of his right. The house, therefore, cannot be sold for the payment of the purchaser's debts, or disposed of according to his testament ; and if the Qazi or executor sells it in order to discharge the debts of the estate, or

if the purchaser has bequeathed it, the Shafee' may render any of these transaction as void, and may take the house; because the right of the Shafee' is antecedent, whence he has the power of annulling the purchaser's acts in respect of the property, even during his lifetime.

5. Shafee' selling the property whence he derived his right :

If the Shafee' prior to the order of the Qazi sells the house from which he derives his right of Shuf'ah, the grounds of his right being thereby finished, the right itself is finished, inspite of his being ignorant of the sale of the house to which it related ; similarly as where a man finishes his Shuf'ah without being informed of the sale or acquits a person of a debt without knowing the amount ; in the first case the right of Shuf'ah is finished and in the second case the debtor is acquitted.

But it is otherwise where the Shafee' sells his house subject to the condition of option ; because as while a power of option remains in the seller, his property is not totally finished, therefore the ground of Shuf'ah also continues.

6. Shafee' acting as agent for the seller or the purchaser :

If the Shafee' acts as agent of the seller, and sells the house on his behalf, his right of Shuf'ah is finished ; but if he acts as agent of the purchaser, and purchases the house on his behalf, his right of Shuf'ah is not validated.

7. Shafee' may resume his right if he had given it up upon misinformation relating to the price :

If the Shafee', is told that the house which is the subject of his right is being sold for one thousand *Dirhams*, and he give up his right of Shuf'ah and afterwards comes to know that the house was sold for a lesser price, his giving it up is not binding, and he is entitled to claim his right of Shuf'ah in it.

Similarly, if the Shafee' is told that the house is being sold for one thousand *Dirhams*, and the Shafee' afterwards comes to know that it was sold against wheat or barley equivalent to one thousand *Dirhams*, or even more, his giving it up is void, and he is entitled to claim his right to *Shuf'ah* in it.

This rule also applies to every other article sold by weight or measure, or which differs so little in its species that it may be sold by number such as eggs or walnuts, as in respect of barley or wheat.

But it is otherwise as regards the goods or effects ; because if the Shafee', on coming to know that the house is being sold for one thousand *Dirhams*, gives up his right, and afterwards learns that it was sold for goods equal in value to one thousand *Dirhams*, or more, his giving it up is still binding, and he is not entitled to claim *Shuf'ah* because he will be in such a case liable for the price of the goods, in *Dirhams* and *Deenars*. Similarly, his giving up is binding if he afterwards learns that the house was sold for a certain number of *Deenars* equivalent to one thousand *Dirhams*, or more.

8. Misinformation regarding the purchaser :

If the Shafee' is first informed that a particular person is the purchaser, and thereupon gives up his right of *Shuf'ah*, and he afterwards comes to know that the purchaser was some other person, he is entitled to his right of *Shuf'ah* because a man may not like to have a person for his neighbourhood , although he may willingly choose to have the other one.

Similarly, if he afterwards comes to know that two persons are the purchasers viz., the one whose name he first heard of and another, he is entitled to claim his right of *Shuf'ah* from the one in whose favour he had not given it up.

9. Misinformation regarding the article sold :

If it is told to the Shafee' that one half of a house is sold and he gives up his right, and afterwards he comes to know that the whole house was sold, he can still claim his Shuf'ah since it is possible that he at first gave up his right to avoid the trouble of a partner, but if the whole house was sold there was no occasion for such inconvenience.

But, if he first comes to know that the whole, house is sold and afterwards that only one half of the house is sold, he is not according to the Zahir Rawayat entitled to claim his Shuf'ah because his giving up of the whole also implies his giving up a part of it.

Section (1)

RIGHT OF SHUF'AH MAY BE DEFEATED

(Fasl Fee Heelat-ul-Inqita'ish Shuf'ah)

1. Right of Shuf'ah may be defeated :

If a man sells the whole of his house, excepting one yard of it in the breadth along the house of the Shafee', the Shafee' is not entitled to claim Shuf'ah because of his neighbourhood is thus cut off.

This is a device by which the Shafee' may be deprived of his right ; and the same is the case if the seller grants the intervening part of his house as a free gift to the purchaser, and hands over its possession to him.

2. House purchased in shares, by the same person, at different times :

If a man purchases, in the first instance, a share of a house say a third or a fourth, and afterwards also purchaser the remainder, the neighbour has the right of Shuf'ah over that share

which was first purchased, but not over that which was purchased afterward, because although, as a neighbour, he is entitled to that right over both, but the purchaser has a superior right of *Shuf'ah* in respect of remainder of the house, as he is a partner in it, and the right of a partner supersedes that of a neighbour.

If, therefore, a man wants to disentitle a neighbour of his right of *Shuf'ah* in any house, he may do it by first purchasing a part of the house, for the price he agrees to give for the whole, excepting only one single *Dirham*, and it afterwards as price of the remainder.

3. Price of the property sold compromised for a specific article :

If a man agrees to purchase a house for the price in cash, and after-wards, in lieu of cash, gives cloth to the seller, the *Shafee'* may take the house for the cash price first agreed upon, and not for the value of the cloth, because the changing of cash price for the cloth was a separate bargain ; and the price which the *Shafee'* is obliged to pay for the house, not for the cloth.

Section (2)

MISCELLANEOUS CASES

(*Masaa'il Mutafarriqah*)

1. *Shafee'* may take the share of one of several purchasers :

If five persons jointly purchase a house from one man, the *Shafee'* can take the share of any one of them.

But, if one man purchases a house from five persons, the *Shafee'* can take or give up the whole, but he is not entitled to take any particular share.

It may, however, be noted that if one of the purchasers has not obtained possession, although he has paid the price, of his share, the Shafee' is not entitled to take his share of the house until all other purchasers also pay their respective shares of the price ; because otherwise, a part of the house being in the possession of the Shafee' and a part remaining in possession of the seller, it is to be feared that the seller may suffer the inconvenience of a bad neighbour.

2. Sale and partition of half a house :

If a man purchases one half of a house, and afterwards the seller and purchaser make the partition of the house between themselves, the Shafee' may take or give up that half which fell to the lot of the purchaser, irrespective of the side it happens to be situated, but he is not entitled to object to the partition, and insist upon a new one : because a Shafee' is not entitled to disturb the possession of the seller, and as partition is an act investiture , he is therefore not entitled do disturb the partition also. This is the opinion of Imam Abu Yusuf.

But, Imam Abu Hanifah says that the Shafee' is not authorized to take the half unless it is on the side next to the house from which he derives his right, because if the purchaser's lot falls in the other part of the house, the Shafee' is not the neighbour.

3. If one partner sells his share :

If one of the two joint owners of a house sells his share, and afterwards the purchaser and the remaining owner make the partition, the Shafee' can object to such partition, and insists upon a new one because as no sale took place between the purchaser and the remaining owner, this partition is not, an act of investiture, but merely an exercise of the right of property, and therefore, the Shafee' is entitled to annul it, in the same manner as he is entitled to annul any other act of ownership, done by the purchaser, e.g., sale or gift.

4. Licensed slave (involved in debt) and his master may be Shafee' to each other's property :

If a man in possession of a Mazoon [licensed] slave, involved in debt, sells his house, that slave can claim the right of Shuf'ah, in it. Similarly, if such a slave sells a house, his master can claim the right of Shuf'ah in it.

But it is otherwise where the slave is not involved in debt, because then if he sells a house, it is for his master, and the man for whom the house is sold cannot be the Shafee'.

5. Act of a father or guardian with respect to the Shuf'ah of an infant ward :

If a father or a guardian gives up the right of Shuf'ah, belonging to his infant ward, such giving up is lawful, according to Imam Abu Yusuf and Imam Abu Hanifah.

Imam Muhammad and Imam Zufar are of the view that it is not lawful, and, therefore, the infant is entitled to claim it as soon as he attains maturity.

Same difference of opinion is in the case of a father or a guardian declining to make the claim of Shuf'ah on coming to know of the sale of the house; or of an agent giving up the claim before the Qazi.

BOOK – II
QASMAT
(PARTITION)

QASMAT *

(Hidayah, Kitab-ul-Qasmat)

CHAPTER 1

PARTITION

1. Partition in articles of weight or measurement of capacity:

Partition of things held in joint ownership is lawful and valid, because the Holy Prophet used to make partition of booty and hereditaments ; and moreover it is a practice which no one pretends to controvert.

It is to be noted, that partition according to one view is "separation", as it separates or distinguishes the right of one man from that of the other ; and according to another view it is an "exchange" because the share or portion which falls to one of the parties in consequence of the partition is partly his own original right ; but part of it was the right of the other during their joint property ; and this he receives in lieu of that part of his own right, which remains involved in the other's share.

It is in fact a separation as regards the articles of weight or measurement of capacity such as wheat or silver, because these articles do not differ in their properties, it therefore follows that each person receives his entire right, and nothing is left in the share of the one which of right belongs to the other ; whence it is that one partner may lawfully take his share during the absence of the other ; and also, that if two men jointly purchase any article of weight or measurement, and afterwards divide it, each can separately sell his share for a profit on half the original price.

* *Ainul Hidayah*, Vol, IV, PP. 70 to 110

2. Exchange in articles of dissimilar parts or unities :

It is, on the other hand, an exchange in respect of articles dissimilar in their parts or unities, as, for example, the animals or household goods ; from which it is that one of two owners in such articles cannot lawfully take his share in the absence of the other ; and also, that if two men jointly buy anything of this species, and afterwards make a division they cannot separately sell their respective shares on profit on half the original cost.

But if those articles are all of one particular species, as for example a herd of goats, the Qazi, at the requests of only one of the owner, should enforce a partition ; because the properties of all the goats being nearly the same, as partition, in effect is only a separation ; and the intention of such a request is that the owner who makes it may enjoy the use of his own share solely, without any other person interfering in his ownership, it is binding on the Qazi to accept his request.

But if, the joint property consists of articles of different species, the Qazi is not to order a partition, as it cannot be made equitably when each particular thing differs from the rest in properties.

If, however, both the owner consent to a partition of things of various species, it is lawful

3. The Qazi to appoint a public partitioner ; and fix his salary :

It is binding on the Qazi to appoint a person to make the partitions, and to fix for him a salary from the public treasury so as that partitions may be made for the people without any hire.

4. Or establish a particular rate of hire for his work :

If it is not in the power of the Qazi to fix the salary from the public treasury, he should appoint a person to make the partition for a certain rate of hire to be paid by the parties who are concerned and are benefited by the division.

The rate should, however be moderate and fixed, so that the partitioner may not be able to make exorbitant demands.

It is, however, more eligible that his salary may be paid from the public treasury, as it is easier for the people in general, and avoids corruption and injustice.

5. The Partitioner must be just and skilful :

The partitioner should be a man known for justice and integrity ; and he should also possess a knowledge of that particular business.

6. Partitioner should not always be the same person :

The Qazi should not compel the people always to accept any one particular person as their partitioner ; because the transaction between the owner and the partitioner is of the nature of a contract ; and it is not lawful to compel any person to enter into a contract ; and also, because, if such a practice is allowed, the person having the exclusive appointment may also demand high rate of wages.

7. The partners may agree to a partition, procuring (if one be an Infant) an order from the magistrate :

It is lawful for several joint owners to agree amongst themselves, and make partition of their joint property. But if there is an infant among them, it is necessary that they obtain an order from the court ; because they have no power over the infant.

8. One partitioner not concerned with another :

The Qazi should not make the persons employed to make the partition to be joined together in the hire because such a conjunction may raise the hire to an exorbitant rate.

9. Partitioner to be paid in proportion to the number of claimants :

The rate of wages for the Partitioner is to be fixed on basis of the number of persons for whom the partition is made according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that it is to be fixed in proportion to their respective shares in the wages of the Partitioner being on account of their property, and therefore fixed according to its extent, like the wages of a public weigher, or a measurer, or of a person who digs a well to be held in joint property, or like the maintenance of a slave jointly belonging to several owners.

According to another opinion based upon the authority of Imam Abu Hanifah, the wages upon of the Partitioner is entirely upon the one who wants the partition, and not on the upon who opposes it, because it is advantageous to the one, and not to the other.

10. In the distribution of hereditaments :

If several co-owners appear before the Qazi, and say that a tenement or piece of land in their possession has come to them by way of inheritance from the Qazi should not make the partition of it unless they prove by evidence the death of the person, and the number of his heirs. This is according to Imam Abu Hanifah. Imam Abu Yusuf and Imam Muhammad are of the view that if they all agree, the Qazi can make the partition, taking care to mention in the *Qismat Naamah*, or deed of partition, that it is made on basis of their declarations.

11. If the property consists of moveables :

But if the joint property is moveable and not land or tenement, and the parties say that it is their inheritance, the Qazi can, on their representation, order the partition.

12. Property acquired by purchase :

If the joint property is land or tenement and they say that they have got it by purchase, the Qazi can order a partition.

13. Partition demanded without specifying how the joint property was acquired :

If the joint owners of a property request for a partition of it, without specifying that it has been acquired by inheritance, or by purchase, or by any other means, the Qazi can order the partition. This in fact, will not a decree against another person, because no other person is admitted by them.

14. Partition on requisition and testimony of any two heirs :

If two heirs appear and produce evidence to prove the death of their ancestor, and the number of his heirs, and the house or other inheritance is in their possession, but one of the heirs is absent, the Qazi can order a partition, if the heirs who attend request for it, and appoint an agent to take possession of the portion of the one who is absent ; or if, one of the heirs is an infant, the Qazi can order for partition, and appoint a guardian to take possession of the portion of the infant.

But this will not apply, if they had become joint owners of the house or land by purchase ; because in that case no partition can be made in the absence of any of the co-owner.

15. Property, or any part of it, held by an absent heir, or his trustee, or an infant :

If the property, or a part of it, is in the possession of an absent heir, or of his trustee, or of an infant heir, no partition should be ordered, even if the heirs who are present produce the evidence or not.

If only one heir appears, no partition should be ordered, although he produces the necessary evidence, because it is necessary that both the litigants should be present ; and no one can singly stand as litigant on both sides.

16. If one of the requiring parties is an infant, or one an infant heir, and the other a legatee :

If two heirs appear, one an adult, and the other an infant, the Qazi should appoint a guardian for the infant, and order the partition as soon as evidence is produced ; and similarly, if an adult heir appears, and also a legatee of one third of the estate, and they request for partition, and produce evidence, the Qazi should order the partition.

Section (1)

THINGS WHICH ARE FIT FOR PARTITION

*(Hidayah, Kitab-ul-Qasmat, Fasl Fee Maa Yuqsimo Wa Maa
Laa Yuqsimo)*

1. Distribution on requisition of any one partner :

Where the share of each of the joint owner is capable of separately converted to use, if any one of them request for partition, it should be granted ; because partition is an indisputable right, when required in any article which is capable of partition.

If the share of one co-owner only is fit for use, and not that of the other, because of its being very small, and the co-owner of the greater share request for partition, the Qazi should grant it ; but he should not grant it at the request of the other co-owner.

2. If the share is separately useless :

If the share of each of the co-owner is so small that they cannot separately be of any use, the Qazi should not order a partition unless both co-owners agree.

3. Property consisting of articles of one species :

When the joint property is 'Arooz * (that is, neither *Dirhams, Dinars*, lands, nor house), the Qazi should order the partition, provided it is all of one species, e.g., articles of weight or measurement of capacity, or gold, silver, iron, or copper, or cattle of one species, whether camels, oxen, or goats ; because as, in this case, there can be no difference in the design, the partition may be made with equity , and utility may thereby be achieved.

* 'Arooz signifies household furniture (Siraj-al-Lughaat).

4. Of various species :

The Qazi should not order a partition when the joint property is of various species, such as a camel and a goat, or a house and an ass ; because, as articles of different species cannot be blended, the partition, such cases cannot be of separation but rather of an exchange, which is always to be made by agreement of the parties, and not by a decree of the court.

5. Household vessels :

The Qazi should not order partition of household vessels, as they are of different kinds, on account of different workmanship.

6. Partition of cloth of an equal quality :

The Qazi can make a partition of Herat cloths, as they are all of one and the same quality ; but he should not make partition of a single piece of cloth which is not uniformly alike ; because division of one piece of cloth causes an injury, as it cannot be made without cutting it ; neither should he make a partition of two pieces of cloth where they are not of equal value.

But it is otherwise in case of three piece of cloth, the value of one of which is equal to that of the other two ; or where the value of one of them is one *Dirham*, that of another one *Dirham* and a quarter, and that of the third one *Dirham* and three quarters ; because, in the first case, he can give one piece to the one co-owner, and the other two to the other co-owner ; and, in the second case, he can give to one of the co-owner the second piece, valued at one *Dirham* and a quarter ; to the other the third piece, valued at one *Dirham* and three quarters, and can leave the first still to be held in partnership, one-fourth appropriated to one partner, and three-fourths to the other, as it is lawful to divide one part of the joint property, and leave one part undivided.

7. Jewels or slaves :

Imam Abu Hanifah is of the view that slaves and jewels should not be divided by the Qazi, on account of there being great difference amongst them.

Imam Abu Yusuf and Imam Muhammad say, that he can make a division of slaves, on account of the fact, that they are of one species, like camels, or goats, or captives of the war.

Some are of the view that jewels cannot be divided if they are of different species, as pearls and rubies.

Some, however, say that if the jewels are of large grains, they cannot be divided, on account of great difference which is between them ; but if the grains are small, the difference is of no consideration and, therefore, jewels can also be divided, while some also say that no jewels, whether of small or large grains can be divided, on account of the difference between them, as the difficulty of knowing their exact value is greater than that of the slaves. Thus for instance, if man marries a woman, and stipulates to give pearls or rubies as her dower, such stipulation is not ; but if he stipulates to give slaves, it is valid. The Qazi, therefore, should not make division of jewels.

8. Partition of a bath, mill, or well without consent of all parties :

The Qazi should not order the division of a joint mill, bath or well, or a wall between two houses except with agreement of all the co-owner ; because if, in these also division is made, it can be troublesome for all parties, as individual share of each can be of no use for them.

9. Partition of houses and tenements :

It may be noted, that "Bait" or "room" is a single rooted place, surrounded with walls, with a door or entry, and "Manzil",

or "tenement", is a place consisting of different rooms, a court yard, and a kitchen, in which a man can live with his family, and a "Door", or a house, or is a place consisting of various rooms or tenements, with an open court-yard. A tenement is therefore superior to a room and inferior to a house. These definitions are given by Shams-al-A'imma in his book on Shuf'ah. In this work, by the word "Khaanah" (house) is meant such as described under the description of "Daar", excepting where is mentioned an under-house in opposition to an upper-house which only mean a "Bait or a Manzil".

If there are several houses held in co-partnership in one city, each house should be separately divided, according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad are of the view, that if it is expedient for the co-owners all houses should be united in one general division, and not divided separately. All the houses, therefore, should be considered merely as one house consisting of many apartments, and all the shares of each co-owner should consequently centre in one of the houses, so that it may be entirely his.

The same difference of opinion also exists in respect of land held in co-partnership and dispersed in different situations.

But it is otherwise as regards a single house, held in co-partnership consisting of different rooms ; because as, in such a case, to divide each room amongst the co-owners would cause inconvenience to all, the whole house should therefore, be divided as one.

If two houses held in co-ownership are situated in different cities, according to Hilaal it is the agreed opinion of Imam Abu Hanifah and Imam Abu Yusuf that both houses shall be divided separately. Imam Muhammad, however, is of the view that they should be divided as one, as the houses situated in the same, city.

Rooms, situated all in the same quarter, or in different quarters, should be divided as one, as the difference amongst them is of no inconsideration. *Manazil al-Mutalaziqah* (i.e., adjoining tenements, or such as are in the same house, one part of them being contiguous to another), are to be considered as rooms; while, *Manazil al-Mutaba'inah* (i.e., apartments not adjoining, in contradistinction to the other), are to be considered as houses, a *Manzil* or tenement ; is in fact the middle term between a house and a room, and resembles both.

If there is co-ownership in immoveable property of two species. e.g., a house and a piece of land, or in a house and a shop, the Qazi should divide each separately, as they are of different species.

Section (2)

MODE OF PARTITION

(Hidayah, Kitab-ul-Qasmat, Fasl Fee Kefiyat-il-Qasmat)

1. Partitioner to make distribution equitably by measurement or appraisement :

It is binding upon the partitioner that he should draw on paper a plan of the property which he is to divide so that it may remain in his memory.

Similarly he should observe equality in the partition, which means that, he should divide the property into due proportions ; and it is also to be noted that he should separate each share and measure it, so that its extent may be known. Moreover, he should appraise the property, as it is necessary, for his further guidance, so that its value may be ascertained.

2. Partition of houses how accomplished :

If the property to be divided is a house, in separating the shares in it he should also separate the road and the drain belonging to it, if possible, so that one share-holder may no longer have any connection with the other, and that every cause of future dispute may be finished, and that the purpose of division may be fully achieved.

In doing this he should term one share the first share, and next to it as the second, and next to it as the third, and so on ; and he should then write down their names, and draw them like lots ; and the one whom he draws as the first name gets the first share, and the second gets the second share, and so on to the end.

The property should, moreover, be divided into fractions equal to the smallest proportion ; meaning that, if the smallest

proportion held by any of the co-owners be one-third, the whole should be divided into three parts ; or if the smallest proportion be one-sixth, the whole must be divided into six parts ; so that the division may be accurate.

Thus, if a property is to be divided between two heirs, one the son and the other the daughter, it should be divided into three shares, one termed as the first,, the next as the second, and the next as the third, and the partitioner should write the names upon ballots and cause them to be drawn like lots ; and if the son's name comes up first, he gets the first share, and the one next to it, and the third goes to the daughter ; or if the daughter's name comes up first, she gets the first share, and the other two go to the son.

The drawing of lots is only to give satisfaction to the parties, and to save the partitioner from the influence of partiality or favour. It is not, however, absolutely necessary ; and if the partitioner chooses to appoint a specific share to each, it is valid; because making of the division is an act of court, and therefore authority of the partitioner is to be enforced.

3. Partition of landed property, and composition in money :

The partitioner in making the division of landed property, should not add a consideration in *Dirhams* or *Dinars* without the agreement of the parties ; meaning that, if he makes one share less than the other, and, as a compensation, adds to it a sum in *Dirhams*, it is not valid, unless the parties agree to it because the co-ownership is not in *Dirhams*, and division is one of the rights of the co-ownership.

Further, if *Dirhams* are admitted into the transaction, it finishes the equality of the division ; because one of the co-owners will get the property ; and will be liable for the *Dirhams* which have become the right of the other ; and thus it is a possible that he may not pay them, and this will cause a loss to the right of the other.

4. Partition of a house with a piece of land :

If the partnership property consists of two things, e.g., a house, and a piece of land, then according to Imam Abu Yusuf, each should be divided separately, according, to its value ; because it is only by fixing the value of each that equality can be observed in the division.

According to Imam Abu Hanifah the land can be divided on basis of its measurement, and afterwards the one on whose share the house is situated, or whose share is the most eligible, should pay a sum in *Dirhams* to the other, so that an equality may be created ; and that therefore the *Dirhams* may be introduced as auxiliaries in the division when it becomes necessary.

Imam Muhammad in such a case is of the view that the person in whose share the house is situated should give to the other co-owner a space in the land equal to the value of it. If, however, his share (due to containing the house) is still of greater value and it is not possible for him to create equality for want of enough of the land to compensate for the value of his house, he can then give *Dirhams* equal to the excess ; because on account of the necessity in that degree, the original rule of division by measurement should not to a greater degree be given up. This is also contained by the opinion noted in the *Mabsoot*

5. Partition of land having a road or drain :

If the partitioner has to divide the property in which the road or drain of one co-owner may run through the share of the other, and there was no condition already existing in this connection, the case can be dealt with in two ways viz. : (1) If possible to turn the road or drain another way, so that it may not pass through the share of the other ; in which case the division will be valid. But it will be otherwise regarding the land sold with the condition that it is sold with its immunities ; and (2) if it is impossible to turn the road or drain another way so that may not pass through the share of the other, which may happen in two

different circumstances viz., firstly, where the parties have not agreed with one another to enjoy their shares “with all the rights and immunities belonging to them” ; in which case the division is to be finished, and made anew, in such a manner that the road and water-drain of each should be separate. But it is otherwise with respect to the lands sold ; and secondly , where all the parties have agreed to enjoy their respective shares with all the rights and immunities belonging to them ; in which case the division will be valid, and the road and water-drain will be included in it. But it is otherwise with respect to land farmed, with the intention of farming to enjoy the use of the land, which could not be possible without having road and water-drain, it therefore follows that even if these articles have not been expressed, they are included in the farm.

6. Dispute concerning the road :

If the parties differ as respect of the road, some want it to remain common, and the rest of the property to be divided, and others oppose it, then if it be practicable, the Qazi should divide the road and assign a part of it to each of them but if it is not practicable, he should leave the road without division so that the parties may enjoy all their property except the road.

If the parties differ in respect of the extent of the road, the Qazi should divide their shares by the breadth and height of the doors of their respective houses as that will be enough for their necessary occasions.

7. Parties may make a private agreement :

If two co-partners in the division of the road, agree that the one of them shall have two-third and the other one only one-third, the division will be Valid , inspite of the house being held between them in equal shares ; because in division it is permissible to give more or less than his share to one co-owner, if both of them agree to it.

8. Partition of different houses and tenements :

If two co-owner own a house, the upper floor of which is held by a stranger, or in which there is no upper floor and similarly another house, the under floor of which is held by a stranger, and also a complete house (of two stories), in such a case the Qazi should take each house separately, and make division accordingly.

Imam Muhammad is of the view that this is the only lawful mode of division. Imam Abu Yusuf and Imam Abu Hanifah are of the opinion, that in such a case he should make the division according to measurement.

9. Disputes after the partition :

If the co-owners differ after division, one says that "he has not received his full share, and a part of it still remains in the possession of the other" ; and the other denies this, and the two partitioners (or any two persons) testify that, "they have made the division," their evidence, according to Imam Abu Hanifah and Imam Yusuf should be accepted.

Imam Muhammad is of the view that it cannot be accepted. Tahavee says that where the partitioners receive wages for making the division, it is universally admitted that their evidence cannot be accepted ; and many doctors of our sect hold the same view.

The author (of *Hidayah*), remarks that the two partitioners could not have any ulterior motive in their evidence, as the co-owner have already agreed that they have accurately performed the work of division for which they have received the wages and, the only point in dispute is as regards the seisin and possession ; for which no allegation of falsehood be imputed against them.

10. But not that of one partitioner :

But if only one partitioner gives the evidence. It is not be accepted ; because the evidence of one man alone against another is does not suffice.

CHAPTER 2

ALLEGATIONS OF ERROR IN PARTITION , AND CLAIMS
OF RIGHT REGARDING IT

*(Hidayah, Kitab-ul-Qasmat, Baab Da'waa-ul-Ghalat Fil Qasmat
Wal Istehqaaq Feeha*

**1. Allegations of error, where the party admits having
received his share :**

Where one of the co-owner complains of error in the division, and alleges that a part which should have been given to him by the partition has been given to another, in such a case, if he has already admitted that he has received his share, his complaint should not be allowed unless it is supported by evidence ;

If the complainant is not able to support his complaint by evidence, the other one should be asked to deny the complaint upon oath ; and if he refuses to take the oath, their refusal should be taken as proof of the complaint in favour of the complaint, and the Qazi divide the property anew according to their respective shares.

The author (of Hidayah) is of the view that in this case the complainant's alleges should on account contradiction be rejected.

2. Complaint of after-assumption is complaint of usurpation :

If the complainant admits that he has received his full share, but that the other co-owner has unlawfully occupied afterwards a part of it, the denial of the other one, on oath, should be occupied , as being virtually a complaint of usurpation.

3. Complaint of non-delivery ; both parties are sworn, and the partition is dissolved and made anew :

If he alleges that "a village which fell to him on account of the division, has not been delivered to him," in such case, if he has not already admitted the delivery of possession of his share, and the other co-owner contradicts him, both are to be given the oath.

4. Plea of error cannot be heard :

If any of the parties alleges that an error has occurred in the division, his allegation should not be entertained as being of the nature of the complaint of fraud in a sale, which had concluded by the principals themselves is not entertained.

In division, as in sales, in which both parties have concurred, such an allegation cannot be entertained.

If, however, the division is made by order of the Qazi, and extreme type of fraud is alleged, the allegation should be entertained as the stability of the authority of Qazi depends on justice.

5. Claim in respect of a particular room in a house, after partition :

If a house is divided between two co-owners, in which each has received a part, and thereafter one of them claims a room which is in the possession of the other, saying that "it should have been given to him due to the division," and the other denies it, then the plaintiff who makes the allegation of usurpation should bring proper evidence ; and if both of them bring the evidence, the evidence of the plaintiff, who is not in possession, should be admitted in preference to that of the other ; because it is a maxim of the law that the evidence of the party who is out of possession is to be preferred to that of the one who is in possession.

If the allegation is prior to an admission of the plaintiff's having ever got the possession, both parties should be given the oath ; and the division must be finished, and made anew.

Similarly, if two co-owner differ as regards their boundaries, the one says that "a certain boundary which belongs to him, has been given to the other," and the other also says the same thing regarding another boundary, and both of them produce the evidence, the Qazi should pass a decree, in favour of each, the boundary which is in the possession of the other.

If only one of them produces the evidence, the Qazi should pass a decree only in his favour ; but if none of them produces any evidence, they should both be given the oath as in cases of sale.

Section (1)

LAWS APPLICABLE IN A CLAIM OF RIGHT

(Fasl Fill Istehqaaq)

1. Claim of an indefinite part, after partition :

If a house held in co-ownership is divided, and thereafter an undefined part of the whole, proves to be the right of another, the division, according to all is void, and should be made anew.

2. Definite part claimed after partition :

If a particular part of the share fallen to one of the co-owners, on account of division, proves to be the right of another person, the division is valid according to all and does not become void with respect to what is left after the share of the other person has been separated ; but the party from whose share that part has been taken has the option to dissolve the division and restore the property to the state in which it was previous to the division and then to demand a new division, or to let the division hold good, and take from his partner's share a compensation for that part of which he has been deprived by its falling to the lot of another.

3. Undefined part claimed :

If, after the division, an undefined part of the share of one of the co-owner (such as a half), proves to be the right of another person, the division is valid as regards the remainder, and does not become void according to Imam Abu Hanifah and Imam Muhammad ; but the co-owner upon whose share the claim operates has it in his option to annul the division and restore the property the state on which it previously stood, and then to demand a new division ; or, he may let the division hold good and take from his co-owner a compensation for the half of his share which he has lost, and which is equal to one-fourth of the share in the possession of that co-owner.

According to Imam Abu Yusuf, however the division is in such a case is void.

If the partner to whom the first half has come sells a moiety of it, and thereafter the other moiety proves the right of another, he will still be entitled to one-fourth of the second half in the possession of his co-owner ; and his option of annulling the division will drop, because of his selling a part of his share. This is according to Imam Abu Hanifah and Imam Muhammad.

Imam Abu Yusuf says that the second half, in the possession of the co-owner, should be divided equally between them ; and that the first owner forfeits to his co-owner one-half of the price for which he has sold a part of his share, for the original partition is not valid and as an article of which a person gets the possession by an invalid deed becomes his property, he may lawfully dispose it of by sale ; but he remains responsible for its value ; and hence in the case in question, the first owner is responsible for the value of one-half of what he has sold, as that is a moiety of the other's half.

4. Debt proved against an estate :

If the estate of a deceased person is divided amongst his heirs, and thereafter a debt is proved against the estate equal to

the whole, of the estate, the division should be finished, because the debt prevents the estate from inheritance falling to the heirs ; and the same applies where the debt is not equal, because the right of the creditor is attached equally to the entire fortune of the deceased. The division is therefore to be finished, unless there is left the division a sum sufficient to discharge the debt, in which case the division is not to be finished as it is not necessary for discharging the debt.

5. Unless the creditor remits it, or the heirs discharge :

If the creditor, after the division, remits the debt, or if the heirs discharge the debt from their own sources, the division remains valid, whether the debt is equal to the estate or exceeds it.

6. Claim by an heir upon the estate after partition :

If any of the heirs claim a debt against the deceased, after the division of the inheritance, his claim is admissible ; because in this case there is no contradiction, as the debt relates to the spirit of value, and not to the substance of the particular inheritance, and it was in the substance of the inheritance that the division took place.

7. Claim, by an heir to any particular article , after distribution :

If any of the heirs, after the division, claims a particular thing included in estate, on whatever ground the claim is built, it is not to be admitted, on account of the contradiction which is here obvious, as their taking part in the division implies an admission in by them that the particular thing, which has been divided, was a part of co-ownership.

Section (2)

LAWS OF MAHAYAAT

(Hidayah, Kitab-ul-Qasmat, Fasl Fil Mahayaat)

1. Mahayaat is a partition of usufruct :

Legally, "Mahayaat", signifies the division of the usufruct ; and it is permissible, because it is frequently impossible for all the co-owners to enjoy together, and at one and the same time, the use of thing held in co-ownership.

Mahayaat, therefore, is the division of the property which the Qazi enforces with this difference, that in the partition of property each co-owner enjoys the use of his respective share at the same time, whereas in the division of usufruct each of the co-owners frequently enjoys the use of the thing held in co-ownership only when it comes to his turn, by rotation.

Division of the property is therefore more effective than division of the usufruct in having enjoyment of the use ; for which reason, if one co-owner applies for a division of the property, and another for division of the usufruct, the Qazi should grant the request of the former ; and if division of the usufruct should have taken place regarding a thing which is capable of division of the property, such as a house or a piece of land, and there-after one of the co-owner applies for division of the property, the Qazi should grant division of the property and annul the division of the usufruct.

2. Death of the parties :

A division of the usufruct is not finished by the death of one of two co-owners, nor even by the death of both, because if it were finished, it would most probably be renewed, as the heirs of the deceased may lawfully demand a division of the usufruct, and therefore it would be of no use to finish it.

3. Partners allotting to each the use of a particular part of the joint concern :

If two co-owners, by mutual agreement, divide the usufruct in respect of a house, to the effect, that one of them will have one part of it and the other another ; or, that one will have the upper-floor and the other the under-floor, such an agreement is valid ; because a just division of the property made by agreement is lawful , so likewise the division of the usufruct is also valid.

4. Either is at liberty to let his share :

It is lawful for each co-owner to let out on rent the part of the property of which the usufruct has come to his share, and he may enjoy the rent accruing from it, even if there is no condition to this effect in the agreement of division of the usufruct.

5. Stipulating an alternate right to the use :

Similarly if two co-owners agree to division of the usufruct regarding a slave, in the manner that one day he will serve the one, and the next day the other, it is lawful and so also if they agree regarding a small room ; because division of usufruct is sometimes made on basis of time, and sometimes on basis of place ; and in this instance it is made on basis of the time.

6. Difference between the parties to be settled by the Qazi :

If two co-owners disagree in respect of the terms of their contract of division, the one saying that it based on time, and the other says that it based on place ; the Qazi should enjoin them to agree to either of these manners.

If they agree to division on basis of time, the Qazi, to avoid the charge of partiality, should draw the lots, to determine which of them should have the first turn.

7. Partition of the use of two slaves :

If two co-owners e.g., Zaid and Umar make division of the usufruct in respect of two slaves to the effect, that the one of them will serve Zaid and the other one of them will serve Umar, it is valid according to Imam Abu Yusuf and Imam Muhammad, because as by their view division of property regarding the slaves is lawful, whether it is by the order of the Qazi, or by the mutual agreement of the parties, it follows that division of the usufruct, in respect of the slaves is also void.

Some however with reference to the doctrine of Imam Abu Hanifah are of the view that the Qazi should not enforce division of the usufruct in respect of the slaves, as also reported by Khassaaf, because compulsion being disallowed by Imam Abu Hanifah in respect of division of the property in the case of slaves, it therefore follows that the Qazi has no power to enforce division of the usufruct in a similar case.

The fact is, that if the Qazi enforces division of the usufruct in this way, it is lawful according to Imam Abu Hanifah, but, if he enforces in this way the division of the substance it will be unlawful ; because though in the service of slaves there may be no much difference, yet in their persons they may differ to a great extent.

If division of the usufruct is made in respect of the two slaves in the manner that the maintenance of the one whom Zaid takes for his service will be paid by Zaid, and the maintenance of the one whom Umar takes will be paid by Umar, it is valid.

8. Or, of two houses :

If two co-owner make division of the usufruct in respect of two houses ; in the manner, that the one will reside in the one house, and the other will reside in the other, it is valid ; and the Qazi can enforce it, according to Imam Abu Yusuf and Imam Muhammad and this is also the view of Imam Abu Hanifah as recorded in the Zahir Rawayat.

Some however, say that according to Imam Abu Hanifah, such division of the usufruct if made by the mutual agreement of the parties, is valid ; but that it cannot be enforced by the Qazi. There is another view reported from Imam Abu Hanifah, that division of the usufruct in this manner is invalid even if enforced by the Qazi.

But it is otherwise in respect of division of the substance of two house ; because the sale of a part of one house for a part of the other house is lawful.

9. Or, of two quadrupeds :

If division of the usufruct is made in respect of two quadruped, to the effect that the one co-owner will ride the one, and the other will ride the other, it is not valid according to Imam Abu Hanifah.

According to Imam Abu Yusuf and Imam Muhammad it is valid.

Same difference of opinion also exists in respect of division of the usufruct by rotation with respect to one quadruped, in opposition to a slave.

10. Partition of the advantage from a house :

If division is made in respect of the rent of a house, to the effect that the one co-owner will let it out on rent for one or two months, and enjoy the rent, and that thereafter the other partner will let it out on rent and enjoy the rent, such division is valid according to the Zahir Rawayat ; but a similar agreement in respect of a slave or a quadruped is not valid.

11. Excess in the rent to be divided equally :

If the rent of a house is greater during the turn of one partner than in that of the other, they should both participate in the excess, or difference between the one rent and the other, in order to create equality between them.

But it is otherwise where they make division in respect of the use of the house, and thereafter it yields more rent to the one in his turn than to the other.

12. Partition of the advantage from two houses :

Similarly division relating to the rent of two houses is also lawful, according to the Zahir Rawayat on account of the same reasons as apply in the case of one house. If, however, one house yields more rent than the other, still the co-owner do not both share in the excess.

13. Partition of the advantage from two slaves :

According to Imam Abu Yusuf and Imam Muhammad, division in respect of the hire of two slaves, made in the manner of the preceding case, is lawful, as well as division in respect of the service and use of two slaves. Imam Abu Hanifah is the view that it is not valid.

14. Partition of advantage from two quadrupeds :

Division of the usufruct in respect of the hire of two quadrupeds is invalid, according to Imam Abu Hanifah, in opposition to the view of Imam Abu Yusuf and Imam Muhammad.

15. Partition of usufruct regarding productive articles :

If two co-owners make division of the usufruct in respect of an orchard of dates, or a garden having trees, in the manner that each will take a part and cultivate it, and enjoy the fruits of it ; or, if they make division of the usufruct in respect of a herd of goats, in the manner, that each will take an specific number, and feed them, and enjoy their milk, none of these divisions of the usufruct is valid.

BOOK – III

IJARAH

(RENT, HIRE, WAGES)

IJARAH *

(RENT, HIRE, WAGES)

(*Hidayah, Kitab-ul-Ijaraat*)

Note

Literally "Ijarah", means a sale of usufruct. But legally it signifies a contract of usufruct against a return. It is of many kinds. It covers rent of houses, salling of servants, wages of the labours, or recompense for work done by anybody

The contract of "Ijarah", is legal and valid and also necessary for the day to day requirements of the mankind. In this connection it may also be noted that the Holy Prophet Muhammad (peace be upon him) has also said "Pay the hireling his wages before the sweat become dried (*Ibne Maajah*) ; and also, "If a person hires another, let him inform him of the wages he is to receive." (*Aasaar*)

The hirer known as the "Aajir", or "Mujir"; and the person hired is known as the "Mustajir."

CHAPTER 1

CONTRACT OF HIRE

1. Usufruct or hire should be specified :

Contract of hire is not valid unless the hire is particularly known and specified, because the Holy Prophet has said, "If a person hires another, let him inform him of the wages he is to receive" (*Aasaar*).

* Qur'an, Ch. 28 (Qasas), Verses 27 to 29 ; Mishkaat, Kitabul Buyoo, Babul Ijarah. 'Ainul Hidayah, Vol.III, pp. 695 to 756

2. Hire may consist of anything :

All that is lawful as a price, is also lawful as a hire ; because the recompense is a price which is paid on hire or usufruct and is therefore analogous to the price of an article purchased.

Articles which are not capable of constituting price, such as a slave, or cloth are nevertheless a fit recompense in hire, since they constitute a return of property.

3. Extent of the usufruct :

The extent of usufruct or hire can be defined by fixing the period ; as in the hire of a house for residence, or the hire of land for cultivation. A contract of hire, stipulated for a fixed period of any extent, is valid ; because, if the period is known, the extent of the usufruct or hire for that period is also known.

This is based on supposition of the use not being various. But where the uses to which the article is to be applied are various, the hire or usufruct cannot be ascertained by the mere declaration of the period ; as in the case, for instance, of hiring the land, for a fixed period, for cultivation, which is not valid unless the particular species of cultivation is mentioned, because some modes of cultivation are injurious to the land, while others are not so.

It may be noted that the expression of the author (of Hidayah "for whatever period," denotes that hire is valid, even if it is for a long or a short period, as the period is ascertained, and people, moreover, frequently require a long period.

But if the *Mutawallee* (procurator) of a charitable property lets out the property, the hire of it for any long period is not lawful, lest the lessee may be enabled to claim a right in it. Hire for a long period means for any period beyond three years.

4. Hiring of servants by specifying the work :

Hire is also ascertained by specification of the work, as for instance where a person hires another to dye or sew the clothes, or an animal for carrying the burden, or riding upon it for a distance, because, on sewing the cloth, and specifying a particular colour, and the nature of dyeing in the first case, or explaining the needlework in the second case, or explaining the weight and nature of the load in the third case, or distance of journey in the fourth case, the hire can be fully known ; and thereafter the contract will be valid.

Generally a contract of hire is a contract of work, as in the case of a fuller or a tailor, where it is necessary that the work should be specified. Sometimes a contract is for the usufruct, as in the case of a domestic servant ; and in such case a specification of the period is necessary.

5. By specification and pointed reference :

Usufruct is also ascertained by specification and pointed reference ; as where a person hires another to carry an specific load to a particular place ; because, on seeing the load and knowing the place to which it is to be carried, the service is precisely known; and therefore the contract is valid.

CHAPTER 2

WHEN THE HIRE MAY BE CLAIMED

(Hidayah, Kitab-ul-Ijaraat, Baab-ul-Ajr Mata Yastahiqqo)

1. Claim of hire :

Hire becomes due claimable on either of the three grounds, Viz., (1) in advance as a condition of the agreement, or, (2) in advance, independent of the agreement ; or, (3) as a result of the hirer getting the property contracted for.

2. Tenant becomes liable for the rent.

When a tenant gets the possession of the house, he becomes liable for the rent, even if he does not reside in it ; because, as it is not possible to deliver the usufruct, the delivery of the property from which the usufruct is derived is a substitute for it ; as in delivering the property the ability to enjoy the usufruct is proved.

3. So long as it is not usurped from him :

But if any person usurps the house from the tenant, the tenant remains no longer liable to pay the rent. Similarly if a person usurps the house before expiration of the period of lease, the rent also drops in proportion, to the period for which the contract is broken.

4. Rent may be demanded from day to day :

If a person takes on rent a house, the lessor is entitled to demand the rent from the tenant from day to day if the time for demanding the rent is not already stipulated in the contract.

The same rule applies in respect of a lease of land also.

5. Hire of an animal :

Similarly, if a person hires a camel for going to Mecca (for instance), the owner is entitled to demand the hire stage by stage.

6. Workman not entitled to any thing :

A workman is not entitled to demand his wages until his work is complete, unless advance payment is stipulated.

The same rule also applies when the workman does his work in the house of his employer. If an advance payment of wages is stipulated in the contract, the workman is entitled to get his wages before his work is complete, as such stipulations are lawfully binding.

7. Baker hired to bake bread :

If a person hires a baker to bake the bread for him, at the rate of one Qafeez of flour for a *Dirham*, the baker is not entitled to get his wages until he draws the bread out of the oven, because till then his work is not complete.

In case, the bread be burnt, or fall down out of the baker's hands, and spoiled the baker, is not entitled to get his hire, because the bread are destroyed before delivery to the hirer.

But if, the bread after withdrawing out of the oven are burnt or destroyed, without the act of the baker in such a case he is entitled to his hire, and neither any compensation is due upon him, nor will he be guilty of any transgression. This is according to Imam Abu Hanifah, but Imam Abu Yusuf and Imam Muhammad are of the view that the hirer in such a case can claim compensation for the value of the flour ; and not pay the baker his wages ; or, pay the wages for the baking and claim compensation for the bread.

8. Case of a cook :

If a person hires a cook to prepare food for the feast, the cook is also required to dish the food, because it is the custom in general.

9. Case of a brickmaker :

If a person hires a brick maker to make for him a number of bricks, the brickmaker is entitled to his wages after setting up the bricks when dried by the sun. This is according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad are of the view the brickmaker is not entitled to his wages until the bricks are dried, collected together and built up.

10. The Article worked upon may be detained by the workman:

Every workman whose work is complete upon an article (such as a dyer or fuller) is entitled to detain the article until he gets his wages.

11. In case of accidents, during such detention :

If, a dyer or fuller detains the cloth until he gets his wages, and the cloth is destroyed in his hands, he is not responsible for it, according to Imam Abu Hanifah. But he is also in such a case not entitled to his wages.

Imam Abu Yusuf and Imam Muhammad are of the view that the cloth creates responsibility before as well as after, detention ; but the owner can take compensation for the value of the cloth as it was before the fulling or dyeing, in which case the workman will not be entitled to his wages, or take a compensation for the value of it as it was after the work, in which case the workman will not be entitled to his wages.

12. If the work be of a nature not to produce any visible effect in the article :

But a workman, whose labour has no effect on the article (such as a boatman, or a porter), cannot detain the article till receipt of his wages.

13. If the contract be restricted to his work :

If the hirer stipulates with the workman to himself do the work, the workman is cannot employ any other person.

But if the work is without the stipulation that the workman will himself do it, the workman can hire any other person to do the work.

Section

CONTRACT CANNOT BE FULFILLED

If from an unavoidable accident the contract cannot be fulfilled :

If a person engages on wages another to go to Basra and bring his family from there, and the person goes to Basra, and there finds some of the family dead, and brings away the remaining ones, he is entitled to his full wages for the journey to Basra, and also to the wages for returning back in proportion to the number of family members he brings with him.

This, however applies when the number of the family members are previously ascertained, so as to object to the wages agreed upon to the whole ; otherwise the whole wages will be due.

This rule, moreover, will apply only when the expenses of the remaining members are materially lessened by the death of some.

If a person engages another on wages to carry a letter to Basra and bring back reply to it, and he goes to Basra, and there finds that the person to whom the letter was addressed has already died and comes back and returns the letter, he is not entitled to any wages at all. This is according to Imam Abu Hanifah and Imam Abu Yusuf.

Imam Muhammad is of the view that he is entitled to the usual wages for going to Basra.

But if, the person leaves the letter at Basra, and returns, he is entitled to the wages for the journey to it, according to all, as what was contracted for has been partly done in this case.

If a person engages on wages another to carry wheat to a person at Basra, and he carries the wheat to Basra, and then finds that the person to whom it was sent has already died, and he brings back and returns the wheat to the hirer, according to all, he is not entitled to the wages at all.

CHAPTER 3

THINGS OF WHICH THE HIRE IS LAWFUL OR UNLAWFUL AND DISPUTED HIRE

*(Hidayah, Kitab-ul-Ijaraat, Baab Maa Yajuzo Minal Ijarah Wa
Maa Yakuno Khilafa Feeha)*

1. House or shop hired without specifying the business to be carried on in it :

It is lawful to take on rent a house or shop for the purpose of residence, without specific mention of the business to be afterwards done in it ; because, as the ultimate purpose of it is residence, this is to be taken for granted ; and residence does not admit of many descriptions. The contract in question is as such valid ; and the lessee can carry on in it any business he pleases.

2. Unless it is injurious to the building :

A blacksmith, however, or a fuller or miller should not reside in the house, as this is evidently injurious, as such generally shake the building. Thus even though, the contract is valid, yet it is naturally restricted to what is injurious to the building.

3. The renter entitled to the use of road and water :

It is lawful to take on rent the land for cultivation, this being the use to which the land is generally applied, and in this case the hirer is entitled to the use of the road leading to the land, and also the water (to his turn of watering) even though there is no mention of these in the contract.

4. Lease is not valid, unless the use to which it is to be applied be specified :

Lease of land is not valid unless the article to be raised in

it is mentioned in the contract to avoid disputes between the lessor and lessee ; or, unless the lessor declares that "the lessee may raise whatever he pleases in it."

5. At the expiration of the lease :

If a person takes on rent the land, for construction or planting, it is lawful, as these are generally the purposes to which land is applied. But upon the period of the lease expiring, it is binding on the lessee to remove his construction or the trees, and to handover the land to the lessor without leaving any claim upon it,

But where, the land is taken on rent for tillage, and the period of the lease expires at the time when the grain is yet unripe in such a case the grain should be allowed to remain on the land, at proportionable rent, until it becomes fit for reaping.

6. Absolute contract :

The hire of an animal is lawful, for carriage as well as for riding, as to these uses animals are generally applied. So if, the riding as expressed is unconditional, the hirer is entitled to allow any person he pleases to ride upon the animal.

But the hirer, either mounting the animal himself, or allowing another to ride on it, is not entitled to see any other person riding on it. Similarly also, if a person hires a dress for wearing it unconditionally, and in an absolute manner, he is entitled to wear it himself, or to give it to any other person to wear but, he is not entitled to clothe anyone else besides.

7. Restricted contract :

If a person gives a quadruped on hire, on the condition that a particular person will ride on it, or gives a dress on hire, on the condition that a particular person will wear it ; and the hirer

sets upon the quadruped any person other than the person specified, in the contract or gives the dress to any other person to wear, and the quadruped or the dress, is destroyed, the hirer will be responsible for the loss.

The same rule also applies in respect of everything that is liable to be affected by a different occupant.

In short if the person who gives on hire restricts the use, it is restricted accordingly ; and if the hirer uses it otherwise, he is responsible for the loss of the hired article.

8. Unless it is of the nature not liable to injury from such deviation :

However, the land and every other article which is not liable to be adversely affected by a different occupant (such as a tent or pavilion) is not restricted as regards the use of it by specific mention of the particular person ; and as a result the hirer is entitled to put any one to reside in it as he pleases, as the exclusive restriction is of use only because of its preventing a difference of effect.

But the residence of the persons whose business is of injurious nature to a building (such as blacksmiths, and so forth), is always excepted from the contract.

9. Deviation not of a nature to injure the article :

If a person takes on hire an animal to carry any burden, and the person who gives it on hire specifies the nature and weight of the article to load upon the animal, as for instance, "You shall load upon it five Qafeez of wheat," the hirer can load upon that animal any article of equal weight not more troublesome in carrying than wheat, such as barley, or ape-seed, and in fact all articles of such description not causing any difference, or they may even be preferable to what is specified in the contract.

The hirer, is not entitled to load upon the animal any article of a more prejudicial nature, than wheat (such as salt, for instance), because to this the lessor had not agreed.

If a person takes on hire an animal to carry an specified weight of cotton, he is not entitled to load upon the animal an equal weight of iron.

10. Excess in the use :

If a person takes on hire an animal to carry an specified weight of wheat, and load upon it a greater weight, and the animal dies, he will be responsible in the proportion of the excess load.

But if the hirer had loaded upon the animal a load heavier than what it was able to bear, he will be responsible for the total value, as he was not authorized to do so. In fact it is generally unusual to do so.

11. A rider taking up an additional rider :

If a person takes on hire an animal for his own riding and he also takes up another person to ride behind him upon the animal, and the animal dies, he will be responsible for one half of the value.

But the animal in question should be capable of carrying two persons. If it is incapable of carrying two persons, the hirer will be responsible for the full value.

Similarly this rule also applies to the minors capable of riding alone upon an animal ; but if the hirer puts behind him another minor incapable of riding alone, it is the same as other loads, and will also accordingly be responsible only in proportion to the additional load.

12. If hired animal dies from ill usage :

If a person takes on hire an animal for riding, and pulls the halter, or beats the animal, and causes its death, he will be responsible for the full value, according to Imam Abu Hanifah.

Imam Yusuf and Imam Muhammad are of the view that he is not responsible if he only pulls the halter or beats the animal in usual or customary manner.

13. Deviation from the prescribed journey :

If a person takes on hire an animal to carry him to a specific place (Medinah, for instance), but goes out of his way, and proceeds to some other place, and then comes with the animal to Medinah, and it dies, he will be responsible for it.

Some are of the view this applies where the animal has been hired merely to go to Medinah (not to go and come back), in which case the hirer will not be required to restore it to the owner but where it is hired for the purpose of going as well as coming, the hirer is in the same situation as a trustee who first deviates from the terms of his trust, and thereafter accords to them, in which case he will not be responsible for the deposit in his hands.

Some are also of the view that the rule is absolute ; and therefore the responsibility exists in either case ; as there is clear difference between a hirer or borrower, and a trustee. A trustee is required to keep the deposit, independently, and as a result the order of conservation still remains in force after the trustee ceases from his deviation and reconfirms to the conditions of trust, and hence he reverts to his situation of representative of the owner. But, in case of hire or loan, the hirer or borrower are required to keep the article dependently on the agreed use, and not independent of it ; and therefore, upon ceasing the use, they no longer remains as representatives of the owner ; and hence they are not discharged from the responsibility by their coming back to Medinah. This is approved.

14. Change of saddle for another of the same sort :

If a person takes on hire an ass with its saddle, but fastens upon it another saddle, of the same sort as is generally used upon such an ass, he will not be responsible if the ass dies.

15. If the weight be different :

But if the hirer fastens upon the ass a saddle of a sort not generally used upon such an ass, he will be responsible for the full value.

16. If the nature of the saddle be different :

If a person takes on hires an ass with its saddle, and fastens upon the ass a pack-saddle, of a sort not generally used upon such an ass, he will be responsible for the full value of the animal. If, also, he fastens upon the ass a pack-saddle of a sort generally used upon such an ass, he will be responsible for the full value, according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad are of the view that, in such a case, he will be responsible only in proportion to the load of the pack-saddle exceeding that of the riding saddle.

17. Porter's deviation from the prescribed road.

If a person takes on hire a porter to carry a load of wheat to any particular place, by a particular road, and he carries it by another frequented road, and the wheat is lost, he will not be responsible. But if he carries the wheat safe to the specified place, he will be entitled to his wages.

But the roads should not widely different, because in such a case the restriction to either road in particular is useless.

But if the roads are widely different, and the road taken by the porter is dangerous or round about, or of difficult passage, the porter will be responsible if the wheat is lost, since the restriction is of use in this case, and, as such valid.

Imam Muhammad however does not make this distinction, and says that the porter will not be responsible if he carries the load by any road other than the road specified, if it is one generally used; because, where it is a beaten path, there will be no apparent difference between the two. But if he carries the load by an unfrequented road, and it is lost, he will be responsible for the value, as the restriction is valid, and the porter has acted contrary to his instructions.

But even, in this case, if he carries the wheat safe to the specified place, he will be entitled to his wages ; because upon so doing his deviation from his orders stand rectified.

18. Injurious deviation from the prescribed culture of hired land.

If a person takes on hire the land for cultivation of wheat, and sows therein trefoils or clover, he will be responsible in proportion to the damage caused to the land, because the cultivation of any species of grass causes more injury to the land than the cultivation of wheat, as those requiring more water, and their roots spreading more in the ground.

But if the lessor demands compensation for it, he will not be entitled to the rent, as the lessee stands as a usurper, on account of his acting contrary to the agreement.

19. A tailor is responsible for deviating from his order.

If a person gives a piece of cloth to a tailor, asking him to make a shirt out of it and he makes a short vest instead of a shirt, the person has the option to take compensation from the

tailor for his cloth, or get the short vest, and pay him his wages, but it should not exceed what had been at first settled. This is according to the Zahir Rawayat.

Some are of the view that the shirt is merely a vest of one single fold, while some say that the shirt is not restricted to vest of one single fold, because both are used in all seasons.

It is reported from Imam Abu Hanifah, that the owner of the cloth is only entitled to compensation from the tailor, and has no other option at all.

If a person delivers a price of cloth to a tailor, asking him to make a shirt out of it, and he makes a Shalwar, instead of a shirt some say that the owner should accept a compensation; and that he has no other option because of the different uses to which the two sorts of clothes are applied.

It is certain, however, that the proprietor has the option, in such a case, to take compensation for his cloth, or take the Shalwar, paying adequate wages ; because the purpose of both is covering the nakedness.

CHAPTER 4

NOT VALID HIRE

(Hidayah, Kitab-ul-Ijaraat, Baab-ul-Ijarat-ul-Faasidah)

1. Invalid condition does not validate the hire.

Hire is not valid if it contains an not valid condition, as in the case of a sale, because hire stands in the place of sale, and therefore a contract of hire can be dissolved in the same manner as a contract of sale is dissolved.

2. Proportionate hire in such a case is due, to the extent of the agreed hire.

In a case of hire becoming not valid on account of involving an invalid condition, proportionate hire becomes due if it does not exceed the hire, agreed in the contract.

3. Contract indefinitely expressed.

If a person takes on rent a house, on a condition, that "he will pay one Dirham as rent, every month", such contract is valid for one month, but not for every subsequent month, unless the all the months for which it is to be hired are specified, in which case it will be valid.

4. Rules with respect to annual leases.

If a person takes on rent a house for one year, at the rate of twelve *Dirhams*, it is valid, even though no specific mention is made of the rent of each month ; because, since the full term of the lease is known without division, it is therefore similar to hiring for one single month, which is valid, even though no mention is made of the rent of each day.

It may be noted that if the day of the commencement of the year is specified (as for instance the lessee says that, "I take this house, on rent for one year, commencing from the first of the month of Rajab"), the lease will commence from that date.

But if no date of commencement is specified, then the lease will commence from the date of the agreement itself.

It may also be noted, that if in such a case, the contract of tenancy concludes on the first day of the month, all the subsequent months of the year are to be counted from the appearance of the new moon because this is the original standard of calculation.

But if, the contract is concluded some days after the commencement of a month, the lease in such case will be taken as for three hundred and sixty days, according to Imam Abu Hanifah; and also according to one report from Imam Abu Yusuf.

According to Imam Muhammad, and also another report from Imam Abu Yusuf, the first month should be counted by days, completed from the next succeeding month; and the other months should be counted from the appearance of each subsequent new moon; because calculation by the number of days is merely on account of the necessity that exists in the first month only.

5. Wages are due to keepers of baths and cuppers.

Keepers of baths and cuppers are lawfully entitled to their wages ; the former on account of an agreed custom, among all Muslims, to pay them wages, and the Holy Prophet Muhammad (peace be upon him) has said, "Whatever seems good unto the Muslims is also good before Allah" (Ahmad) ; and the latter, because the Holy Prophet paid wages to a person who performed upon him ; (Bukhari, Muslim, Ahmad) and also, because this is the wages for service, and is therefore lawful.

6. If no hire for the covering of mares & c.

There are no wages for the covering of animals, that is, for bringing a male to copulate with a female; because the Holy Prophet has said, "*Asab-ut-Tees* is among the things prohibited" (*Bukhari, Abu Daud, Tirmizi, Nisai*) and by *Asab-ut-Tees* is understood the wages for the copulation of a stallion, or so forth.

7. No hire for the performance of any religious duty.

It is not lawful to take wages for calling the people to prayers, or for performance of the pilgrimage, or for duties of the Imam, or for teaching the Qur'an, or the Law.

Some of modern scholars, however, are of the view that to get wages for teaching the Qur'an in the present age is lawful, because of the indifference that has taken place in respect of the religion, and therefore if people do not pay wages for teaching the sacred writings, they will in time be disregarded; and judgments are given accordingly.

8. Hire for singing or lamentation.

It is not lawful to get wages for singing or lamentation, over the dead ones or for any other public function, as amounts to wages for an act of criminal nature, and such acts do not entitle to wages on account of contract.

9. Hire of indefinite articles.

The hire of anything indefinite is not valid, according to Imam Abu Hanifah, unless it is from a partner.

Imam Abu Yusuf and Imam Muhammad however hold such hire as valid, and judgments are given accordingly.

10. Hire of a nurse.

It is lawful to acquire the services of a nurse to suckle a child, at a fixed rate of wages : because Allah has said in the Holy Qur'an, that "If they suckle your children, pay them their hire;" (Ch. 2, (*Baqarah*) verse. 233) and also, because, in the time of the Holy Prophet, such was the practice, and also since before him as well as since his time.

It is lawful to engage a nurse to suckle an infant in return for food and clothing, on a favourable construction, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that this is not lawful.

In the *Jaame'-as-Sagheer* it is said that if a nurse is hired to suckle a child for her food and clothing, and the kind and fashion of her clothing are explained, and the time of giving it, and a specific number of Dirhams are fixed for her board, and victuals are then given in lieu of the money, it is lawful according to all, as in such a case there is no ignorance. Or, if the victuals are specified, and the quantity and quality are both explained, this is also lawful.

The hirer, in the such a case, is not entitled to stop the husband of the nurse from having sexual intercourse with her, because such connection being the husband's right, the hirer has no power to stop it. On the other hand, the husband, if not informed of the contract at the time of concluding it, has the right to dissolve it in order to safeguard his own right.

But the hirer, is entitled to prevent the husband of the nurse from having such sexual intercourse with her in his house, because that house is his exclusive right.

Further, in consequence of sexual intercourse by her husband the nurse becomes pregnant, the infant's guardians have

the right to dissolve the contract, if there is apprehension of injury to the child's health on account of the use of her milk, as it generally happens in such cases ; and for the same reason, they also have the right to dissolve the contract if the nurse falls sick.

It is also binding upon the nurse that she should prepare the child's food by mastication, and avoid every kind of food which may be injurious to her milk, on account of her duty.

If the nurse, feeds the child with goat's milk, during the contracted period of hire, she is not entitled to the wages, as she has not actually performed her duty, namely, feeding the child with the milk from her own breasts.

11. Stipulation that the wages shall be paid from the article manufactured or worked upon.

If a person gives the thread to a weaver, to weave it into cloth, in consideration of one half of it to himself, he is to get the wages in proportion of his work; and the same rule also applies if a person takes on hire an ass to carry wheat, against payment, in consideration, a quantity of such wheat. The contract, is not valid in both these cases.

But if a person takes on hire an ass to carry one half of a parcel of wheat, in consideration of the other half, such contract is valid.

It may be noted that where a person takes on hire an ass, to carry wheat, against consideration of a quantity of such wheat, or an ox, to grind the grain, the hire should not exceed the value of what has been agreed.

But it is otherwise if two men enter into partnership for collecting the wood, and one of them says to the other. "I will take the entire wood ; and pay you recompense for your share in the collecting of the wood".

12. Partners do not owe hire to each other with respect to their stock.

If a person engages another to carry wheat which is in partnership between them, no hire is due ; because in all that is so carried the other person works on his own account.

13. Uncertainty in the terms.

If a person engages on wages another to bake ten specific Saas of wheat into bread, "this day" for one Dirham, it is not valid, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad, in the *Mabsoot*, under the article "Hire", hold that the contract in question is valid.

14. Lease of land stipulating not to perform any act leaving lasting effects.

If a person takes on rent, the land, stipulating that he will be entitled to plough and cultivate it, or give water and cultivate it, such contract is valid : as he is entitled to cultivate the land on account of the contract; and since this is not possible unless he ploughs and gives waters to it, he is naturally entitled to do these acts upon it ; and also every such act being a necessity of the contract ; and even the mention of it does not cause in validity.

But if, he stipulates that he will be entitled to plough the land twice, or to dig trenches in it, or to dung it, the contract is not valid ; because, in such a case, an effect is likely to remain after expiry of the contract of lease, and that is not a necessity of the contract.

15. Contract stipulating the return to consisting of a similar usufruct.

If a person gets on rent the land to cultivate, in consideration of the right, on the part of the lessor, of cultivating other land, it is not valid.

16. Case of two partners.

If a quantity of wheat is in the partnership of two persons, and one of them hires the other, or his ass, to carry his share to a place, and he, or his ass, carries the entire wheat to it, he is not entitled to the hire specified, or to proportionate wages.

17. Lease of land without specifying the purpose to which it is to be applied.

If a person gets on rent the land, without specifying that it is for cultivation, or, or without specifying the species of cultivation, the contract is not valid.

18. Responsibility on account of customary use of an article, under an indefinite contract.

If a person takes on hire an ass to go to Baghdad (for instance) for one Dirham, without specifying the article to carry, and loads upon it a burden as is usually put upon such animal, and it dies before it covers more than half the way, the hirer is not responsible for it.

But if, the ass arrives at Baghdad, the owner is entitled to the hire stipulated.

If, also, a dispute arises between the hirer and the owner of the ass, before it is loaded, the contract is finished, in order the dispute may be prevented.

CHAPTER 5

RESPONSIBILITY OF A HIRELING

(Hidayah, Kitab-ul-Ijaraat, Baab Zamaan-ul-Ajeer)

1. Common Hireling.

Hirelings are of two kinds, viz., common and particular. A common hireling is the one with whom the contract of hire is concluded for work of such a nature as may be perceived by examining the subject; and in this case there is no occasion for any mention of a term; nor is he entitled to his hire or recompense until the work he has engaged for (such as dying or fulling) is complete, because the work is the only thing agreed upon, where he engages to perform it in person, or the effect of such work, where he has not particularly engaged to perform it in person. It is therefore lawful for him to work for the public at large, as no particular person has any exclusive claim to his service; and accordingly he is termed Ajeer-ul-Mushtarak, that is, a common hireling.

2. Goods committed to a common hireling is a trust.

An article given to common hireling is a trust in his hands. If, therefore, it is destroyed in his possession, he is not in any way responsible for it, according to Imam Abu Hanifah, and such also is the view of Imam Zufar.

Imam Abu Yusuf and Imam Muhammad are of the view that he is responsible, except where the article is destroyed by any irresistible accident, such as a fire burning down his house, or robbers robbing the article, in such force as could not be repelled.

3. He is responsible if it is destroyed in the course of his work.

A common hireling is responsible for destruction of any goods in the course of his work; as where a dyer or fuller tears

the cloth given to him, or a porter stumbles, or the tying of his load is broken, or the girth of a camel breaks, and thus the goods is loaded fall to the ground, or a boat sinks on account of mismanagement by the boatman.

Imam Zufar holds that the hireling is not responsible in these cases.

If a person engages on hire a porter to bring an earthen jar from the banks of the Euphrates (for instance), and he falls down upon the way and breaks the jar, the hirer can take the value which the jar bore at the place where it was taken up (in which case the porter is not entitled to any wages), or take compensation for the value it bore at the place where it was broken, and pay the porter proportionate wages.

4. A surgeon, or farrier, acting according to customary practice.

If a surgeon performs the operation of phlebotomy in any customary part, he is not responsible if the person dies in consequence of such operation, according to the Mabsoot.

According to the Jaame'as-Sagheer, if a farrier bleeds an animal for a danik, and the animal dies in consequence, or if a cupper performs the operation of cupping upon a slave by direction of his master, and the slave dies in consequence, no responsibility is incurred.

5. Particular Hireling.

A particular hireling is the one who is entitled to his wages on account of surrendering himself during the period of hire, although he does no work; as, for instance, a person who is hired as a servant for a month, or to take care of flocks for a month, at certain wages, under a condition that he will not serve or tend the flocks of any other person during that period.

An hireling of this description is known as Ajeer-e-Wahid, or singular hireling, because his service belongs exclusively to a single person during the period of his engagement, and the wages he gets are opposed to such advantage; and as the hireling, in this case, is entitled to his wages on account of his surrendering himself, for the period of hire, he is entitled to his wages although he does no work, or although his work be thereafter undone ; as where, for instance, a person is hired to make up a dress, and he sew it accordingly, and the sewing is thereafter ripped out, in which case he is nevertheless entitled to his wages.

6. Responsibility of particular hireling.

If an article is lost in the hands of a particular hireling, without his act ; as by a thief stealing it, or, a usurper carrying it away ; or, if it is lost by his act, he is not responsible for it.

CHAPTER 6

HIRE ON ONE OF THE TWO CONDITIONS.

(Hidayah, Kitab-ul-Ijaraat, Baab-ul-Ijarah 'Ala Ahad-ish-Shartain)

1. Hire under an alternative in respect of the work.

If the owner of cloth says to the tailor whom he has engaged, "If you make this cloth in the Persian fashion, you will get one Dirham, and if in the Turkish fashion, you will get two," it is valid, and the tailor is entitled to the wages according to whichever of the two fashions he makes the cloth in.

Similarly, if he says to a dyer, "If you dye this cloth purple, you will get one Dirham, and if yellow, you will get two," the dyer is entitled to the wages, according to colour he dyes the cloth purple or yellow.

2. Hire of the goods under an alternative of another goods.

The same rule also applies if the owner of any goods hired leaves two things at the option of person who hires it; as if he says to him "I let to you this house, for one month, for five Dirhams, or the other house, for one month, for two Dirhams."

3. Hire in respect of the use :

And similarly if he leaves at his option two different distances; as if he says "I hire to you this camel, to Kufa, for five Dirhams; or this, to the half-way station, for so much;" and the same, will also apply if the owner gives the option of three things. But if he gives the option of four things it will not valid.

4. **Tradesman** hired under an alternative in **respect of time**.

If a person hires and says to a tailor, "if you sew this garment today, you will get one Dirham; and if tomorrow, you will get half a Dirham," in this case, if the tailor sews the garment within the day, he gets a Dirham; or if he sews it the next day, he will get a proportionate wages, according to Imam Abu Hanifah, where it does not exceed half a Dirham. Thus he will get the least of the two, between a half Dirham and his proportionate wages. According to Jaame'-as-Sagheer, he will be entitled to his proportionate wages, not being less than half a Dirham, and not more than one *Dirham*.

Imam Abu Yusuf and Imam Muhammad hold that both conditions are valid, and therefore if he does his works on the morrow, he will get half Dirham.

Imam Zafur says that both conditions are not valid.

5. **Hire of a shop, under an alternative with respect to the business to be carried on in it.**

If the lessor of a shop says to a person who is to hire it, "if you place a perfumer in this shop, the rent will be one Dirham; or if a blacksmith, it will be two," the contract is valid, and the lessor is entitled to one or other of the rents fixed according to which of the two trades may be carried on in the shop. This is according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad hold that such a contract is not valid.

Similarly, if a person hires a house, on condition, that, "if he resides in it himself, the rent will be one Dirham, or if he places a blacksmith in it, the rent will be two Dirhams," it is valid, according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad deem it not valid.

6. Hire of an animal, under a condition in respect of the journey :

If a person hires an animal of Heera for one Dirham; on condition that if he goes to Qadseeah he will pay two Dirhams, it is valid ; and in this instance, also, the above difference of opinion exists.

7. The load that it has to carry.

If a person hires an animal to Heera, on condition, that “if he loads it with a Kur of barley, he will pay one Dirham ; or if with a Kur of wheat, he will pay two Dirhams,” it is valid according to Imam Abu Hanifah. But Imam Abu Yusuf and Imam Muhammad hold it to be not valid.

CHAPTER 7

HIRE OF SLAVES.

(Hidayah, Kitab-ul-Ijaraat, Baab-ul-Ijarah 'Abd)

1. Hired servant cannot be taken upon a journey.

It a person hires a slave, as a servant, he is not entitled to carry him along with himself upon a journey without this, being a condition of the contract.

2. Wages paid to an inhibited slave, who is hired without consent of his owner.

If a person hires an inhibited [absolute] slave for one month, without the consent of his owner, and pays him his wages after the performance of service, he is not entitled to resume such wages.

3. Usurper of a slave is not responsible for what the slave earns during usurpation.

If a person usurps a slave, and the slave thereafter lets himself to hire, and the usurper gets his wages, and spends the same, he is not responsible for them, according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad are of view that he is responsible for the wages.

But if, the master finds the wages in the usurper's possession, he is entitled to take them from him as he in this case discovers his own property.

Similarly, it is lawful for the slave to get his wages from the usurper, according to the opinion of our three doctors, since,

if he is not otherwise employed, and remains safe, he is licensed with respect to the business, because it is advantageous.

But if a master lets his slave to hire, in such a case the slave is not entitled to get his wages unless his master makes him his agent for it, because getting of the wages is one of the rights of the contract.

4. Slave hired for different terms.

If a person takes on hire a slave for two months, on the condition, that he will serve one month for four Dirhams, and one month for five Dirhams, it is lawful; and the hire will be four Dirhams in the first month.

5. Hired slave absconding before the expiration of the term.

If a person takes on hire a slave for one month, at the rate of one Dirham, and gets possession of the slave in the beginning of the month, and at the end of the month, the slave absconds or falls sick, the hirer and the owner or master dispute, the hirer saying that the slave had absconded or fallen sick in the beginning of the month, and the master, that he had not fallen sick or absconded until within a short time, the assertion of the hirer should be accepted.

But if, the hirer produces the slave, who is then in good health, the assertion of the master should be accepted.

But if, they dispute in respect of the deficiency in the running of the stream, as if the lessee to says that it had not run for ten days, and the lessor that it had not run for five days, in such a case the assertion of the tenant should be accepted, or evidence on the part of the lessor.

CHAPTER 8

DISPUTES BETWEEN THE HIRER AND THE HIRELING

(Hidayah, Kitab-ul-Ijaraat, Baab-ul-Ikhtilaaf)

1. Dispute with a tradesman concerning the orders he has received.

If a dispute arises between the tailor and the owner of cloth, the owner saying that "he had directed the tailor to sew the cloth into a vest," and the tailor that "the owner had directed him to sew it into drawers;" or if a similar dispute happens with a dyer, the owner of the cloth saying that he had directed the dyer "to colour the cloth yellow," and the dyer says that the owner "had directed him to dye it red," in either case the declaration of the owner of the cloth should be accepted as it is from him that the orders have proceeded.

He must, however, be sworn, because he in this case denies a thing which, if he had acknowledged it, would be binding upon him.

Upon the owner of the cloth taking the oath, the tailor becomes responsible ; and the owner of the cloth is entitled to take the value of the cloth, or to take the drawers, on payment to the tailor an adequate wages.

Similarly, in the case of dyeing, the owner of the cloth, on taking the oath, becomes entitled to take a recompense for the value of the cloth uncoloured, or to take dyed cloth, on payment to the dyer adequate wages not beyond the value, because the dyer, in acting contrary to his instructions, stands in the same position as a usurper.

2. Dispute with regard to wages.

If a dispute arises between the owner of cloth and the dyer, tailor, or other workman, the owner saying that “the workman had agreed to do the work without hire,” and the workman says that “he did it for wages,” the assertion of the owner should be accepted, according to Imam Abu Hanifah.

Imam Abu Yusuf holds that if the workman is one commonly employed by the owner of the cloth, and for whom it is usual for the owner to fix a hire for the work, he is entitled to wages proportionate to what he does ; but that, if he is not commonly employed by the owner, he gets nothing at all.

Imam Muhammad says that if it is a general and known practice of the workman to work for wages, his word should be accepted.

CHAPTER 9

DISSOLUTION OF CONTRACTS OF HIRE

(Hidayah, Kitab-ul-Ijaraat, Baab Fiskh-ul-Ijarah)

1. Contract for the hire of a house.

If a person takes on rent a house, and discovers a defect in it, which makes it uninhabitable, he can dissolve the contract.

But if, the hirer derives the advantage, that is, makes use of the house, he assents to the defect ; and in such a case the whole rent is binding upon him. Similarly if, the lessor does what is necessary to remove the defect, the hirer in that case has no option, as the cause for such option is finished.

2. House decaying; wells of land becoming dry; mill stopping.

If a house falls to decay, or the wells for watering land dry up, or a mill-stream ceases to run, the contract of hire is finished.

Some however, hold that the contract of hire is not finished in such a case, because the advantage has been defeated in a manner which needs a recovery of it.

It is noted, from Imam Muhammad, that if, in such a case, the lessor removes the defect by repairing the house, the hirer should abide by the contract, and also the lessor.

3. If the mill-house is used.

If a mill-stream ceases from running, and the mill-house be applicable to any other use than that of grinding grain, the

hirer should pay a rent in proportion to the use derived from such house, as that is a part of what was contracted for.

4. Death of one of the contracting parties.

If one of the contracting parties dies, and the hirer had entered into the contract of hire on his own account, the contract of hire is finished.

But where a person enters into a contract of hire on behalf of any person other than himself, such as an agent, an executor, or the procurator of a Waqf in that case the contract is not finished.

5. It admits a reserve of option.

A reserve of option is valid in hire.

6. Occurrence of any sufficient pretext.

A contract of hire is finished by a pretext.

7. Circumstance which form a pretext.

If a person, suffering from toothache, hires a surgeon to draw his affected teeth, and the pain afterwards finishes ; or hires a cook to prepare a marriage feast, and afterwards divorces the bride by her own desire, the contract of hire is finished.

If a person lets on rent a house or shop, and then becomes poor and is involved in debt and is unable to discharge it except by the price of the house or shop, the Qazi should dissolve the contract, and sell the property for payment of the debt.

If a person takes on hire an animal to carry him upon a journey, and then something happens and prevents his going, this is a valid pretext for finishing the contract.

But if, the obstacle to the journey happens to a Makaari, or the person who gives the animal on hire, it is in his power, if he does not go himself, to send the animal under the care of one of his servants or apprentices.

But if, the Makaari falls sick, and is not able to go on journey, this is not a valid pretext, according to the Mabsoot.

Karakhi is of the view that it is a valid pretext, as sending his animal under the care of another person is not altogether free of injury; the contract, is therefore, to be set aside on account of unavoidable necessity, as in sickness, but not in the case of mere option, as in health.

If a person lets his slave on hire, and then sells him, this is not a valid pretext.

If a tailor hires servant to sew for him, and he then becomes bankrupt, and finishes his job of tailoring, this is a valid pretext.

It is to be noted, that by the tailor mentioned in the above case is to be understood the one who carries on his job on his own account ; because with respect to a tailor who works on hire, his only capital is needle, thread, and scissors, and therefore he cannot become bankrupt.

If a tailor, who has an assistant to work on wages as above, is desirous to finish his job of tailor and adopt the business of money-changer, this is not a valid pretext.

But if a person hires a shop to carry on the job of a tailor, and afterwards wants to do some other business, this is not a pretext.

If a person hires a servant to attend him in a city, and afterwards goes on journey, this will be a valid pretext.

The same rule applies if the servant is hired in an absolute manner, by the hirer saying to him or to his master, supposing him to be a slave “I hire you” or “I hire your slave”, “to wait upon me,” without specifying the service as of local or traveling description.

If a person lets the land, and then desires to go on a journey, this is not a valid pretext.

But if, the lessee desirous to go on a journey, this is a valid pretext.

Section

MISCELLANEOUS CASES (*Fasl Masaa'il-e-Mansurah*)

1. Hirer or borrower of land is not responsible for accidents in burning off the stubble, & c.

If a person takes on rent or borrows the land, and in burning of the stubble and roots of the soil, happens to burn anything upon the neighbouring lands, he is not responsible, because as, in the cause of the destruction, he is not guilty of transgression or trespass, he stands in the same position as regards the person who digs a well in his own house.

Some are of the view that this would apply only where he sets fire to the stubble during a calm ; and the wind rises afterwards.

2. Tradesman may join another, for a moiety of the hire acquired upon the work.

If a fuller, tailor, or dyer, who runs a public shop, and is possessed of the credit, but being unskilled in his business engages, any other person to work in his shop who is skilled in the business, with a view to himself procure the cloth to be

worked upon, and the other person to work with it, on the condition that a part of the wages or hire will go to him, this is lawful and valid, as being a *Shirkat-il-Wujoo'h*, or partnership upon credit.

3. Hire of a camel to carry a litter with two persons.

If a man takes on hire a camel to carry a litter with two persons to Mecca, it is valid, and he can put upon the camel a litter of the usual dimensions.

4. A sumpter loaded with other goods in proportion as the provisions he carries are consumed.

If a person takes on hire a camel to carry provisions upon a journey, he can load the camel with other articles during the journey, in proportion as the provisions are consumed.

The same rule applies in respect as anything else besides provision, provided it is an article of weight, or measurement of capacity.

BOOK - IV

RAHN

(PAWN OR MORTGAGE)

RAHN ***POWN OR MORTGAGE***(Hidayah, Kitab-ur-Rahn)***CHAPTER - 1****RAHN**

Literally, "Rahn" (Mortgage) means to detain a thing on any account legally it signifies the detention of a thing on account of a claim which can be satisfied by means of that thing only as in the case of debt.

"Rahn" or Mortgage is lawful, and ordained ; by the Holy Qur'an, itself, (Ch. 2, Baqarah, Verse, 283). The Holy Prophet himself in a bargain made with a Jew for grain, gave his coat of mail as a mortgage for the payment. (Bukhari and Muslim). Therefore all scholars of law mortgage or pawn as lawful. Moreover it is an obligatory engagement, and as such lawful like bail.

1. Establishment and confirmation of pawn.

Contracts of pawn are entered into by declaration and acceptance, and are made perfect and complete by taking possession of the article mortgage.

2. The contract becomes binding.

when a person gets the pledge distinguished and defined as separate from the property of the pawner, and acceptance is ascertained, the contract because complete, and binding. However, until the possession actually takes place, the pawner is entitled.

* Qur'an, Ch. 2 (Baqarah), Verse 283 and Ch. 74 (Muddassir) Verse 38 ; Mishkat ; Kitabul Buyoo' ; Babus Salam War Rahn. Also see Bukhari and Muslim. 'Ainul Hidayah Vol. IV pp .493 to 604

to adhere to, or withdraw from the contract, because the validity of the contract entirely depends upon the possession, without which the purpose of a pledge cannot be achieved.

3. Pawnee is responsible for the pledge.

When the pledge is delivered to the pawnee, and he takes possession of it, he becomes responsible if it is destroyed in his hands.

4. Pawnee is entitled to detain the pledge.

A contract of pawn requires that the pledge remains in the hands of the pawnee in lieu of his debt, as a security for the fulfillment of his claim.

5. Pawner is not entitled to any use of it.

If the pawner desires resuming his pledge for a short time, so that he may enjoy the use of it as in the case of taking milk from a cow, or so forth, he is not allowed, to do so the pawnee agrees to it otherwise the object of the contract of pawn would be defeated.

6. Debt must be actually due.

A contract of pawn is not lawful unless there is a debt due at that time ; because the purpose of such contract is to establish possession in order to obtain payment ; which presupposes the obligation of debt.

7. Responsibility of the pledge extends to the amount of the debt owing to the pawnee.

A pledge is insured in the possession of the pawnee to whatever is the smallest amount, the debt of the pawnee, or the value the pledge that was at the time of its being given in possession.

Therefore if a pledge equal to the amount of the debt is destroyed in the pawnee's hands, his claim becomes void, and he thereby, is deemed to have obtained his payment in full.

But if the value of the pledge exceeds the amount of the debt, the excess is to be considered, as a trust, and the entire claim of the pawnee is annulled, on account of the decay of that part of the pledge which is equal to the amount of it ; and the excess, as is held in trust, is not to be compensated for, and as a result the pawner has to suffer the loss of it.

But if the value of the pledge is less than the debt, the pawnee will forfeit only that part of his claim which is equal to the value of the pledge, and the excess, will be paid to him by the pawner.

Imam Zufar is of the view that a pledge is to be compensated for according to its value. Therefore if a pledge of the value of one thousand five hundred Dirhams at the time of delivery is destroyed, and the debt of the pawnee is one thousand Dirhams, the pawner will be entitled to claim from the pawnee the difference, i.e., five hundred Dirhams.

8. Pawnee may demand payment of his debt, and get imprisoned the pawner in case of refusal.

It is lawful for the pawnee to demand payment of his debt, and even to imprison the pawner in case of refusal; because his claim exists even after getting the pledge, which does not amount to fulfillment, but it is merely a security for it. The pawnee, therefore, is not prohibited from making the demand; and if the fact of evasion and delaying by the pawner is proved the Qazi, should imprison him.

9. Pawnee bound to produce the pledge.

Whenever a pawnee demands payment of his debt, it is necessary for the Qazi to order him first to produce the pledge ; because since he possesses it for the purpose of getting payment, it is not lawful for him to get his due and at the same time also retain possession of the pledge, which he has by way of security ; because, if in such a case, the pledge is destroyed in his hands, a double payment would be induced, which is not allowed. And when the pawnee produces the pledge, the Qazi should order the Pawner first to discharge the debt, to ascertain the pawnee's right, similarly as the right of the pawner is ascertained, so that both of them may be on equal footing.

10. Pawnee demanding payment in a distant place.

If the pawnee demands payment of his debt in a city different from that where the contract of pawn was made, and the pledge does not require charge of carriage or expense, the same rules that apply other cases also apply in such a case ; as the place for the return of a pledge of this kind is totally immaterial and indifferent, the scholars of law have therefore laid down no particular rules or conditions for it.

But if, the pledge is to require carriage and expenses for the removal, the pawnee will not be asked to produce it ; because such a requirement will necessarily oblige him to carry it from place to place.

Moreover, it is necessary for him to relinquish the pledge to the pawner, and to allow him to get it ; but he should not be forced to remove it from one place to another, because that will be a loss to him which was not stipulated by him.

11. Pledge to be sold at the desire of the pawner.

If the pawner authorises the trustee (Arabic “Aadil”) to sell his pledge, and he sells it for ready money or on credit, it is lawful, because the authority of the pawner to sell it is indisputable.

If, therefore, the pawnee after the sale, demands the payment, he is not obliged to produce the pledge, as that, in such a case, is not in his power.

The same rule also applies where the pawnee, at the instance of the pawner, has sold the pledge, and does not possess himself the purchase money; because then the Qazi can compel the pawner to discharge his debt, without asking the pawnee to produce the pledge, which on account of its sale at the instance of the pawner himself, has become converted into a debt, and therefore the pawner himself did, as such, pawn the purchase-money (that is, the debt).

But if the pawnee himself has the purchase-money, he should be required to produce it upon demanding his debt ; because as the money is a security for the pledge, it is as such a substitute for it.

It is to be noted, that in the above case the pawnee has a right to have possession of the purchase-money; because as he himself has made the sale, the rights of the contract therefore appertain to him.

12. Pawnee bound to produce the pledge .

Similarly, as the pawnee is required to produce the pledge when he is to receive payment of his debt in full, he is also required to produce it when he receives part payment of the debt if the stipulated period has expired.

But the pledge, is not to be restored to the pawner until a complete discharge of the debt is made by him and also if the pledge has been sold by the pawnee, and the purchase-money is in his possession, he is required to produce such purchase money upon demanding payment of his debt, or of part of it, similarly as he is required to produce the pledge itself, in case of its being extant, as the purchase money is a substitute for the pledge.

If a person, on account of misadventure, kills a pawned slave, and the Qazi posses a decree for the value of such slave to be paid by the Aa'qilaas of the slayer within three years, the pawner should not be forced to discharge the pawnee's debt until the pawnee produces the full value of the slave ; because in such a case, the value is a substitute for the slave who was pawned.

13. Pawnee not required to produce the pledge.

If the pawner gives the pledge into the hands of a trustee, and orders him, at the same time, to give it in the charge of some one other than the pawnee, and he does so, in such a case the pawnee cannot be required to produce the pledge upon demanding payment of his debt,

If, the trustee, after giving the pledge into the hands of one of his relations, absconds, and the person to whom it has been given admits that "he had received it in trust, but was ignorant of the real owner," the pawner can be compelled to discharge his debt, without the pawnee required to produce the pledge.

The same rule also applies, where the trustee absconds, with the pledge, and it is not known where he has gone.

But if the trustee denies that the goods entrusted to him are a pledge, and says that "they are his own property," the pawnee cannot take anything from the pawner until the contrary is proved.

14. Pawner cannot reclaim the pledge on the plea of selling it for discharge of his debt.

If the pawner demands restoration of the pledge to him with a view to sell it, and thereby make payment of his debt, still it is not binding on the pawnee to do so, because the contract of pawn requires that the pledge should be detained by the pawnee until his debt is paid.

If, the pawner discharges the debt in part, still the pledge is to remain with the pawnee until he receives payment of the balance; but as soon as a complete payment is made, the pawnee is bound to restore the pledge to the pawner.

15. Pawnee bound to restore what he has received in payment, if the pledge is destroyed in his hands.

If, after re-payment of the debt, the pledge is destroyed with the pawnee, he should return the money he has received in payment of his debt.

Similarly if the pawner and pawnee, by mutual agreement, finish the contract of pawn, the pawnee can still, keep the pledge until he receives payment of the debt, or exempt the pawner from it.

16. Contract not dissolved until the pledge is restored.

A contract of pawn does not become void until the pawnee restores the pledge to the pawner, according to the settled mode of annulment of the contract.

17. Debt is discharged by destruction of the pledge.

If the pledge is destroyed, in the hands of the pawnee, after the parties have by consent finished the contract, his debt is to be considered as discharged, provided the value of the pledge is equal to it, the contract being still taken to be in force.

18. Pawnee not entitled to use the pledge.

The pawnee is not entitled to enjoy, in any way, the usufruct of the pledge.

If a slave is pawned, the pawnee is not entitled to employ him in service. If a house is purchased, he should not in it. If clothes are purchased, he cannot wear them. In fact the right of the pawnee is in the possession, but not in the use. Similarly a pawnee is not authorized to sell the pledge, unless it is desired by the pawner.

19. Or to lend or let it to hire.

A pawnee is not entitled to let out, or give the pledge in loan ; because as he himself is not entitled to any use of it, he is also not authorized to confer the enjoyment of it upon another, and if he does so, it amounts to transgression. But transgression does not cause a dissolution of the contract.

20. Pawnee may give it in charge of any member of his family.

A pawnee can take care of the pledge himself, or entrust its care to his wife, child, or servant, provided they are of his family.

But if he entrusts the care of it, or gives it in trust, to any person who is not of his family, he becomes the surety, and the person to whom he entrusts it the secondary surety.

21. Pawnee transgressing with respect to it.

If the pawnee commits any act of transgression in respect of the pledge, he is responsible for the whole amount of the value; similarly as in the case of usurpation.

22. Use of the pledge to be determined.

If the pawner pledges a ring, and the pawnee puts it on his little finger ; and it is afterwards lost or destroyed, he is responsible, because he has transgressed in himself using the pledge instead of adopting the means to preserve it.

But if the pawnee puts the ring on any finger other than his little finger, this is not taken as enjoyment of use, but as a means of its preservation, as it is contrary to the usual mode of putting on a ring.

Similarly, if the pawnee wears a sheet, which he has received as a pledge, after the usual mode of wearing, he is responsible for it ; but, if he spreads it over his shoulders, he is not responsible.

If a person given in pledge two or three swords, and the pawnee slings them over his shoulder, then if the swords are only two, he becomes responsible for their value in case of their loss, but not if swords are three; because amongst warriors it is usual to sling two swords on their shoulders in battle, but never to sling three swords at a time.

If a person gives in pledge two rings, and the pawnee puts them both on his little finger, and it is proved that he was accustomed to adorn himself in this manner, he will be liable to compensate in case they by any means, are destroyed ; but in case the contrary is proved, he will not be responsible for the loss.

23. Expenses of conservation and subsistence of the pledge.

The rent of the house where in which the pledge is kept, as well as the wages of its keeper, rest upon the pawnee.

But if the pledge is a living animal, and needs a keeper and maintenance, the expenses of these are to be paid by the pawner.

24. Expenses incurred by sickness, or by offences.

The expense of healing the wounds, of curing the disorders, and of pecuniary compensation for the crimes of pledges, are to be paid by the pawnee and the pawner in proportion to the amount of the debt, and the excess of the value of the pledge over the debt.

25. Taxes are to be paid by the pawner.

The taxes on pledges are to be charged from the pawner as they are necessary for subsistence of his property.

26. Tithes (upon pawned land) have preference to the right of the pawnee.

The tithe from the revenue of tithe-lands kept in pawn has preference over the right of the pawnee.

But it will be otherwise where an undefined part of a pledge proves to be the right of another ; because in that case the contract becomes not valid as regards the remainder, because in such a case pledge is not wholly the pawner's property.

27. Either party voluntarily pays what is binding on the other.

If either party pays any of the expenses which are binding on the other, it is to be treated as a voluntary and gratuitous act. But if, one of them by order of the Qazi, fulfils a duty binding on the other, he has in that case a claim on the other for so doing, similarly as if he had done it at his instigation ; because the Qazi's jurisdiction is general.

It is reported, from Imam Abu Hanifah, that no claim can be made on the other, person inspite of the expenses paid by order of the Qazi unless he was then absent. Imam Abu Yusuf, on the contrary, holds that a claim can be made in both cases ; that is, whether the other person was present or was absent.

CHAPTER 2

ARTICLES WHICH MAY BE PAWNED; AND ARTICLES
FOR WHICH PLEDGES MAY BE TAKEN; AND ARTICLES
FOR WHICH PLEDGES MAY NOT BE TAKEN

*(Hidayah, Kitab-ur-Rahn, Baab Maa Yajooz Irtihanahu Wal
Miliaria Belli Wa Maa Laa Yajooz)*

1. Indefinite part of an article.

It is not lawful to pawn an indefinite part of any article.

2. Even to a co-owner in the article.

It is not lawful to pledge any undefined part of joint property, even to a co-owner.

3. Pledge rendered indefinite.

A supervenient indefiniteness disturbs the continuity of a contract of the pawn, according to the Mabsoot. Then, if a person pledges a piece of land, and then after wants a trustee to sell the half of it, and the trustee does so, the contract of pawn does not exist anymore.

4. Article naturally conjoined to another.

It is not lawful to pledge the fruit without the trees which bear it, crops without the land on which they grow, and the trees without the land on which they are standing.

Similarly, it is not lawful to pawn a piece of the land without the trees which have grow upon it, or a field without its product or a tree without its fruit.

5. Trees can be pawned with the pieces of land on which they grow.

It is lawful to pawn the trees, together with the particular pieces of land on which they grow.

And if, there is fruit upon the trees, it is also included in the contract.

6. Claim of right established in a separable part of a pledge.

If any other person proves his right in a part of the pledge, and the remaining part of it is of such a nature that it could be distinctly pawned, the contract will subsist with respect to the remaining part.

7. Occupancy to obstruct delivery of the pledge to the pawnee.

It may be noted that continuity of the pawner, or of his goods, in the house which he has pawned are obstruct the proper delivery of the house.

Thus, if a person mortgages his house and remains himself, or keeps his goods in it, delivery of it to the pawnee is not proved until he vacates it, or takes out his goods from it, which if destroyed in the interim, the pawnee is not responsible for the loss.

8. Pledges cannot be taken for trusts.

It is not lawful to take pledges for trusts, such as deposits, loans, or Mozaribat, or partnership stook.

9. Nor for anything not insured with the holder of it.

It is not lawful to take a pledge for articles which do not make the holder of it responsible for it.

10. Nor as a security against contingencies.

It is not lawful to take a pledge as security against contingencies.

11. Pawns in bargains of Salam or Sari.

If a person, who has bespoke goods of a merchant, pawns anything in security for payment of the purchase-money; or who has sold silver to a banker, receives a pledge in security for the price; or if a merchant gives a pledge to a person who has bespoke goods from him, as a security for his delivery of them, the contract is valid.

Imam Zufar however, says that the contract, in all these cases, is not valid.

12. Pledge in dissolution of a contract of Salam.

If the parties to a contract of Salam finished the bargain in a case where a pledge has already been given for the delivery of the goods, it will still remain as a security for the refunding of the money which had been advanced, as that then will stand in lieu of the goods.

13. Pledge lost in the advancer's hands.

But if, the pledge is lost after the parties had agreed to finish the bargain of Salam, the bespoken article in that case will be considered as delivered, and the purchaser will have no further claim. It will, however, be binding on him to give to the seller as much quantity of the grain as he would have received from him, in order to recover the money he had advanced.

14. Pawn of Freedman, Mudabbir, Mukatib, or an Umm-e-Walad.

It is not lawful to pawn a Freedman, a Mudabbir, a Mukatib, or an Umm-e-Walad.

15. Pledges to secure the appearance of a surety; or of a criminal liable to retaliation.

If a person agrees to be a surety for the appearance of another, he is not entitled to demand a pledge from him on this account.

Similarly, it is not lawful to take a pledge as a security for a criminal ordered for retaliation in life or limb, as in such a case the liability cannot be satisfied by the pledge.

But it is otherwise in the case of offences by misadventure; because in such cases the fine can be recovered from the pledge.

16. Security for a right of Shuf'ah.

It is not lawful to take a pledge for the right of Shuf'ah

17. Or for a criminal slave, or the debts of a slave.

It is not lawful to take a pledge for a slave guilty of a crime, or for the debt of a slave.

18. Or for the wages of a public singer or mourner.

It is not lawful to give a pledge for the wages of a mourner or of a singer.

19. A Muslim cannot give or take wine as a pledge.

It is not lawful for a Muslim to give or take wine as a pledge from a Muslim or a Zimnee. But if a Zimnee, is the pawner and a Muslim is the pawnee, and the wine is lost or destroyed, the Muslim is responsible for it, similarly as in the case of his having usurped it. But if a Muslim is the Pawner

and a Zimnee is the pawnee; and the wine is destroyed in the hands of the Zimnee, he would not be liable to compensate the Muslim for it.

But it is otherwise where the pawner and pawnee are both Zimnees ; because wine is a property among them. But Carrion, is not a property among them and therefore a pledge of carrion is not valid among them also as among the Muslim.

20. Pawnee is responsible for the pledge.

If a person purchases vinegar, a slave, or a slaughtered goat, and gives a pledge for the purchase – money, and afterwards comes to know that vinegar is wine, the slave is a freeman, or the goat is a carrion, still the seller is responsible for the pledge if it is lost or destroyed ; because it was given against a debt to all appearance due.

The same rule also applies where a person, after killing a supposed slave and giving a pledge for the payment of his value, afterwards comes to know that he was a freeman.

Similarly, where the parties to a litigation compromise the claim for a part of the plaintiff's demand and the defendant gives a pledge to satisfy the same, and they afterwards agree that nothing was due from the defendant, the pledge will be a security in the hands of the holder of it.

21. Father or guardian may pledge the slave of his infant ward.

It is lawful for a father to pledge, in security of his own debt, the slave of his infant child.

A guardian also has the same right as a father has in this affair, because such an authority vested in him is of benefit for the child itself.

Imam Abu Yusuf and Imam Zufar are of view that this is not lawful to the father as well as the guardian.

22. They are responsible in case of loss.

Since the contract of pawn is valid in such a case, it follows that if the pledge is destroyed in the pawnee's hands, he is taken to have received payment of his debt, and that the father or the guardian are responsible to the infant, as they have discharged their debt from his property.

23. They may authorize the pawnee to sell the pledge.

Similarly it is lawful for a father or a guardian to authorize the pawnee to sell the pledge.

24. Father may retain the goods of his infant child in pledge.

If a father pledges the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being infant, or of his slave, being a merchant and not in debt, it is lawful.

25. Guardian has not this privilege.

But it is not lawful for a guardian to keep as a pledge into his own hands the goods belonging to his ward on account of a debt due to him, or into the hands of his child being an infant, or into the hands of his slave being a merchant and free from debt, nor is it lawful to him to give as a pledge anything of his own in pawn into the hands of an orphan for a debt owing to the orphan from himself.

26. Guardian may retain the goods in pawn for necessaries provided by him.

If a guardian purchases food or apparel for his ward, and, having debited him for the price, keeps in pawn part of his goods as a security for the debt, it is valid.

Besides, since it is lawful for a guardian to trade on account to his ward, it follows that it is also lawful for him to give and receive pawns, as they are similar to receipts and payments.

27. Child cannot recover property, mortgaged by his deceased father, without discharging the debt.

If a father mortgages the goods of his infant son, and the infant attains maturity, still he is not entitled to finish the contract of mortgage and take back the pledge until he discharges the debt.

28. If he redeems it during the father's lifetime.

If a father mortgages the goods of his son on account of his own debt, and the son, after discharging the debt, redeems the same, he has a claim on the father for the sum he pays for discharging the debt.

29. Father is responsible in case of the pledge being lost.

If the pledge is lost or destroyed before the son getting it released by discharging his father's debt, it is lawful for him to prefer a claim upon the father, as he has in effect discharged his debt by means of his own property.

It is lawful for a father to mortgage the goods of his son for a debt jointly due by both, and if the pledge is destroyed, the father should compensate the son by the payment of a sum equal to his share of the debt; because he has paid off so much from the sons' property.

The same rule also applies to a grandfather, or a guardian, in case the father does not exist.

30. Guardian mortgaging the goods of his orphan ward, and then borrowing and losing the pledge.

If a guardian purchases food for an orphan, and the price of it is a debt upon the orphan, and pledges an article belonging

to the orphan as a security for the debt, and the pawnee gets possession of it, and afterwards the guardian borrows it from the pawnee for the use of the orphan, and it is destroyed in the guardian's hands, it is no longer included in the contract of mortgage, nor is any person responsible for it; because the act of the guardian in this case is the same as that of the orphan after attaining maturity, as he has borrowed the article for his use, in which case such is the rule.

But the debt of the orphan, in this case, will still remain due, and the creditor will be entitled to receive payment from the guardian, who will be reimbursed by the orphan; because the guardian, in borrowing the pledge, did not commit any transgression, as it was borrowed for the use of the orphan himself.

But if, it has been borrowed by the guardian on his own account, he is responsible for it to the orphan; because in borrowing it for his own use he was guilty of transgression, as he has usurped a privilege which did not belong to him.

31. Money and all weighable and measurable goods.

It is lawful to mortgage Dirham, Deenars, or any goods of weight or measurement of capacity.

If, any such goods is mortgaged in security for an article of the same kind or species, and is lost in the hands of the pawnee, the debt is taken as discharged in proportion to the value of the pledge, if that is equal to, or less than the amount of the debt. But if, the value of the pledge exceeds the amount of the debt, the entire debt is in that case held to be discharged, inspite of the one being base and the other pure; because where the pawn and debt are of the same kind, the quality is not to be taken into consideration. This is the view of Imam Abu Hanifah ; because according to him the pawnee in this case is to receive payment of his debt by weight, and not by value.

Imam Abu Yusuf and Imam Muhammad, on the contrary, are of the view that the pawnee, on destruction of the pledge, becomes liable for its value in something of a different species, which value in fact he holds in pawn in lieu of the original pledge.

32. Silver vessel pawned, and afterwards lost.

If a silver vessel of the value equal to ten Dirhams is mortgaged for a debt of ten Dirhams, and it is afterwards destroyed in the hands of the pawnee, the whole amount of the debt stands discharged.

33. Or broken.

But if, the vessel is not lost, but broken, then on the supposition that the weight and value are the same, according to Imam Abu Hanifah and Imam Abu Yusuf, the pawner cannot be forced to redeem it. He is entitled to redeem the broken vessel by discharging the whole of his debt, or relinquish it and compromise with the pawnee for its value.

But according to Imam Muhammad, the pawner may redeem the broken vessel by discharging the whole of the debt, or he may give it to the pawnee as discharge of it similarly as in the case of the loss of the pledge.

34. Pledge may be stipulated, in sale, for the price of the goods sold.

If a person sells a slave on condition that the purchaser will give to him in mortgage some specified thing, it is lawful on favourable construction, but analogy suggests that it is not lawful. Similarly, it is lawful for a person to sell a slave, on condition that the purchaser will give, as his security, a third person who is present at the conclusion of the bargain, and who agrees to be the security.

35. Agreement is not valid unless the pledge is particularly mentioned.

But if, the surety is not present, nor the pledge is specified, the agreement is not valid. But if the proposed surety appears before the parties separate, and agrees to be the security, the agreement becomes valid.

36. Nor can the purchaser be compelled to deliver it.

If the purchaser, after the mortgage had been agreed upon, refuses to deliver the pledge as agreed, the Qazi should not compel him to it, because it is the delivery alone which finalises the agreement.

Imam Zufar says, that when the condition of mortgage is included in the sale, its fulfilment is absolutely necessary ; and therefore the Qazi has the right to enforce it.

37. Goods offered by a purchaser in security for the price of the merchandize.

If a person purchases anything for a specific sum, and asks the seller "to keep his garment until he pays him the purchase-money," the garment is considered as a pledge ; although the word pledge is not expressly mention by him ; because in every agreement regard is to be given to the spirit, and not to the letter.

Imam Zufar says that, in this case, the garment is not to be taken as pawned, and this is also the opinion of Imam Abu Yusuf.

Section

REDEMPTION

1. Redemption of two (or more) goods opposed in pledge to one debt.

If a person mortgage two slaves for a debt of one thousand Dirhams, and thereafter pays the proportion amount of

one of these slaves, still he is not allowed to take back that slave until he pays to the pawnee the remaining of the debt.

2. Notwithstanding each article be opposed to a particular part of the debt.

The same rule also applies, according to the Mabsoot, when the depositor previously mentions the value of each of the different parts of his pledge; as, for instance, when a person, after pledging two slaves against a debt of one thousand Dirhams, declares the value of each of them is five hundred Dirhams.

3. Article pawned to two persons.

If a person mortgage any particular article into the hands of two people, in security of a debt which he jointly owes to both, it is lawful; and in this case the article is to be held as completely pledged into the hands of each of the creditors.

4. If they agree to hold it alternately.

But if, in this case, the parties agree to have an alternate possession of the pledge, each is, during his term of possession, a trustee on behalf of the other; and if it is destroyed, each one of them is responsible according to his respective share, because upon this happening each one of them is held to have received a discharge of his claim, as discharge is capable of partition. If, also, the pawner pays off the debt of either, the article in that case remains wholly in pledge with the other, as it was before completely a pledge in the hands of each of them without any separation.

If two persons, by one agreement, mortgage a specific article into the hands of one person in security of a debt which they jointly owe to him, it is lawful, and the thing so pledged is kept in security of the whole of the debt. The pawnee is, moreover, entitled to keep the pledge until he receives a complete discharge; because the two after pawning the article

together, the pawnee is therefore held to have received a complete and undivided possession of it.

5. If two persons claim an article from a third on account of an alleged pawn.

If two persons claim a slave in the possession of a third person, each of them separately saying that, "the possessor had previously pawned the slave into his hands, and had thereafter borrowed or usurped him," and each produces evidence in support of his claim, the claims and evidences are null and not admissible at all.

6. If a pawner dies, leaving an article in pledge with two pawnees.

If a pawner dies, leaving a pledged slave for instance in the hands of two pawnees, and each one of them produces evidence to prove that the slave had been pledged to him, a moiety of the slave in that case is awarded in pledge to each, of them can respectively be sold by them in discharging of their claims, upon a favourable construction; and this the opinion of Imam Abu Hanifah and Imam Muhammad.

Analogy however, suggests that the mortgage in this case is a nullity, and this is also the view of Imam Abu Yusuf.

CHAPTER 3

PLEDGES KEPT IN THE HANDS OF A TRUSTEE

(Hidayah, Kitab-ur-Rahm, Baab-ur-Rahm Allazi Yuza' 'Ala Yad-ul-'Adl)

1. Parties may entrust the pledge.

If the pawner and pawnee agree to give the pledge in the hands of any “ 'Aadil” i.e., upright person (as trustee for both), it is lawful.

2. After which neither of them can take it.

The pawnee is not entitled to take the pledge from the trustee, as the right of the pawner still subsists in it, because the pledge is a trust in the trustee's hands. No is the pawner entitled to take it back, because of the pawnee's right subsisting in it for getting the payment of his debt. No party, as such, is entitled to not validate the right of the other.

3. The pawnee is responsible in case of loss.

If the pledge is destroyed in the possession of the trustee, the pawnee is responsible; because the possession of the trustee in essence is that of the pawnee in regard to the value of the pledge; and responsibility is on account of the value.

4. Unless the trustee has transgressed.

But if, the trustee gives the pledged article to the pawner or the pawnee, he is responsible; because he is the pawner's trustee as regards property of the pledge, and the pawnee's trustee as regards its value ; and each of these parties is as a stranger towards the other; and a trustee becomes responsible by giving the article of his trust into the hands of a stranger. The trustee, therefore, being responsible, cannot retain the value by

way of mortgage in his own possession; because as he has become indebted for the value, it follows that, if retains it by way of the mortgage, he becomes at once the claimant and the claimee, and the payer and the payee; which is impliedly inconsistent.

5. Rules to be observed in this case.

The pawner and pawnee should, therefore, in such a case, join together to take the value from the trustee, and deliver again to him, or to any other person, in place of the original pledge.

But if they do not join together so doing, either of them can in such a case refer the matter to the Qazi, who can take the value from the trustee, and again given it to him, or to any other person, in the place of the original pledge.

If the Qazi does so, and the pawner therefore pays off his debt, then, if the responsibility for the value was of the trustee on account of his having restored the pledge to the pawner, the value in question will remain safe for the trustee, because the pawner here would appear to have got his pledge, and the pawnee his debt.

But if, the responsibility was of the trustee on account of his surrendering the pledge to the pawnee, the pawner, after discharging the debt, is entitled to take from him the value in question.

6. Pawner may authorise the pawnee, or any other person, to sell the pledge, and discharge the debt.

If the pawner makes the pawnee, or another person of good character, an agent for the sale of the pledge, for discharging his debt at the expiration of the agreed period, such agency is valid.

And if, such agency is mentioned as an article in the contract of mortgage, the pawner afterwards has no power to reverse it.

7. Rules with respect to an agent appointed to sell a pledge.

If the pawner makes any person his agent to sell the pledge, without laying the condition of ready money or credit, and leaves it entirely at his own discretion, and subsequently prohibits him from selling it on credit, such prohibition is of no effect at all.

Similarly, the agent cannot be dismissed by the pawnee, because on him he is no dependence, as he has been made an agent by the pawner. Even if the pawner dies, the agency remains in force.

And likewise, if the pawnee dies, the agency does not finish.

But the power of agency, finishes, on the death of the agent; and his heir or executor cannot stand in his place.

8. Pawnee cannot sell it without the pawner's consent.

A pawnee is not entitled to sell the pledge without the permission of the pawner, as the property of it belongs absolutely to him. Nor can the pawner sell it without the permission of the pawnee.

9. Agent at the expiration of the terms of credit, may be compelled to sell the pledge.

If, after expiry of the period of credit, the agent refuses to sell the pledge deposited for that purpose with him, and the pawner has absconded, the Qazi should force him to execute the sale, by imprisonment, or any other means.

10. If the pledge is sold by commission from the trustee.

When the agent of a trustee, in whose hands a pledge is kept, sells it, it is no longer in the pawn, and the purchase-money takes its place, even though the agent has not received it, as a substitute for the thing which was previously in his possession. Thus, if the purchase-money is lost by the purchaser for instance who has died insolvent without getting it discharged the pawnee is responsible for the loss.

Similarly, where a pawned slave is killed, and the murderer has to account for his value, the contract still subsists, as the owner of the slave is entitled to the value on account of his property, even though such value is paid in atonement for blood. The same rule also applies where a slave, kills another pawned slave, is commuted for the one so killed, the murderer is in such a case substituted for the killed one.

11. If the trustee, after selling the pledge and paying off the pawnee, suffers any subsequent loss.

If a trustee, who has been appointed as agent for the sale of the pledge, sells it, and gives the price to the pawnee as payment, and another person afterwards claims and proves a property in the pledge, and he accordingly pays the other person a compensation for its value, it is then in his option, to take the value from the pawner, or the amount of the purchase-money from the pawnee; but he is not entitled to take more from the pawnee than the purchase-money.

12. If he was authorised by the pawner after the contract.

But, if the pawner appoints the trustee as his agent for the sale of the pledge after the contract, the agent is in that case to indemnify himself against any loss he may suffer, as a result of selling the pledge from the pawner, and not from the pawnee,

inspite of the fact that he has paid to the pawnee the price he had received for the pledge, because with this agency the pawnee has no concern, as the pawner can finish the agency without his consent.

13. Stranger proving his right in a pledged slave, who had died with the pawnee.

If a pledged slave dies while in the possession of the pawnee, and it is afterwards discovered that he was the property of another person, and not of the pawner, the owner is entitled to compensation from the pawner or the pawnee.

CHAPTER 4

POWER OVER PAWNS; AND OFFENCES COMMITTED BY
OR UPON THEM.

*(Hidayah, Kitab-ur-Rahn, Baab-ut-Tasarruf Fir Rahn Wal
Janayat 'Alaihe Wa Janayat 'Ala Ghairihi)*

1. Pledge cannot be sold without the pawnee's permission.

If the pawner sells the pledge without the permission of the pawnee, the sale remains suspended upon the will of the pawnee, because of his right is involved in the pledge, even though such sale is an act of the pawner in respect of his own property.

If, therefore, the pawnee gives his consent to the sale, it is valid and it will also be valid ; if the pawner clears his debt.

But if the pawnee does not gives his consent, and finish the contract of sale, it will be a nullity.

2. If the pawner sells it more than once.

If the pawner sells the pledge, without permission of the pawnee, and again, before the pawnee has consented to it, sells it to another person, in such a case, whichever of these two sales the pawnee confirms will be valid.

3. Pawned slave may be emancipated by the pawner.

The pawner is entitled to emancipate the slave whom he has given in pawn.

4. Who, if he be rich, must substitute the value in pawn for the slave.

Therefore, if the pawner is rich and the debt to the pawnee

is then due, the pawnee may require immediate payment of it ; or, if it is not due until after the expiry of the term, he can take from the pawner the value of the slave, and return it as a substitute until his debt becomes payable, when he can take it against his right, and return the surplus of it to the pawner.

5. If he is poor, the slave must perform emancipatory labour.

But if the pawner is poor, the slave should perform emancipatory labour to an amount equal to his value; and with this the debt of the pawnee should be discharged. But as a discharge from the pawner is here impossible, it is therefore made from the one who gets the benefit of manumission, i.e., the slave.

6. Although he denies his being in pawn previous to such manumission.

If a person pawns his slave, by saying to him, "I have given you in pledge with such a person." and the slave denies it, and the master then emancipates him, at a time when he is poor, it is necessary for the slave to perform emancipatory labour. Imam Zufar is however of a contrary view.

7. Pawner may make his pawned slave a Mudabbir or Umm-e-Walad.

If a pawner makes his pawned slave, a Modabbir, it is valid. Similarly, it is also lawful for a pawner to make his pawned female slave an Umm-e-Walad.

8. If he is rich, he should substitute the value in pawn; but if he is poor, the slave should perform emancipatory labour.

If, a pawned slave is made a Modabbir or Umm-e-Walad, he or she slave is excluded from the contract of pawn, as the intention will be defeated, as a debt cannot be satisfied by

means of a Modabbir or as Umm-e-Walad.* Therefore if the pawner is rich, he is responsible for the value, in the same manner as in the case of pawned slaves emancipated; but if, he is poor, the pawnee can require the Modabbir or Umm-e-Walad to do emancipatory labour equal to the amount of the debt, as the income of their labour is the property of their master.

But it is otherwise in the case of a pledged slave emancipated by a poor pawner ; because the income of his labour is his own property, he is to do the labour equal to the amount of his value only, or that of the debt of the pawner, if it be less than his value.

9. Pawner, on becoming rich, is responsible for the emancipatory labour.

A Modabbir or an Umm-e-Walad is not entitled to get back from their master when he becomes rich what they paid on his account when he was poor, because they in fact paid it from his property. **** But if a poor pawner emancipates the slave whom he had pawned the slave is entitled to take back whatever had paid on account of his emancipator, because he had paid it from his own property, ***** and this is, in conformity with the precepts of the law that such payment cannot be considered as gratuitous.*****

10. Emancipated Mudabbir does not owe the pawnee labour beyond his value.

If a pawner emancipates the slave whom he had declared a Mudabbir, it is not then binding on the freedom to earn, a such greater than his value, even though he is so ordered by the Qazi

* Because Modabbirs and Umm-e-Walads cannot be sold

** The earnings of their labour is the right of their master.

*** The earnings of a freedman are his own property.

**** A person, who pays the debts of another in a gratuitous manner, is not entitled to recover.

because after emancipation, the earnings of his labour are his own property. Still, he cannot get back from his master what he had paid on his account before his freedom; as that was, in fact, the property of his master.

11. Destruction of the pledge by the pawner.

If a pawner destroys the article he had pledged, the same rules apply as apply in the case of emancipating the pledge.

12. By a stranger.

If a stranger to the contract destroys the pledge, the pawnee, and not the pawner is litigant against him, and he can take from him a compensation for the value, which he should keep in pawn in place of the original pledge.

13. Or by the pawnee.

If the pawnee destroys the pledge before expiry of the period of payment, he is responsible for the value, because of his destroying the property of another; and this value he should keep in pawn until the time of payment arrives.

14. Depreciation in the value of the pledge.

If a person pawns an article estimated to be of one thousand Dirhams, in security of a debt of the same amount payable at some future time, and the article, on account of a fall in the price, becomes of the value of five hundred Dirhams, only and is then destroyed in the pawnee's hands, the pawnee is responsible for five hundred Dirhams, and five hundred Dirhams are also remitted from his debt.

15. Pawnee lending the pledge to the pawner.

If a person, after getting a slave in pawn, lends him to the pawner, so that he can enjoy his service, or for any other

purpose and the pawner takes him in his possession, the slave no longer remains an object of responsibility with the pawnee.

16. He may resume it at pleasure.

The pawnee, however, is entitled at any time to get back the pledge from the pawner; because he holds it against a loan which is not binding; and also, because the contract of pawn still exists and therefore if the pawner dies, without returning the pledge, the pawnee will have a claim upon it in preference to the other creditors.

Since the contract is still subsisting, the pawnee on getting back the pledge from the pawner, will again become liable for it, similarly as formerly, because he has again taken possession of it on account of the contract of pawn.

17. Pledge being lent to a stranger by either party.

If either party to a contract of pawn lends the pledge with the consent of the other party to a stranger, it will not be in this such a case an object of responsibility to the pawnee, any more than in the former case, but the contract of pawn will still continue in force, and either party will be entitled to get back the pledge from the borrower, and to give it in pawn as before, on account of the interest which each has in it.

18. Pledge, on being disposed of by either party, with the consent of the other.

If either party to the contract, with the consent for the other, lets, sells, or gives the pawn by way of gift to stranger, it will be treated as excluded from the contract, and cannot again be subject to it, unless the parties enter into a fresh contract.

If the pawnee borrows the pledge from the pawner for any specific purpose, and it is destroyed before he applies it to that purpose, he will be responsible for it.

The same rule applies where the pawn is destroyed after the pawnee has taken the service for which he had borrowed it.

But if, it is destroyed during the period in which he enjoys the use of it, he is not responsible, as during that time he holds it as a loan and not as a pawn.

The same rule applies where the pawner permits the pawnee to make use of the pledge.

19. Person borrowing an article, with intent to pawn it.

If a person borrows a garment from another, with the intention generally declared "to pawn it," he can pawn it in security for any debt, more or less.

But, if the lender specifically mentions the sum, in security for which the borrower can pawn the garment, he is not, in such a case, allowed to pawn it for a sum either more or less than what is so mentioned.

The same rule applies where the lender mentions the particular species of debt, the person who is to receive the pawn, or the city in which the contract is to be made.

20. If the borrower transgresses.

If, in any of these cases, the borrower acts contrary to the directions of the lender, he becomes liable for the value of the article in case it is lost in the hands of the pawnee ; and if this happens, the lender has the option to take a compensation from the borrower, or from the pawnee, who will take indemnity from the pawner.

But if the borrowed article is lost in the hands of the borrower, before his pawning it, or after his redeeming it, he is not liable.

21. Disputes concerning the loss of the pledge.

If a dispute arises between the lender and the borrower after the loss of the pledge, the lender saying that it had been lost in the hands of the pawnee, and the borrower saying that it was lost in his own possession, before he had pawned it or after he had redeemed it, the statement of the borrower, upon oath, is to be accepted.

But if, they dispute regarding the amount of the debt to which the lender had restricted the pawning of the garment, the statement of the lender is accepted.

22. Person receiving a borrowed article in pledge on the faith of a promise.

If the borrower of the garment pawns it on the faith of a promise, that is, on a person giving promise to lend him an specific sum of money, and the promise accepts the pledge, and makes the promise accordingly, and the pledge, supposed to be equal to the amount of the debt, is lost before the pawnee had fulfilled his promise, he the pawnee is in that case liable for the promised sum, as a promise is held to be the same as a real debt; and the lender is entitled to receive from the pawner the sum which he takes from the pawnee.

23. Lender of a slave to pawn may emancipate him.

If a person lends his slave to another, that he may pawn him, and the borrower pawns him accordingly, and the lender afterwards emancipates him, he is accordingly free.

24. Borrower first transgressing upon the article and then stopping from such transgression.

If a person borrows a slave or a camel with the intention of pawing it, and after first employing the slave in service, or

riding upon the camel, he pawns it in security of a debt equal to its value, and after discharging the debt, the pledge is totally destroyed in the hands of the pawnee before returning it, in such a case the pawner is not responsible.

Similarly, if the pawner, after redeeming the pledge, employs it in service, without causing any injury to it, and afterwards it is destroyed on account of some unforeseen event, he is not responsible.

25. Pawner destroying the pledge.

If the pawner kills the slave pledged by him, he is responsible for the value of the slave to the pawnee.

26. Or causing injury to it.

If the pawnee causes any injury to the pledge, a sum is to be reduced from his debt equal to the atonement for such injury.

27. Finable offence committed by a pledged slave.

If a pledged slave commits an offence against the pawner, in person or property, such offence is of no consideration.

28. Offence committed by him upon the person of the pawnee.

If a pledged slave commits an offence against the person of the pawnee, according to Imam Abu Hanifah such offence is of no consideration.

Imam Abu Yusuf and Imam Muhammad however are of the opposite view.

29. Offence upon the property of the pawnee.

If a pledged slave commits an offence against the property of the pawnee, such offence is of no consideration.

according to all, if the value of the slave is equal to the amount of the debt.

But if, the value of the slave exceeds the amount of the debt, there are two opinions reported from Imam Abu Hanifah, viz., one is that the offence may be redressed in the proportion in which the value of the slave exceeds the debt, as a pledge is a trust in respect of any excess, and the injury in such a case is similar to that committed by a slave in deposit on the property of the trustee, and the other that the offence cannot be redressed at all; because as the effect of the contract of pawn i.e., the detention of the slave on account of debt applies to the excess as well as to any other part of the pledge, it may therefore be inferred that he is a subject of responsibility in to.

30. Offence against the son of the pawnee.

If an offence is committed by a pledged slave against the son of the pawner or pawnee, it is a cognizable offence.

31. If the pledge is destroyed after reduction in its value.

If a person pawns a slave estimated to be of the value one thousand Dirhams, in security for a debt of the like amount, payable at a future time, and the value of the slave is thereafter decreased to one hundred Dirhams only due to the fall in the price, and a person then kills the slave, and pays a compensation of one hundred Dirhams, as the value he at that time bears, and the time of payment arrives, the pawnee should in such a case keep the one hundred Dirhams in lieu of his debt and he has no further claim against the pawner.

32. But if after reduction of value he sells it by desire of the pawnee for payment of his claim.

If a person pawns a slave estimated to be of the value of one thousand Dirhams in security of a debt of an equal amount,

and the value of the slave is afterwards decreased to one hundred Dirhams due to the fall in the price, and the pawnee is authorized by the pawner to sell the slave, and he sells him for one hundred Dirhams, and gets the price for discharging his debt, he still remains entitled to receive from the pawnee the remaining nine hundred Dirhams.

33. The pawner should redeem a slave of less value.

If a person pawns a slave of the valued of one thousand Dirhams against a debt of an equal amount, and afterwards a slave of the value of one hundred Dirhams kills the slave in pawn, and himself been given in compensation for his blood, is kept in pawn in lieu of him, the pawner is in such a case liable to be forced to redeem him against payment of the entire debt, i.e. one thousand Dirhams. This according to the opinion of Imam Abu Hanifah and Imam Abu Yusuf.

Imam Muhammad is of the view that the pawner is in such a case entitled to redeem the pledge by clearing the entire debt or to transfer the property of it to the pawnee as a commutation.

Imam Zufar, however says that the slave who has caused the murder is to remain in pawn in security for one hundred Dirhams; and that the remaining sum of nine hundred Dirhams is to be hold as discharged.

34. Fines incurred by a pledged slave.

If a pledged slave kills a person by misadventure, the fine of blood is in such a case chargeable from the pawnee who should pay it accordingly, and he is not entitled to commute the slave for it, as he has no power to transfer the property of him to any person.

35. But if the pawnee refuses.

But if, the pawnee refuses to pay the fine, the pawner should in such a case be ordered to pay the fine, or to hand over the slave in lieu of it.

36. The debts increased by a pledged slave destroying the property of a stranger.

If a pledged slave destroys the property of any person to an equal or more amount than his value, and the pawnee satisfies the debt thus incurred by the slave, his claim upon the pawner remains good as before, as where he pays a monetary atonement for any offence committed by the slave.

But if the pawner objects to such payment, he is then required either to sell the slave for discharging the debt, or pay it himself.

37. If the value of the slave is twice the amount of the debt.

If a person pawns a slave valued at two thousand Dirhams in security of a debt of one thousand Dirhams, and the slave commits an offence in such a case the pawner and pawnee should both be ordered to pay the atonement.

38. The executor of a deceased pawner may sell the pledge, and discharge the debt, with the consent of the pawnee.

If a pawner dies, his executor is entitled to sell the pledge, and clear the debt, if he has the consent of the pawnee.

But if a pawner dies and this is an executor, of him, it is then for the Qazi to appoint a person to act in that capacity; who may clear the debts of the deceased, and receive payment of his claims due upon others.

39. Executor cannot pawn goods of the deceased to any particular creditor.

If an executor pawns part of the goods of the deceased to one of his creditors, it is illegal, and the other creditors may force him to revoke the pawn.

40. Unless there is only one.

But if the deceased leaves only one debt outstanding against him, in such case the executor is justified in pawning part of the goods in security of it.

41. He may receive pledges in security for debts owing to the defunct.

If an executor takes a pawn in security of a debt due to the deceased, it is lawful.

Section

CHANGE OCCURRING IN THE PLEDGE

1. Grape-juice remaining in pawn after it has become wine and then vinegar.

If a person pawns, in security of a debt of ten Dirhams, a quantity of the juice of grapes of an equal value, which afterwards becomes wine, and then vinegar, and the value for the vinegar is also ten Dirhams, it in such a case will remain in pawn for the debt of ten Dirhams.

2. Pledge destroyed in part.

If a goat, estimated to be of the value of ten Dirhams, has been pawned for a debt of an equal amount, and afterwards dies, and its skin is preserved so as to bear a value of one Dirham, it is kept in pawn in security of a like part of the

debt ; because where a part of the pawn remains, the contract also remains in force in proportion to that part.

But it is otherwise where a goat, has been sold, and dies before the purchaser takes possession, of it and the skin is preserved; because in such a case the contract is completely void and does not exist even in respect of the skin.

3. Increase accruing from the pledge.

Every kind of increase accruing from a pledge after the contract such as milk, fruits, wool, or progeny, belongs to the pawner, as being the increase of his property ; but they are, nevertheless, detained with the original in pawn ; because the branches are dependent on the stock ; and the contract of pawn, as of a binding nature, extends over all its branches.

But if, this increase is destroyed in the pawnee's hands, he is not liable for it ; because no part of the sum opposed to the original is opposed to the increase, as that was not originally included in the contract, as the proposal and acceptance which form the contract did not relate to, or expect it.

But if, the original is destroyed, and the increase remains whole, it is binding on the pawner to redeem the same, by paying its proportionate value; that is, the debt should be divided proportionately to the value which the original bore at the time of the bargain, and that which the increase bears at the time of redeeming it; and the proportion given to the original is, upon the loss of it, held to be finished ; but that of the increase remains due and should be paid by the pawnee against the redemption of it.

4. Pawnee using the product of the pledge by permission of the pawner.

If a person, who has mortgaged a goat, allows the pawnee to milk it, and also gives him, permission to enjoy the milk, and

the pawnee does so, he is not liable to compensation for the milk he consume, nor is his claim, on that account, diminished, as he uses the milk by consent of the pawner himself.

5. Pledge may be increased, but not the debt.

The increased of a pledge is lawful, according to all as where, for instance, a person, who has mortgaged a slave for a debt of one thousand Dirhams, afterwards gives the slave a garment to be kept in pawn in security of the same debt; in such a case the addition so made to the original pledge is lawful, and the garment is included in the contract ; the case in fact is the same as if the slave and garment had both been originally pawned together.

But, the increase in the debt in security of which a mortgage has been taken is not lawful according to Imam Abu Hanifah and Imam Muhammad ; Imam Abu Yusuf is of the view that both debts are liquidated.

6. Increase in a pledged female slave.

If a person mortgages, in security of a debt of one thousand Dirhams, a female slave of an equal value, who afterwards gives forth to a child likewise estimated to be of at one thousand Dirhams, and the pawner then increases the pledge by the addition of a slave also of the value of one thousand Dirhams, saying to the pawnee, "I have added this slave to the child of the pledge", the slave, in that case is pawned with the child only.

But if, the child afterwards dies, the slave no longer remains in pawn, and the pawner can get him back from the pawnee without giving any return to him.

So, also if the slave dies, or is lost, nothing is due, on that account, to the pawnee.

But if, the mother dies, the debt is to be divided between her value at the time of making the contract, and value of the child on the day of redemption ; and as the slave was attached solely to the child, the share of the child is to be divided proportionately between it and the slave, according to their respective values, so that if either of them dies, he may be charged for accordingly.

But if, the pawner attaches the slave to the mother saying to the pawnee. "I have given him with her in addition to the pledge", the debt is in that case to be proportionately opposed to the mother and the slave, according to their value at the time of possession; and from the sum opposed to the mother a proportionate part is to be allotted to the child; because the pawner, in placing the slave with the mother, joined him to the original object of the contract ; and therefore the child is included proportionately to the mother only.

7. Pawner giving a slave in pawn for another.

If a person mortgage a slave of the value of one thousand Dirhams in security of a debt of equal amount and afterwards gives the pawnee another slave, of the same value, to be kept in place of the former, in such a case the first slave is to be held in pawn until the pawnee restores him to the pawner in the way of annulment, the second slave is merely a deposit in his hands until he is regularly made a substitute for the other.

8. Pawnee is not responsible for the pledge after discharging the pawner of his debt.

If the pawnee discharges the pawner of the debt, or gives it to him as a gift, and the pledge, is afterwards destroyed in the pawnee's hands, he is not responsible for it, according to all, upon a favourable construction of the opinion of Imam Zufar is however contrary to it.

9. Pledge destroyed with the pawnee after receipt of payment of his debt :

If a pawnee receives payment of his debt, from the pawner, or from any other person in a gratuitous manner, and the pledge is afterwards destroyed in his hands, his debt is consequently finished and it is binding on him to return what he had received to the person from whom he had received it, whether the pawner or any other person.

10. If pawnee compounds the debt :

If a pawnee purchases any article from the pawner against his debt, or compounds the debt with him for any article ; and the pledge is afterwards lost in his possession, he still remain responsible, and can be forced to return the article which he had received in purchase or compromise.

11. If the pawner transfers the debt upon another person :

If a pawner transfers the debt which is due the pawnee upon another person who agrees to pay the same, and the pawnee, agrees to such transfer, and discharges the pawner of the debt and the pledge is afterwards destroyed in the pawnee's hands, the transfer becomes ineffective, and the claim of the pawnee is finished.

12. If the pledge is lost after the parties agreed that no debt had existed

If a person mortgage anything with another person, and both of them subsequently agree that no debt had ever existed between them, and the pledge is then destroyed in the hands of the pawnee, in such a case, the debt in security of which the thing had been pawned is finished.

BOOK – V

WAQF

(APPROPRIATIONS FOR CHARITY)

WAQF *

APPROPRIATION FOR CHARITY

(*Hidayah, Kitab-ul-Waqf*)

DEFINITION OF WAQF

Literally, "Waqf" means detention, but legally, according to Imam Abu Hanifah, it signifies the appropriation of any particular thing in such a way that the owner right in it continues and the advantage of it goes to charitable purposes, in the manner of a loan.

According to some, Imam Abu Hanifah was of the view that, as the advantage of a thing is a non-entity, and as alms-gift of a non-entity is not valid, therefore "waqf" is also not valid. According to Mabsoot also Imam Abu Hanifah held "waqf" as not valid.

Prominent scholars, however, declare "waqf" to be valid according to Imam Abu Hanifah; but since like a loan it is not of an irrevocable nature, the owner is entitled to take it back, and the sale or gift of it is therefore lawful.

According to Imam Abu Yusuf and Imam Muhammad, "Waqf" signifies the Waqf of any specific article, in such a manner that it becomes a Divine property, from which the owners right in it is finished, and it becomes a property of Allah, and its advantage goes to his creatures. They, therefore, hold it as absolute which cannot be taken back, or disposed of by gift or sale, or inherited.

According to Imam Abu Yusuf, the Waqf is absolute from the instant of its creation ; while Imam Muhammad holds it to become absolute on the delivery of it to a *Mutawalli* or

* Mishkaat, Kitabul Buyo, Baabul 'Ataaya.. 'Ainul Hidayah Vol. II pp 760 to 779

procurator. Thus "*Waqf*", in its literal sense, is substantially the same as defined by Imam Abu Hanifah, as well as Imam Abu Yusuf and Imam Muhammad.

As regards the arguments of Imam Abu Yusuf and Imam Muhammad on this point are twofold. Firstly, when Hazrat Umar wanted to bestow in charity the lands of Simagh, the Holy Prophet said to him, "You must bestow the ACTUAL LAND ITSELF, in order that it may not remain liable to be either SOLD or BESTOWED, and that INHERITANCE may not hold in it. Secondly, it is a necessary for the *Waqf* to be absolute, so that the benefit of it may be forever to the owner ; and this necessity can be satisfied only by the appropriator's withdrawal from his right in the *waqf* property, and dedication of it solely to Allah ; which dedication, being according to the Law, as in case of a mosque, is to be made in the same manner.

The arguments of Imam Abu Hanifah in this respect are. Firstly, the Holy Prophet has said, "Property cannot, after the death of the owner , be detained from division among his heirs"(Dara Qutni Abne Abi Shaibah and Tabrain), Shuriah moreover says, "the Holy Prophet determined the sale of a *waqf* to be lawful," (Abi Shaibah, Behaqi and Tahmur) which in words mean that, "before the promulgation of the Law by the Holy Prophet Muhammad (on whom be the blessing and peace of Allah), *waqfs* were absolute but our Law has rendered them otherwise."

Secondly, the owner's right in the article appropriated should remain in force, so that it is lawful for the creatures of Allah to derive benefit from it, either by tillage, if it is the land, or by residence if it is a house because if no one has any right in it any act with respect it will be unlawful, in the same manner as in respect to a mosque. It is therefore clear that a right of property in it should continue ; and it is also clear that this right of property should rest in the owner, and not in any other person, because he alone is entitled to expend the income up it upon the

objects of the Waqf, and to appoint a Muttawalli over it, and yet as the term *Waqf* implies charity, the use of it is like that of a loan.

Thirdly, the owner wishes to apply the income of what he appropriates to any charitable purpose in perpetuity which is impossible, unless his right of property in it continues.

Fourthly, it is rather impossible that the owners right of property in the *Waqf* be totally finished, during its existence ; without it becoming the property of only other person, as the Law does not admit the idea of a thing, during its existence, going out of the possession of one owner without coming into the possession of another owner. *Waqf*, therefore, in this respect is like a *Saa'ibah*, i.e., a female camel, set at entitled in pursuance of a vow, as where a man says, "if I return home from this journey," or, "recover from this disease, a certain female camel of mine is *Saa'ibah*" which the owner prohibits himself from any further use of, similarly as a Baheera, i.e., female camel, which, after producing ten colts, it was customary, in times of ignorance, then to set at entitled rendering it unlawful to be used or eaten.

According, "Waqf", in short, is like the Pagan practice of setting a camel at liberty, in the manner, that the thing appropriated does not go out of the ownership of the owner.

But it is not so in the case of manumission, as that is a dereliction of property. It is otherwise also in the case of a mosque, as that is dedicated purely to Allah and therefore it is unlawful to derive any benefit from it, whereas in a case of a Waqf, the right of the individual remains in force, and as such it, is not dedicated purely to Allah.

1. Alienation of the property of Waqf :

Qadooree has reported, from Imam Abu Hanifah, that the owner's right of property is not finished, except where the court so decrees, or where the owner himself suspends it upon his death, by declaring "When I die, this house is appropriated

to such a purpose" (and so forth). Imam Abu Yusuf is of the view that his right of property is finished on the instant of his saying "I have appropriated" also is the opinion of Imam Shaafe'ee, because it and this is a dereliction of the property in the same manner as manumission. Imam Muhammad holds that it is not finished until he appoints Mutawalli or and hands it over to him ; and decrees are accordingly passed upon it.

2. Decree of the court fixes a waqf ; but not the decision of an arbitrator:

It is noted in the Fatawa Qazi Khan, that judicial decrees are passed on the subject of waqf only in cases where a person who has appropriated a particular article, and delivered it over to a Mutawalli and then desires of resuming it ; and the Mutawalli objects to the resumption, on the plea of the appropriation being absolute ; and they bring the dispute before the Qazi, who decrees it to be absolute.

As regards the case where the parties authorize any third person as an arbitrator to decide the dispute between them, and he decides the waqf to be absolute, there is a difference of opinion ; but it is certain, , that such a decision is not binding upon the parties.

3. Waqf made upon a death-bed :

If a person makes a waqf upon his death – bed, Tahavee says that, according to Imam Abu Hanifah, it stands in the same position as a bequest after death, that is to say, it is absolute ; as opposed to a waqf during health, which according to Imam Abu Hanifah is not of absolute nature.

The real fact, however, is that such a Waqf is not absolute, according to Imam Abu Hanifah ; but it is absolute according to Imam Abu Yusuf and Imam Muhammad ; with this distinction, that the waqf here death with is of one-third of

the owner's estate, while a waqf made during health is of the whole of the owner's property.

4. Owner's right of property is finished, without transfer of it to any other person :

Upon the Waqf becoming valid, that is, absolute, according to the opinions of our doctors, as mentioned here, according to Imam Abu Hanifah, as a result of the owner's declaration, and the courts subsequent decree, and according to Imam Abu Yusuf, by his simple declaration, and according to Imam Muhammad, by his declaration and delivery of possession to a Mutawalli, it passes out of the possession of the owner, but it does not become the property of any other person.

5. Undefined part of a thing may be appropriated :

The waqf of an undefined part or portion of any property is lawful, according to Imam Abu Yusuf.

Imam Muhammad holds that a waqf of this kind is not lawful.

Imam Abu Yusuf, however, excepts a mosque, or a burying-ground, and says that the waqf of any undefined part it is unlawful, although it is of an indivisible nature.

The waqf of an undefined part of any other property, where it is of an indivisible nature, is held to be lawful by all the doctors, as it may be hired, for instance, and the parties may divide the rent.

6. Waqf of land, where an indefinite part of it afterwards proves to be the property of another person :

If a person appropriates land, and it is afterwards proved that an indefinite part of the land, such as the fourth, was the property of another person, the waqf is void with respect to the

remainder also, according to Imam Muhammad ; because, in this case, the separation into indefinite divisions is associated with the waqf, which is consequently not valid, as in the case of a gift.

If, however, it is proved person that another person is entitled to a part of the land, of a specific and not an undefined nature, in such a case the waqf is not void with respect to the remainder, because of no indefinite division exists in this case, and gifts and charitable donations are also governed by the same rule.

7. Objects of Waqf should must be of a perpetual nature :

A waqf is not complete, according to Imam Abu Hanifah and Imam Muhammad, unless the owner destines its ultimate application to objects which are not liable to be finished; as for instance, a man destines its application ultimately to the use of the poor by saying, "I appropriate this to such a person, and after him to the poor", because these never finish.

Imam Abu Yusuf is of the view that where the owner names an object which is liable to be finished as if he says, "I have appropriated this to Zaid, it is valid, and after the death of Zaid it goes, as a waqf, to the poor, even though the owner had not named them.

8. Waqf of immoveable and of moveable property :

The Waqf of land is lawful ; because many companions of the Holy Prophet created Waqf of their lands ; but the Waqf of moveable property is not lawful, whether purposely or as a dependant. This is the view of Imam Abu Hanifah.

Imam Abu Yusuf is of the view that if a person creates Waqf of lands, together with the cattle and slaves attached to them, it is valid ; and similarly of all instruments of husbandry.

The view of Imam Muhammad also supports the views of Imam Abu Yusuf on this point, because Imam Muhammad is also of the view that if a person creates Waqf of horses, camels, or arms, to carry on war against infidels, it is valid. In this view Imam Abu Yusuf also coincides with him.

The reason for a more favourable construction, however, is that the Holy Prophet once said, "Khalid has created Waqf of his horse and armour in the Way of Allah; Bukhari and Muslim and Talha has dedicated his horse in the Way of Allah.

According to Imam Muhammad, the Waqf is lawful of all moveable, of which the waqf is commonly practised, such as spades, shovels, axes, saws planks, coffins (and their appendages), stone or brazen vessels, and books. But according to Imam Abu Yusuf it is not lawful ; because analogy cannot be given up except but on the express authority of the sacred writings ; and since horses and armour only are mentioned, therein they should be restricted accordingly.

But Imam Muhammad argues that analogy can be abandoned on account of utility as in arts or manufactures; and utility exists in these articles also.

Moreover, it is reported that Naseer Ibne Yahya, made the waqf of his books, as thinking it to be analogous to the Waqf of a Qur'an, meaning there by that as the Waqf of Qur'an is lawful, so also is the Waqf of any other book; This is approved because Qur'an and other books are kept for of reading and instruction, and judgment are generally passed accordingly.

9. Waqf of articles in which it is not customary:

It is not lawful to create Waqf of moveables, the Waqf of which is not usual or common.

10. Waqf cannot be sold or transferred :

When Waqf of any property is valid and absolute, the sale or transfer of it is not lawful, according to all doctors of law; because according to a Hadees reported by Hazart Umer, the Holy Prophet, has said, "Bestow the Actual Land Itself, in charity, in such a manner that it may not remain liable to be either sold or bestowed."

11. It may be divided, where it consists of an undefined part of anything:

If, the waqf is of an undefined part of anything, and in conformity with the doctrine of Imam Abu Yusuf becomes absolute, and the co-owner requires it to be divided, such division is lawful ; because division consists in separation and distinction.

If a person creates waqf of his share in partnership lands, he should divide it and separate it from the shares of his partner ; because he has the authority to do so during his life, or his executor, after his death.

But if, a person creates a waqf of the half for example, of his own land, in such a case the Qazi is to divide it, and separate it from the owner or the owner may sell one half, for example of his land to any other person, and then divide the part appropriated, and separate it from that person, and afterwards repurchase the remaining part from the purchaser, because the owner is not entitled himself to divide the part of land which he has appropriated, or to separate it from that part which he has not created the waqf because one person is not capable of himself to make the division, and thus give to himself, as division can take place only between two persons.

12. Payment of the balance, if any, in case of division, and its effect:

If, in dividing the waqf land, any balance occurs, as where a person creates waqf of his share in partnership land, and he and his co-owner divide the land, and the share of one of them proves defective, and the other makes up the difference by payment in money, it is not lawful, where this balance is paid to the appropriator, as the sale of a waqf property is not lawful ; but if it is the appropriator who pays the balance , it is lawful and what he gets in return is his property; If therefore, he wants it to be divided from the part of which he has created waqf, he should refer the matter to the Qazi, so that he may separate the part of the waqf from that he i.e., the appropriator gets in return for the balance.

13. Income of an the Waqf :

It is necessary that the income of the Waqf property should in the first instance be spent in the maintenance of it, whether the appropriator should have stipulated this or not.

14. Unless the appropriatee is rich, in which case he is responsible for the maintenance :

But if the Waqf is firstly to any particular person, and after him to the poor, the maintenance is in such a case due out of that person's property (but he is at liberty to furnish the means out of whatever part of his property he chooses), during his life ; and in such a case no part of the income is to be spent in the maintenance because the requisition from the person who enjoys the benefit is in such a case possible, as he is specified and known.

15. In such a degree as may suffice to preserve it in its original state :

The maintenance, however, is to be out of the property, only in such a degree as may be necessary to preserve it in the state in which it was when appropriated ; and if it ruins it should be restored to the estate in which it was when appropriated.

16. Maintenance of a house is incumbent upon the individual occupant :

If a person creates the Waqf of a house, with the condition, that his son or any other person will reside in it during his life, the maintenance of it is incumbent upon him who has the right to live in it.

17. But if he neglects this, the court should let out on rent the house and furnish maintenance of it out of the rent :

But if, the person who lives in the house refuses or neglects to maintain the house, or he is incapable of doing, so due to poverty, the court should in such a case let it out in rent and provide for the maintenance out of the rent ; and should return it to him after the maintenance is complete.

18. The occupant is not liable to any compulsion :

It may, however, be noted that where the person to whom the article is appropriated refuses to make maintain it, he should not be compelled, because the maintenance would be at his loss.

19. None can let out the house but the court :

It may also be observed that it is not lawful for the occupant to let out the house because, he is not the owner. The court, on the contrary, has such a power, as being agent of the community.

20. Decayed materials are to be used for maintenance :

The buildings or materials of the waqf which have become damaged or useless should be employed by the court in the maintenance of it, where necessary, But if these are not necessary, he should keep them until such time as the occasion arises when he should employ them in making the necessary maintenance; because maintain is required from time to time, so that the Waqf property may be continually preserved; and the purpose of the owner fulfilled.

If materials of the decayed part are damaged so much that it has become impracticable to employ them in the maintenance it is necessary for the court to sell them, and spend the price in such maintenance; It is however, not lawful for him to give them to the occupants, because the timbers, and so forth, are constituent parts of the actual waqf property, in which no person has any right, as their right is merely to use, and not to the property itself.

21. Waqf with a reserve of the use to the owner during his life :

If a person creates a waqf of a house, with a reserve of the income to his own use during his life, and after his death to go to the poor, this is valid, according to Imam Abu Yusuf.

22. Waqf with a reserve to change the subject :

If the owner reserves to himself a right of changing the lands of which he creates waqf for any other lands, at his pleasure, it is valid, according to Imam Abu Yusuf.

Imam Muhammad says that the waqf itself is valid, but the condition is void.

23. Waqf with a reserve of a right of option :

If the owner reserves to himself a right of option with respect to his waqf, for three days, by saying, for example "I

create waqf of this house for such and such purposes, with the condition that I will have a right of option for three days , according to Imam Abu Yusuf, both the waqf as well as the condition are lawful.

But according to Imam Muhammad, the waqf is not valid.

24. Waqf with a reserve of authority :

If a person creates waqf of a land, with the a reserve of his authority over it, it is lawful, according to Imam Abu Yusuf. Qadooree has expressly declared this, and such also the view of Hilaal; and in fact it is the generally accepted opinion and Hilaal particularly mentions it in dealing with the waqf,

Some doctors are of the view, that if the waqf specifically stipulates a reservation of authority over the lands, this authority remains to him accordingly; but not unless it is specifically mentioned by him.

Section

ALIENATION OF THE WAQF PROPERTY

1. Mosque is not alienated from the founder otherwise than by the performance of public worship in it

If a person builds a mosque, his right of property in it is not finished so long as he does not separate it from the rest of his property, or give general permission to people to come and offer prayers in it ; but as soon as the people in general, or a single person, offer their prayers in it, his right of property is finished according to Imam Abu Hanifah.

Imam Abu Yusuf is of the view that the founder's right of property is finished immediately upon his saying, "I constitute this a mosque."

2. Mosque connected with a residence :

If a person constructs a building of two stories, and makes the under storey a mosque, and the upper storey a residence or *vice versa*, with the door of the mosque towards the public road, and separates the mosque from his own property, he is even then entitled to sell it ; or, if he dies, the mosque becomes part of inheritance ; as the mosque does not, in such a case, appertain solely to Allah, because of the individual's right in it still subsists.

This, however, is only where the house has not been built merely for the purpose of the mosque ; because if it has been built for the purpose of the mosque, the Waqf is absolute.

Imam Hasan reports from Imam Abu Hanifah, that if the lower storey is a mosque, and the upper story a residence, the former continues for ever a mosque ; because a mosque is one of those things which are designed to continue forever, and an under storey is more suitable for this purpose than an upper storey.

Such a reverse is reported from Imam Muhammad, because reverence is indispensably due to a mosque and where an upper storey is built over a mosque for the purpose of residence in or of letting it out on rent ; this reverence cannot be observed.

It is also, said that when Imam Abu Yusuf went to Baghdad and saw the narrow and crowded condition of the place, he held the Waqf as lawful and absolute in either case, that is, whether the mosque be in the lower storey and the residence in the upper story or *vice versa* ; but this he admitted out of necessity. The same view also is recorded from Imam Muhammad, when he went to Rai, and for the same reason.

If a person converts the central hall of his house into a mosque, and allows general entrance into it, even then it does

not become a mosque and remains saleable and inheritable ; because in a mosque no person possesses any right of obstruction and wherever a man has such a right in respect of its surrounding parts, it necessarily affects the place inclosed in them, such place, as such, cannot be a mosque ; besides, it is necessarily a thoroughfare for the family, and therefore virtually does not belong solely to Allah.

It is noted from Imam Muhammad that the central hall of a house, thus declared to be a mosque, cannot thereafter be given away, sold or inherited. He as a result considers it to be a mosque Imam Abu Yusuf is also of the same view, because, as the person in question desired, that such a place should be a mosque, and as it cannot be so without an entrance into it, the entrance will also be included even without specifically, mentioning it as in the case of letting out on rent.

3. Ground appropriated to build a mosque cannot be sold or inherited :

If a person creates the waqf of a ground for the purpose of building a mosque, he cannot afterwards take it back, or sell it, nor can it be inherited, because such ground is altogether taken out of the right of the individual, and belongs solely to Allah.

4. Mosque cannot, revert into the property of the founder :

If a locality in which a mosque is situated becomes deserted or uninhabited, and there is no further use for the mosque, as no person comes to offer prayers therein, even then it continues to be a mosque according to Imam Abu Yusuf, and does not revert to the founder, because, since he had himself put it out of his own ownership, it cannot again become his property.

Imam Muhammad is however, of the view that the mosque again becomes the property of the founder, or of his heirs, in case of his death : because he had made it for the

purpose of public to offer progress in it: and, since that has ceased, the mosque stands in the same position with the materials for building a mosque.

5. Waqf made to the use of the community at large :

If a person builds a reservoir for the public, or as resting place for travellers, or a house upon the infidel frontiers for the Muslim warriors in their excursions (termed a *Rabaat*), or dedicates it as a ground for burying the dead ones, his right of property therein is not finished until the court passes a decree to that effect.

But otherwise in the case of a mosque, because in it no right of usufruct remains to the founder, as the mosque belongs solely to Allah independent of any official decree. This is according to Imam Abu Hanifah.

Imam Abu Yusuf is of the view that the person's right of property finishes on the instant of his saying, "I have made this for such and such purposes," viz., residence, interment, or so forth.

Imam Muhammad holds that as soon as people start drinking water from the reservoir, or enter the rest houses, or warriors take up their residence in the *Rabaat*, or burial takes place in the burying ground, the proprietor's right is finished. According to him, it is sufficient even if these acts are performed by, or with respect to only a single individual.

6. They may be consigned to a Mutawalli:

If, in the cases cited above, the founder hands over the property to a *Mutawalli* (procurator), such handing over is approved, because the Mutawalli is of the status of a deputy, and the act of the deputy is the act of the principal.

With respect to a mosque, some are of the view that the delivery of it to a Mutawalli is not a complete consignment, because there is no business for a Mutawalli in a mosque.

Some are, however, of the view that consignment is complete, as it is necessary, in a mosque, that there should be someone to maintain it, and lock up the doors; the delivery of the mosque, therefore, to a Mutawalli is approved.

Some also say that a graveyard is to be considered in the same light as a mosque in, because the Mutawalli of graveyard is an office not in use.

While some, maintain that it is like a reservoir, or, resting place. If, therefore, it is delivered to a Mutawalli delivery is established ; because such an appointment is valid, even though it is contrary to general usage.

7. Waqf may be consigned to the prince :

If a man, having a house in Mecca, makes it a Waqf for the stay of the pilgrims, or if a person, having a house in any other place, makes it a waqf for stay of the poor, or mendicants, or, having a house upon the frontiers, dedicates it for stay of the Muslim warriors and their cattle, or dedicates the income from his lands to the support of the warriors in the Way of Allah, and delivers or consigns those houses, or lands to the Prince who is empowered to act in those particulars, such delivery is lawful.

If, therefore, such a person afterwards desirous to revoke his Waqf, he cannot lawfully do so.

The income arising from the lands, however, is lawful for the poor ones only, and not to the rich ones ; but the use of any of the other properties such as residing in the rest house, or drinking water from the well, fountain, or reservoir, are lawful to the rich as well as the poor ones alike.

BOOK – VI

HIBAH

(GIFT)

HIBAH

(GIFT)

(Hidayah, Kitab-ul-Hibah)

Definition of Hiba

Literally, “Hibah” means “gift” or “donation” of a thing from which the donee may derive benefit, and legally, it means a transfer of anything, made immediately, and without any return.

The person who gives the gift is known as the Waahib, or donor ; the person to whom it is given is known as the Mohoob – lahoo ; or donee ; and the thing gifted is known as the Mohoob.

CHAPTER 1

GIFTS

1. Gifts are lawful :

Gifts are lawful. The Holy Prophet has said, “Give presents to each other so that love may increase among you.” (Bukhari and Nasai). This actually is the sacrum for gifts, as presents actually mean gifts. All our jurists therefore accept the validity of gifts.

2. Offer, acceptance, and possession :

Gifts are made valid by offer, acceptance, and possession, offer and acceptance are necessary, because a gift is virtually a contract, and offer and acceptance are required in the making of all contracts ; and possession is necessary to create a right of property in the gift, because the right of property, according to the jurists cannot be created upon the thing given merely by means of the contract, without possession.

* Mishkaat, Kitabul Bayoo, Babul 'Ataaya; 'Ainul Hidayah Vol. III pp 675 to 649

3. Gift to be taken in possession on the spot where it is tendered :

If the donee takes possession of the gifted property, at the spot of making the gift, even without the order of the donor it is lawful, upon a favourable construction.

But if, the donee takes possession of the gifted property afterwards, it is not lawful, without consent of the donor.

4. Gift made from divisible property and gift made from indivisible property :

A gift of part of a divisible property is not valid unless the gifted part is divided and separated from the rest of the property of the donor; but a gift of part of an indivisible property is valid even without dividing and separating it.

If a person makes a gift to his co-owner, of his share in the joint property which is capable of division, it is not valid, because of the not validity of the gift of an undefined part of a divisible property.

But a person makes a gift to another of an undefined part of land, such gift is void. But if he afterwards divides it and delivers it to the donee, the gift becomes valid.

5. Gift of an article included in another article :

If a person gives the gift of the flour of sessame which is still in the grain, or of oil of sessame which has not been yet extracted from the seeds, such gift is not valid, even if he afterwards grinds the wheat into flour ; or extracts the oil from the sessame seeds ; and then delivers them to the donee.

The same rule also applies to butter which is still in the milk.

Similarly the gift of milk in the udder, of wool upon the sheep, of grain or of trees upon the ground, or of fruit upon the trees, is also a gift of an undefined part of a thing.

6. Gift of a deposit without a formal delivery and possession:

If the thing given as a gift is already in the hands of the donee, as a trust, the gift in such a case is complete, even though there is no formal delivery of possession.

But it is otherwise where a depositor sells the deposit to his trustee, because in such a case the original possession is not sufficient, because possession on account of purchase is a possession creating responsibility, and therefore cannot be substituted by possession on account of a trust; but possession on account of gift, on the contrary, as not being possession creating responsibility, may be substituted by possession on account of a trust.

7. Gift by a father to his infant son, of anything rather actually or virtually in his possession :

If a father makes a gift of something to his infant son, the infant, on account of the gift, becomes owner of it, if the thing given is, at the time, in the possession of the father or of his trustee.

The same rule applies if a mother gives something to her infant son whom she maintains, and of whom the father is dead, and there is no guardian of him; and similarly also, to the gift of another person maintaining a child under similar circumstances.

It may also be noted that the law in respect of possession in cases of alms-gift is similar to that in the gifts.

8. Gift to an infant by a stranger :

If a stranger gives a gift of a thing to an infant, the gift is completed by the possession of the father of the infant.

9. Gift to an orphan:

If a person gives a gift of a thing to an orphan, and it is given, on his behalf in the possession of his guardian, being the executor appointed by his father, or his grandfather, or the executor appointed by his grandfather, it is valid.

10. Gift to a fatherless infant :

If fatherless child is under charge of his mother, and she takes possession of a gift given to him, it is valid.

The same rule also applies to a stranger who has the charge of an orphan.

11. Gift to a rational infant :

If an infant himself takes possession of a thing given to him, it is valid, provided he is endowed with understanding.

It is lawful for a husband to take possession of anything given to his wife, who is an infant, if she has been sent from her father's house to his house even though the father be present.

But it is otherwise if she has not been sent from her father's – house, because in that case the father can not be held to have given up the management of her affairs. It is also otherwise with respect to a mother, or any other having the charge of her ; because they are not entitled to possess themselves of a gift in her behalf, unless the father is dead, or absent, and his place of residence is not known ; because their power is on account of necessity, and not from any authority ; and such necessity does not exist while the father is present.

12. House given in gift by two persons to one :

If two persons jointly give a house as a gift to one man, it is valid ; because, as they give it to him wholly, and he gets it wholly.

13. But not by one person to two :

If one man gives a house as a gift to two men, this is not valid, according to Imam Abu Hanifah, but Imam Abu Yusuf and Imam Muhammad hold it as valid.

14. Distinction between joint gift or alms to the rich and to the poor :

According to Jaame'-as-Sagheer, if a rich man gives ten Dirhams, in alms, to two poor men, or gives as a gift that sum to them, it is valid, but if the said charity or gift is given to two rich men, it is not valid.

15. Gift of a house in separate lots :

If a person gives as a gift to two men, one-third of his house to one of them, and one-third to the other, it is not valid according to Imam Abu Hanifah and Imam Abu Yusuf, but Imam Muhammad holds it is valid.

But if, he gives as a gift, one-half to one, and one half to the other, there are in that case two opinions reported from Imam Abu Yusuf. According to the principles laid down by Imam Abu Hanifah, the gift is not valid ; while, according to the principles laid down by Imam Muhammad, it is valid.

RESUMPTION OF GIFTS

*(Hidayah, Kitab-ul-Hibah, Baab Maa Yushe Ruju'ah Wa Maa
Laa Yushe)*

1. Donor may resume his gift to stranger :

It is lawful for a donor to retract the gift made to a stranger.

2. Circumstances which bar the resumption :

It may be noted, that the bars to a resumption of a gift are many, viz., (1) The donee gives the donor a return of consideration ; because this fulfils the donor's object ; (2) The inclusion of an increase with the gift ; because in that case a retraction cannot take place without including the increase, as that is implicated ; and it cannot take place so as to include the increase, because that was not included in the gift ; (3) The death of one of the parties ; because if the donee dies, his property goes to his heir, and becomes the same as if it had given during his lifetime ; and if the donor dies, his heirs are strangers as regards the contract, because they made no offer of the thing given ; (4) The alienation of the gift from the donee's property during his lifetime ; because this is the result of the power vested in him by the gift, which power, therefore, cannot thereafter be retracted ; and also because the right of property has regenerated in another person, on account of a fresh cause, namely conveyance to a second donee ; and as a regeneration of the right of property is equal to an essential change in the thing, the case is therefore the same as if the gift was to become, in effect, a different thing from what it was, and as a result not liable to retraction.

3. resumption of the gift of land after the donee has built or planted on it :

If a person gives a gift to another of a piece of land free of buildings or plantations, and the donee plants trees in it, or builds a house on it, a stable or a shop of such a size which may be deemed as an increase, in such a case the donor is not entitled to retract the gift, because of the increase made in it.

The restriction is with respect to the shop, because shops are sometimes so small that they cannot be deemed as an increase, and sometimes the land is very extensive, and the shop occupies only a very small part of it ; in which case the bar can operate only as regards the part in question.

4. Resumption after the sale of a part of the land by the donee:

If the donee sells one half of gifted undivided land, the donor may in such a case resume the other half, because to the resumption of that part no bar exists.

But if, the donee does not sell any part of such land, the donor is entitled to resume one half of it, because as he is entitled to resume the whole, he is also entitled to resume the half *a fortiori*.

5. Gift to a kinsman cannot be resumed :

If a person gives a gift of anything to his relation within the prohibited degrees, he is not entitled to resume it, because the Holy Prophet has said, “when a gift is made to a prohibited relation, it should not be resumed”; and also because the purpose of the gift is the increase of the ties of relationship, which is thereby achieved.

6. Nor a gift to a husband or wife during marriage :

If a husband gives a gift of anything to his wife, or a wife gives a gift to her husband, it cannot be taken back because the purpose of the gift is an improvement of affection as in the case of presents to relation ; and as the purpose is achieved, the gift cannot be resumed. This purpose, however, is to be regarded only during the existence of marriage because if a man gives something to a strange woman, and thereafter marries her, he can retract the gift ; if a man gives something to his wife, and thereafter divorces her by three enouncements, he is not entitled to take back the gift.

7. Receipt of return prohibits retractation:

If the donee says to the donor, "take this thing in return for your gift," and he accepts it, the right of retractation is finished because of the donor having obtained the return of his gift.

8. Although the return is given by a stranger :

If a stranger, on behalf of a donee, gives something gratuitously to the donor in return for his gift, and the donor accepts the same, the right of retractation finishes; because stranger may also lawfully give a return for the relinquishment of a right.

9. If a part of the gift proves the property of another :

If one-half of a gifted property proves to be the property of some other than the donor, the donee, in such a case is entitled to take back from the donor half of the return he gave him for the gift, because the thing opposed to that half was not secured and made safe to him.

But if, half of the return proves to be the property of some other than the donee, the doner is not in such a case

entitled to take back from the donee any specific part of the gift ; but he can give the remaining part of the return, and then take back the whole of the gift from the donee.

Imam Zufar holds that the donor can take back half of the gift, as he considers this case to be similar to that part of the gift proving to be the property of another.

10. If the return is opposed only to a part :

If a person gives a gift of a house to another, and the donee gives a return to the donor for half only of the house so given, the donor may in that case take back the half of the house for which he has received no return, because a bar to his resumption existed only in respect of the other half.

11. Retractation requires mutual consent, or decree :

A gift cannot lawfully be resumed except with the consent of both parties, or by a decree of the Qazi.

The same rule also applies where the gift is lost or destroyed in the possession of the donee, after the decree of the Qazi, but before to the demand of it by the donor.

But if the donor demands the article, and prohibits the donee from keeping it, after the decree of the Qazi, and the donee continues to retain it. he is responsible for it, because he is then guilty of transgression.

12. Donor's re-possession of the gift is not requisite to the validity of retractation :

When a person resumes his gift, either on account of a decree of the Qazi, or of the mutual consent of the parties, it is finishing of the original gift, and not a gift , *denovo* on the part of the donee, and therefore possession by the donor is not in such a case necessary.

13. Donee incurring any responsibility in consequence of a gift:

If the property a gift proves to be the property of another person after it has been destroyed, and the donee makes good the loss to the owner, in such a case he is not entitled to receive anything by way of compensation from the donor.

14. Mutual gift requires mutual possession:

If a person gives something to another person on the condition that other person will also give something to him in return for it, the mutual possession of the respective returns is necessary meaning thereby that the contract is nothing until the two possession take place, and is made void by the subject of it, on either side, being mixed with other property.

Imam Zufar and Imam Shaafe'ee hold that this is a sale both original and ultimate, because the characteristic of sale, i.e. giving of a property for a return, exists in it; and in all contracts regard must be paid to the spirit of them, because if a master sells his slave to the slave himself, the slave in that case is free.

Section (1)

GIFT WITH EXEMPTIONS

1. Gift of a pregnant slave includes a gift of her *foetus* :

If a person makes a gift to another person of a female slave, and child in her womb, the gift is valid ; and the exception is void.

2. Unless that has been previously emancipated :

If a master emancipates the *foetus* in the womb of his female slave, and then makes a gift of the slave to some person, it is valid.

3. If the *foetus* has been previously declared a Mudabbir, the gift is void :

If a master declares the *foetus* in the womb of his female slave a Mudabbir , then gives as a gift the slave to some person, the gift is not valid.

4. Gift of a thing makes all provisional conditions regarding it nugatory :

If a person gives as a gift his female slave to another, on condition that he restores her to him, or that he emancipates her, or declares her an Umm-e-Walad ; or, if a person gives as a gift a house to another, on condition that the donee will give back a part of it ; or , if a person gives as a gift his house in charity to another on condition that the receiver of the charity will give him something in return for a part of the house, such gift or charity is valid ; but the condition is not valid.

5. Gift of a debt by a conditional exemption from:

If a person, having a debt due to him of one thousand Dirhams says to the debtor “when tomorrow arrives, the said thousand Dirhams will be your property;” or , “you are exempted from the debt,” or, if he says, “whenever you pay me one half of the said thousand, the other half will be your property,” or , “you are exempted from the debt of the other half,” the gift then made is not valid.

6. Life-grants :

An 'Umraa, or life-grant, is lawful for the grantee during his life time, and goes to his heirs after him.

In an 'Umraa, or a gift of a house for example, during the life time of the donee, on condition of its return upon his death, the conveyance of the house is valid without any return ;

and the condition annexed to is it not valid, because the Holy Prophet has sanctioned the gift in such a case, and finished the condition. An 'Umraa, is in fact a gift, and a gift is not invalidated by an invalid condition.

If one person says to another, "my house is yours by way of Raqbaa," it is void, according to Imam Abu Hanifah and Imam Muhammad.

Imam Abu Yusuf, however, holds it valid.

Section (2)

SADAQAH, OR ALMS

1. Alms require possession of the article :

Alms, like gift, is not valid unless given with possession because it is gratuitous, similarly as a gift. Nor is an alms lawful, where it is of an undivided part of a divisible thing.

2. It cannot be taken back :

Taking back of the alms is not lawful ; because the purpose of alms is merit in the Sight of Allah, and that has been achieved by giving the alms.

If, also a person gives alms to a rich man, it is not lawful to take it back on a favourable construction of the law, because to achieve the merit in the Sight of Allah may also sometimes be the purpose of giving the alms to the rich.

Similarly, if a person gives a gift of anything to a poor man, it is not lawful to take it back, because the purpose in such gift is merit and that has been achieved.

3. Distinction between vows of Maal and Milk, in alms :

If a person makes a vow to devote his property [Maal] in charity, he should give it of that kind on which it is binding upon him to pay Zakaat. But if, he makes the vow to devote his possessions [Milk] , he should give the whole of his property.

It may also be noted that the person who makes the vow should be told to keep for himself and his family as much of his property as may be necessary for their maintenance until he is able to acquire more. The remainder, after such reservation, should be given in charity ; and , after he has acquired more, he should then give in charity a portion equal to what he had reserved for the maintenance of himself and family.

BOOK – VII

WASIYAT

(WILL)

WASIYAT *

(WILL)

(Hidayah, Kitab-ul-Wasaya)

Definition of "Wasiyat"

Literally, "Wasiyat", of which "Wasaya" is the plural, means the Will or bequest legally signifies the endowment of anything to take effect after death, as if one person says to another person, "give this property of mine, after my death, to a particular person."

The thing to be given is known as the "Moosee Behee", or legacy ; the person who makes the Wasiyat or Will is known as the "Moosee," or testator ; the person in whose favour the Wasiyat or Will is made is known as the "Moosee Lahoo", or legatee ; and the person appointed to execute the Wasiyat or Will is known as the "Wasee", or executor.

CHAPTER 1

WILLS WHICH ARE LEGAL, AND WILLS WHICH ARE LAUDABLE ; AND RESUMPTION OF WILLS

(Hidayah, Kitab-ul-Wasaya, Baab Fee Sifat-il-Wasiyat Maa Yajooz Min Zalik Wa Maa Yustinibbo Minho Wa Maa Yakuna Ruju'an 'Anho)

1. Wills are lawful and valid :

Wills are lawful as being "Mustahab" (recommended) and, not "Waajib" (mandatory though analogy suggests that they are unlawful ; because a bequest, signifies endowment of a thing referred to a time when the property does not belong to its owner

* Qur'an, Ch. 2 (Baqarah), Verse 180 to 182, Ch. 4 (Nisa) Verse 11 to 12 ; and Ch. 5 (Maa'idah) verses 106 to 108 Mishkat ; Kitabul Bayoo ; Babul Wasaya ; 'Ainul Hidayah Vol. IV pp. 793 to 909

[i.e., the testator] and as endowment with reference to a future period (as if a person says to another, "I make you owner of this article on the morrow"), is unlawful, supposing even, that the donor's ownership in the article still continues to exist at that time, it follows that the suspension of the act to a period when the ownership is null and void (as at the death of the party), is unlawful, *a fortiori*.

The reasons, however, in favour of the legality of the Wills are : Firstly, there is an indispensable necessity that man should have the power of making bequests ; because a man from the delusion of his hopes, is improvident, and deficient in practice; but when sickness overtakes him, he becomes alarmed, and afraid of death. At that time, therefore, he is in need of compensating for his deficiencies by means of his property ; and this in such a manner, that if he dies on account of that illness, his objects namely, compensation for his deficiencies, and merit in a future state may be obtained ; or , on the other hand, if he recovers , then he may use the his property in his requirement ; and as these objects can be attainable by giving validity to the Wills, they are therefore hold to be lawful. Secondly, Wills are declared to be lawful in the Qur'an and the Traditions of the Holy Prophet * and all our jurist are unanimous as regards the legality of the Wills.

2. To the extent of one-third of the testator's property.

If a person makes a will in favour of a stranger, to the amount of one-third of his property, it is valid, although the heirs of the testator may not agree to it ; because it is so permitted by the Holy Prophet in his Traditions.

3. But not to any further extent.

A bequest exceeding one-third of the testator's property is not valid. In proof of this the following Tradition is quoted, as

* See the previous foot note.

reported by Abi Waqqaas,. “In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet of Allah came to pay me a visit of consolation. I told him, that, by the blessing of Allah, having a great estate, but not heirs except one daughter, I wished to know ‘if I dispose of it all by will.’ He replied, ‘No!’ and when I severally interrogated him, ‘if I leave two third, or one half, he also replied in the negative; but when I asked ‘if I leave a third’ , he answered, ‘Yes, you may leave one-third of your property by will; but one-third part, to be disposed of by will, is a great portion; and it is better that you leave your heirs rich, than in a state of poverty, which might oblige them to beg of others.’” (Tirmizi)

4. Unless by the consent of the heirs.

It may be noted, that although a will, bequeathing more than one-third of the testator’s property, is not lawful, yet if the heirs, being of the age of maturity, give their consent to it, after the death of the testator, it then becomes valid.

Their consent, during the lifetime of the testator, is not regarded; because as this is an assent previous to the establishment of their right, they are therefore entitled to annul it upon the death of the testator

5. Bequest to an heir.

When a person makes a will in favour of any of his heirs, the same rule applies as in the case of bequeathing more than one-third to a stranger. In other words, it is not valid, unless the other heirs give their consent to the bequest after the death of the testator, and their consent previous to his death will be of no effect.

6. Bequest to a person from whom the testator had received a mortal wound.

If a person makes a bequest in favour of another from whom he had received a mortal wound, it is not valid; even if the

murderer is one of his heirs, or a stranger, or even if he may have wounded him willfully or by mistake, if he is the actual perpetrator of the act; because it is said in the Traditions, that "there is no legacy for a murderer."

7. If a legatee slays his testator.

Similarly, if a man, who has made a bequest in favour of a particular person, is then after killed by that person, the bequest in his favour becomes invalid.

But, in such cases, if the heirs give their consent, the bequest then remains valid, according to Imam Abu Hanifah and Imam Muhammad, but not according to Imam Abu Yusuf.

8. Bequest to some of the heirs.

If a man makes a bequest in favour of some of his heirs, it is not valid; because of a Tradition of the Holy Prophet, that "Allah has allotted to every heir his particular right;" (Ibne Maajah), and also, because a will in favour of some of the heirs is a loss to the remaining heirs, and, therefore, if it is held an legal, it would cause a breach in the ties of relationship. Further, it is also said, in a Tradition, that, "a bequest to particular heirs is unjust." (Ibne Maajah)

It may be noted, that although a bequest in favour of some of the heirs is not valid, but it becomes valid if the remaining heirs give their consent to it.

But if some of them give their consent, and some do not, the bequest becomes valid in proportion to the extent of the shares of those who give their consent, and remains not valid in proportion to the extent of the shares of those who do not give their consent.

9. Bequests between Muslims and Zimmees.

The bequest of a Muslim in favour of a Zimnee, or of a Zimnee in favour of a Muslim, is valid, the former, because Allah has said, in the Qur'an, "Ye are not prohibited, (O believers, from acts of benevolence) towards those who subject themselves to you, and refrain from battles and contentions;"* and the later, because Zimmees, on account of their relation with the Muslims, are considered in the same light with them in all worldly affairs, and as, on this principle, an interchange of good offices towards each other is held lawful during this life, they are therefore in the same manner allowed to have after death. It is said in the *Jaame'-as-Sagheer* that a will in favour of an hostile infidel is not valid, as Allah has prohibited, in the Qur'an, the acts of benevolence toward them.

10. Acceptance or rejection of the Wills.

The acceptance or rejection of a bequest is not valid until after the death of the testator. Thus, if a legatee accepts a bequest after the death of the testator, it is valid, inspite of that he has rejected it during his lifetime.

11. To avoid making legacies where the heirs are poor.

It is preferable, rather advisable, that no legacies should be made, if the heirs are poor, and their specific shares are not such which may to enrich them.

But if, the heirs are rich, or the specific portions assigned to them are such which may enrich them, it is advisable to leave something short of one-third of the estate in legacies (in favour of strangers).

* Ch. 60 (Mumtahanah), verses 8 and 9

12. Legatee becomes owner of the legacy by his acceptance of it.

The property of a legatee in a legacy is established by his acceptance of it. Imam Zufar is of the view that a legacy is like an inheritance.

13. Which may be either express or implied.

It may be noted that acceptance, in cases of bequest, is of two kinds.viz., (a) Express, which needs no explanation and. (b) Implied, which is where the legatee dies without having either declared his acceptance or refusal ; because this also amounts to acceptance in effect.

14. Bequest by an insolvent person .

If a person deeply involved in debt bequeaths any legacies, such bequest is unlawful and of no legal effect.

But if, the creditors of the deceased give up their claims, the bequest then becomes valid, as the obstacle to it is then removed, and the legatee is taken to be in need of his legacy.

15. So likewise by an infant.

Bequest by an infant is not valid.

If an infant makes a will, and dies after he had attained the age of majority, the will is not valid, because it was made at a time when he was not qualified for such an act; and similarly, if an infant says, "it is my will, whenever I reach the age of majority, that one-third of my estate should be considered as legacy in favour of a particular person," the will is not valid ; because an infant, being unqualified, is not entitled to make a will that is to be deemed valid immediately; or that can be made so by being suspended to a future time.

16. Or a Mukatib.

Bequest by a Mukatib is not valid, inspite of a fact that he leaves effects sufficient to discharge his covenanted ransom; because the property of a Mukatib is not fit for gratuitous acts. Some say that this is according to Imam Abu Hanifah; but Imam Abu Yusuf and Imam Muhammad are of a contrary view.

17. Bequest of (or in favour of) a *foetus* in the womb.

A will in favour of a *foetus* in the womb, and a will bequeathing a *foetus*, are both valid, provided the birth happens in less than six months from the date of the will.

18. A female slave may be bequeathed with the exception of her progeny.

If a person bequeaths a female slave, and excepts the offspring of her womb, both the bequest and the exception are valid.

19. Bequest rescinded by express declaration or by any act of the testator implying retraction.

If the testator expressly rescinds his bequest (as if he says, "I retract what I had bequeathed"), or doing any act which proves his rescinding it, retraction is confirmed.

20. Or which extinguishes his property in the legacy.

Every act or deed which causes an extinction of the property of the testator is a retraction from his bequest (as where, for example, a testator sells the article he had bequeathed, and thereafter purchases it ; or gives it to some person, and thereafter retracts the gift).

21. Testator's denying his bequest is not a retractation of it.

If a testator denies his bequest, and the legatee produces witnesses to prove it, there is in such a case a difference of opinion among our jurists. According to Imam Muhammad, this is not a retractation; but Imam Abu Yusuf holds that it is so.

22. Nor his declaring it unlawful or usurious.

If a testator declares the will he has made in favour of a particular person to be unlawful or usurious, this does not amount to retractation. But if he declares the will to be void it is evidently a retractation.

23. Or desiring the execution of it to be deferred.

If a testator desires that the execution of his will should be suspended for some time after his death, this is not a retractation. But if, he says "I depart from my will", he is then held to have retracted it.

24. Bequest to one person is finished by a subsequent bequest of the same article to another.

If a person says, "I will that a particular slave, which I had previously bequeathed to Zaid, is given as a legacy to Bakr," in such a case annulment of the first will is established, as his speech clearly shows that it was not his intention that they should both be specified in the legacy.

But if a person first leaves particular article to one man, and then leaves the same thing to another, as if he says, "I will that this thing should be given to Zaid," and thereafter makes a bequest of the same thing in favour of Bakr ; then in such a case annulment of the first will does not take place; as the subject is capable of division, and the separate declarations bear that construction.

25. Unless that other be not then alive.

If a person says, “the slave which I previously left to Zaid, I now bequeath to Bakr,” and at that time Bakr is not alive, the first will, in favour of Zaid, will remain good because that was annulled only on account of the legacy completely devised to Bakr; and this no longer remains in force, because of Bakr’s death, and the first will therefore reverts.

But if, Bakr is alive at the time of the bequest in his favour, and afterwards dies before the testator, the legacy (i.e. the slave) in such a case will pass to the heirs, both bequests being void, the first, because of the retractation, and the last, because of the death of the legatee before that of the testator.

CHAPTER 2

BEQUEST OF ONE-THIRD OF THE ESTATE.

(Hidayah, Kitab-ul-Wasaya, Baab-ul-Wasiyat Be Sulas-il-Maal)

1. A person bequeathing two thirds of his property to two persons respectively: -

If a person bequeaths one-third of his property to one man, and one-third to another man, and the heirs do not give their consent to the execution of both bequests, one-third is in such a case to be divided equally between the two legatees.

2. Or one-third to one and one-sixth to the other.

If a man bequeaths one-third of his property to one person and one-sixth to another person, and the heirs do not confirm the whole, in such a case one-third of the property is to be divided between the legatees in three equal portions, two to the legatee of the one-third, and one to the legatee of the one-sixth.

3. Mohabaat wills.

If a person, who has two slaves, one of the value of thirty Dirhams, and the other of sixty Dirham, on his deathbed, makes will that the slave of the value of thirty Dirhams should be sold to Zaid for ten Dirhams, and that the other of the value by sixty should be sold to Bakr for twenty Dirhams, in such a case Zaid obtains a Mohabaat of twenty Dirhams, and Bakr obtain a Mohabaat of forty Dirhams; and this is what is called a will by Mohabaat.

But if the testator does not possess any property except these two slaves, and the heirs refuse to confirm the will, in such a case the Mohabaat is to be executed only in the proportion of one-third.

Here the whole of the property is ninety Dirhams, being the total value of the two slaves ; one-third of it therefore i.e., thirty Dirhams, is divided into three parts, two of which are to be given in Mohabaat to Bakr, and one to Zaid; that is, the slave of the value of sixty Dirhams is to be sold to Bakr for forty Dirhams, and the other, are of the value of thirty Dirhams to Zaid, for twenty Dirhams.

If a person, who has two slaves, one valued at thirty Dirhams, and the other valued at sixty Dirhams, on his deathbed emancipates both, such manumission is in fact a bequest. If, therefore, such person leaves no other property except these two slaves, and the heirs do not give their consent to the emancipation, it will take effect in the proportion of one-third; that is to say, each of the slaves will be free in one-third of his value, and he will have to earn his freedom of the remaining two thirds by emancipatory labour.

4. Bequests of specific sums of money.

If a person bequeaths an specific number of Dirhams without mentioning the relative proportion they bear to his estate, such as one-half, one-third, one-fourth, or the like, it is valid, but it is to be executed only to the extent of one-third of his whole property, unless the heirs confirm the whole.

Thus if a person, who has only ninety Dirhams, bequeaths thirty to Zaid, and sixty to Bakr, and the heirs do not give their consent to it, in such a case the sum of two legacies is to be reduced to thirty Dirhams, of which Zaid will get ten Dirhams and Bakr will get twenty Dirhams.

5. If a person bequeaths the whole of his estate to one, and then one-third of it to another.

If a person first bequeaths the whole of his estate to one man, and then one-third of it to another, and the heirs does not give their consent to it, in such a case one-third of his estate is to

be divided into four parts, of which three will be given to the legatee of the whole and one to the legatee of the third. This is according to Imam Abu Yusuf and Imam Muhammad.

Imam Abu Hanifah is of the view that the one-third of the estate should be divided equally between the two legatees.

6. Bequest of "a son's portion of inheritance".

If a person bequeaths to another "his son's portion of inheritance," such bequest is void. But, if he bequeaths "an equivalent to his son's portion," such bequest is valid.

7. Bequest of "a portion" of the estate.

If a person bequeaths "a portion of his estate," the legatee in such a case is entitled to the smallest portion allotted to any of the heirs, provided such portion is not less than one-sixth, because then a complete sixth should be given to him; and if it exceeds one-sixth, in such a case also one-sixth is to be given to him: because he is in no way to get more than one-sixth. This is according to Imam Abu Hanifah.

Imam Abu Yusuf and Imam Muhammad are of the view that the legatee is entitled to the lowest share, whatever may be its amount, provided it does not exceed one-third; but if it exceeds one-third, an exact third should be given to him, and not more, unless the heirs give their consent to it.

8. Bequest of "part of the estate" undefined.

If a person bequeaths "a part of his property" to another person, without specifying the amount, the heirs are entitled to give whatever they please to the legatee.

9. A person bequeathing first one-sixth, and then one-third, to the same person.

If a person bequeaths "one-sixth of his property" to another person, and afterwards, before the same or another company,

bequeaths “one-third of his property” to the same person, in such a case the legatee is entitled to one-third of the testator’s estate, whether the heirs give their consent to it or not, the one-sixth is included in the latter bequest of one-third.

10. Or, first one-third, and then one-sixth, to the same person.

If a person bequeaths “one-third of his property” to another person, and afterwards, either before the same or another company, bequeaths “one-sixth of his property” to the same person, in such a case the legatee is entitled only to the one-sixth.

11. Person bequeathing “one-third” of any specific property, but if two-thirds of it are lost, the remaining portion will come within one-third of the testator’s estate.

If a person bequeaths to another person “one-third of his Dirhams,” amounting to three thousand, or “one-third of his goats,” amounting to three, and afterwards two-thirds of the Dirhams or goats are lost or destroyed, so that only one-third remains, and the remaining one-third do not amount to one-third of the testator’s entire property, he having possession of other things besides the Dirhams or goats, the legatee is entitled to the complete remaining one-third; that is, to one thousand Dirhams or to one goat as the case may be.

Imam Zufar is of the view that the legatee is entitled only to one-third of what remains, that is, to one-third of one thousand Dirhams, or to one-third of the value of the goat.

12. Bequest of “the one-third” of an article, part of which is afterwards destroyed.

If a person bequeaths to another person “one-third of his clothing,” of which two thirds are afterwards destroyed, and the remaining one-third exceeds in value one-third of the entire property of the testator, the legatee is in such a case entitled to only one-third of what remains.

The jurists, however, have said that this is only where what remains are of different kinds; because otherwise they are to be considered in the same light as Dirhams; and similarly all articles of weight, or measurement of capacity, as it is possible, in those also, to maintain complete the right of particular partners to particular portions, from which it is that a division of such among partners may be compelled.

If a person bequeaths to another "the one-third of his three slaves," and two of them afterwards die, the legatee is entitled only to one-third of the value of the remaining slave; and the same rule also applies to different houses.

Some allege that this is according to Imam Abu Hanifah only; but others say that this is the view of all the jurists.

According to the author of *Hidayah* this is approved as based upon the general rule before stated, that, "in all articles which consist of the rights of the partners being united in them, it is practicable to unite the right of the legatee."

13. Legacy of money to be paid in full with the property, in hand, although all the rest of the estate may be spent in debts.

If a person, whose estate consists, partly of ready money, and partly of debts due to him from others, bequeaths to another person one thousand Dirhams, and that sum exceeds not one-third of the existing property, it is paid to the legatee without any deduction.

But if, it exceeds one-third of the ready property, he is only to receive one-third of the amount in hand; and afterwards one-third is to be paid to him, of whatever sums may occasionally be recovered by the heirs, until in this manner the amount of the legacy is completely discharged.

14. Legacy left to two persons, one of them at that time is dead.

If a person leaves one-third of his property, “to Zaid and Umar,” and Umar at that time is dead, the whole of the one-third will be given to Zaid, irrespective of the fact that their testator, at the time of making the will, was aware of the death of Umar or not.

15. Legacy bequeathed to two persons indefinitely while one of them was dead at that time.

If a person makes the will that one-third of his property should be divided, as a legacy, between Zaid and Umar,” and Umar was at that time dead, Zaid is entitled to only one-half of the one-third; because the words used by the testator clearly denote his intention that each should have one-half, but Umar was at that time dead, the will in his favour is void.

16. Bequest made by a poor man, who afterwards becomes rich.

If a poor person bequeaths to another person “one-third of his property,” and afterwards becomes rich, the legatee is in such a case entitled to one-third of his estate.

Same will be law in case the testator, being rich at the time of making the will and afterwards becomes poor, and then again becomes rich.

17. Bequest of an article, which does not exist in the possession or disposal of the testator at his death.

If a person bequeaths “one-third of his goats” to another person, and it happens either that he has no goats, or that the goats he had were destroyed before his death, the bequest is void because the condition of its validity is, “the testator should possess of the property at the time of his death” which is not the case here.

But if, having no goats at the time of making the will, this testator afterwards gets the goats, and leaves some of them at his death, one third of them will go as a legacy.

18. Unless it was referred to his property.

If a person bequeaths "a goat of his property" to Zaid, and afterwards dies without leaving any goats, the price of a goat should in such a case be paid to Zaid; because the testator's expression "a goat of his property" implies his intention to bequeath the value of the goat.

But if, he neither mentions "a goat of his property," nor "one of his goats," but simply "a goat" without reference to his property or herd of goats, in such a case there is difference of opinion. Some say that the bequest is not valid, because the expression of the testator implies his intention to making legacy of the goats itself, although he had none, whilst some hold it as valid, for this reason, that the testator has specified a goat, although he had none, and therefore he should be supposed to have intended the value of it.

But if, the words of the testator were, "I bequeath one of my goats," in such a case the bequest is clearly invalid; because the reference to his herd of goats makes the legacy restricted to the goat itself.

19. Distribution of a bequest made indefinitely to three kinds of persons.

If a person bequeaths "one-third of his property to his Umm-e-Walads, to the poor, and to beggars," and the Umm-e-Walads are three in all, in such a case, according to Imam Abu Hanifah and Imam Abu Yusuf, one-third of his property, after his death, is to be divided into five shares, three of which are to be given equally to the Umm-e-Walads, one to the poor, and one to the beggars.

But Imam Muhammad, is of the view, say that it is to be divided into seven shares, three of which are to be distributed in equal portions to the Umm-e-Walads, two to the poor, and two to the beggars.

20. Or to an individual and a specific class of people.

If a person bequeaths “one-third of his property to a person mentioned by name and to the poor,” in such a case, according to Imam Abu Hanifah and Imam Abu Yusuf, the one-third is to be divided into two equal parts, one of which is to be given to the person mentioned by name, and the other to the poor. But Imam Muhammad says, that it is to be divided into three shares, one of which is to be given to the said person mentioned by name, and two to the poor.

21. Or to a specific persons.

If a person bequeaths “one-third of his property to the poor,” Imam Abu Hanifah and Imam Abu Yusuf are of opinion that the executor can in such a case give the whole of the one-third to one poor person. But Imam Muhammad says that it cannot be given to less than two poor person.

22. One more person admitted, by the testator, to participate with two other legatees.

If a person bequeaths one hundred Dirhams to Zaid, and one hundred to Umar, and thereafter declares Bakr to participate with them, by saying, “I make Bakr a sharer with Zaid and Umar,” Bakr in such a case is entitled to one-third of each of their shares so that he may be put on an equality, because the words of the testator clearly imply such intention, as the term used by him i.e., *Shirkat* literally means equality which it is here possible to preserve, and there is no question of impracticability in the execution of the bequest.

But if the shares of the legatees are not equal, as when the share of Zaid was of four hundred Dirhams and that of Umar two hundred, and Bakr was declared by the testator to be a sharer with them; because in such a case creation of equality was

impracticable, and, therefore, Bakr is entitled to get a portion of each of their shares, that they can be brought to equality as nearly as possible.

23. Acknowledgment of debt upon a death-bed.

If a person, on his death-bed, says to his heirs, "I am indebted to Zaid, and you should give him what he demands," in such a case the claim of Zaid, not exceeding one-third of the estate, is to be admitted, even though the heirs do not admit it.

24. Joint bequest to an heir and a stranger.

If a person bequeaths an article jointly to one of his heirs and also a stranger, in such a case the bequest in favour of the heir is not valid, and a portion only of the legacy is to be given to the stranger.

25. Joint bequest to the murderer of the testator and a stranger.

If a person makes a will jointly in favour of his murderer and also a stranger, in such a case the murderer is not entitled to any thing, and the stranger gets only a portion of the legacy.

26. Accident causing uncertainty, with respect to the legatees.

If a person bequeaths three pieces of cloth of different prices, giving the best in value to Zaid, the next in value to Umar, and the worst in value to Bakr, and one of these pieces of cloth is then lost and it is not known which of them is lost, and the heirs of the testator say, to each legatee, that "his share is lost," in such a case the bequest becomes void in toto.

But if, the heirs give the two remaining pieces of cloths to the legatees, the bequest will not be void, and remain in force, and those two pieces of cloth will be divided among them, by

two-thirds of the best in value to be given to Zaid, two-thirds of the worst in value to Bakr, and the remaining one-third of each to Umar.

27. Bequest of room in a partnership house.

If Zaid bequeaths to Umar a particular room of a house owned in partnership by him and Bakr, it is necessary that a partition should be made of the house; and then, if the room so bequeathed comes within the share of Zaid, it should be given to Umar as his legacy, according to Imam Abu Hanifah and Imam Abu Yusuf. But according to Imam Muhammad, he is entitled only to one half of the room.

But if, the room so bequeathed does not come in the share of Zaid, then, according to Imam Abu Hanifah and Imam Abu Yusuf, a number of fact equal to the size of the bequeathed room is to be given to Umar from the share of Zaid. But, according to Imam Muhammad, he is entitled only to the half that number.

28. Bequest of money belonging to another.

If a person bequeaths one-thousand Dirhams belonging to another, the execution of the bequest depends totally on the consent of the other person, and it is for him to confirm it, or not.

If the other person, after the death of the testator, gives his consent, the bequest will be valid, and the money will be paid to the legatee. However this consent, being purely voluntary and gratuitous; therefore if, after coming to know it, the other person refuses to pay the money, it is lawful.

29. An heir, after partition of the estate, acknowledging a bequest in favour of another.

If two sons divide their father's estate, and one of them then says that "his father had bequeathed one-third of his property to Zaid," the declarer should in such a case hand over one-third of his portion to Zaid.

30. Bequest of a female slave who previous to the partition of the estate, gives birth to a child.

If a person bequeaths a female slave to Zaid, and, after his death, the said slave gives birth to a child, the legatee is in such a case entitled to both the mother as well as the child, but their added value should not exceed one-third of the estate, otherwise then Zaid will receive the female slave, to the extent of one-third of the estate, and if her value is short of the one-third, the residue will be made up to him from the value of the child. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad; are of the view that in such a case the legatee is to get the amount of one-third of the property from both the mother as well as the child, in proportion to their respective values. Thus if the value of the mother is three hundred Dirhams, and that of the child is also the same, and the other goods amount to six hundred Dirhams, the whole estate will be of one thousand two hundred Dirhams, of which one-third will be four hundred Dirhams.

Imam Abu Hanifah holds that, in such a case, the female slave should be given to the legatee in payment of three hundred Dirhams, and he will also get one hundred deducted from the value of the child. But Imam Abu Yusuf and Imam Muhammad hold that he will be entitled to a deduction of two-thirds from the value of each.

Section

TIME OF MAKING THE WILLS.
(Fasl Fee E'tibaar Haalat-il-Wasiyat)

1. Gratuitous acts of immediate operation if executed upon a death-bed.

It may be noted, as a general rule, that where a person does in respect of his property any gratuitous deed of immediate

operation, not restricted to his death, if he is in the state of health at the time, such act is valid to the extent of his entire property; or, if he is sick, it will take effect to the extent of one-third of his property; and where a person does such act, with in respect of his property, restricted to the event of his death, it will take effect to the extent of one-third of his property, whether, at the time, he is sick or healthy.

But if, a person acknowledges a debt, such acknowledgment is of effect to the extent of his entire property, inspite of the fact that it is made during ill, because this is not a gratuitous act.

Still if, a declaration of this nature is made in health, it precedes a declaration of the same nature made in sickness.

It may also be noted that an illness of which a person afterwards recovers is considered, in law, as health.

2. Acknowledgment of debt on a death-bed in favour of a person who will afterwards become an heir.

If a sick person makes an acknowledgment of debt in favour of a stranger woman, or makes a bequest in her favour, or bestows a gift upon her, and afterwards marries her and then dies, the acknowledgment will be valid; but the bequest or gift will be void; because the nullity of an acknowledgment in favour of an heir depends on the person being an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death, as has been already explained; and as the woman was not an heir at the time of the acknowledgment, but had become so by marriage, at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void; and similarly the gift, of it is also subject to the same rule as the bequest.

- 3. An acknowledgment so made is not valid, if the principle of inheritance had existed in the person previous to the act.**

If a sick person acknowledges a debt due by him to his son, or makes a bequest in his favour, or gives a gift to him, at a time when the son is a Christian, and the son thereafter, but previous to his father's death, become a Muslim, all those acts of acknowledgement, gift, or bequest, will be void; the bequest and the gift will be void, because of the son being an heir at the death of his father, as above explained; and the acknowledgement will be void, because, although the son, on account of the bar of religion, was not an heir at the time of making it, still the cause of inheritance namely consanguinity did then exist, which brings an imputation on the father, as it covers a suspicion that he may have made a false declaration, in order, to secure the descent of part of his fortune to his son.

- 4. Such acknowledgement, gift or bequest, in favour of a son, being a slave, who afterwards becomes free previous to the father's death.**

If a sick person acknowledges a debt due by him to his son, who is a slave or Mukatib, or gives a gift to him, or makes a bequest in his favour, and the son afterwards, but before the death of his father, gets his liberty, in such a case none of these acts are valid.

- 5. Rule for ascertaining a death-bed illness.**

Paralytic, gouty, or consumptive persons, where their disease continues for a long time,* and they are in no immediate danger of death, do not fall under the description of sick [Mareez], and therefore their acts of gift, executed by such, take effect to the extent of their entire property.

But if such persons again become bedridden, they are taken to be one recently sick, and if they make a gift in the beginning of their illness, or after they are bedridden, such gift takes effect from the one-third of their property, because at such a time there is apprehension of death for which medicine is then administered to them, and, therefore, the disease is then considered as a death-bed illness.

CHAPTER 3

EMANCIPATION UPON DEATHBED; AND WILLS IN
RESPECT OF EMANCIPATION.

(Hidayah, Kitab-ul-Wasaya, Baab-ul- 'Itq Fil Maraz-il-Maut)

1. Emancipation, gift, and acts of Mohabaat, on a deathbed.

If a person, on his deathbed, emancipates a slave, or gives a part of his property to another person, or makes a Mohabaat, in purchase or sale, by buying an article at an over-value, or selling it at an under-value; or in respect of the dower, hire, or so forth; or becomes security for another all these acts are to be taken as bequests, to take effect to the extent of one-third of his estate.

2. A Mohabaat, and an emancipation, by the same person.

If a sick, dying, person makes a Mohabaat, of any kind, and then emancipates his slave, and after his death, the one-third of his property is not enough for both, in such a case Imam Abu Hanifah is of the view that the Mohabaat will have the preference.

Imam Abu Yusuf and Imam Muhammad hold that the emancipation will have the preference in both cases, because it is the stronger, as it cannot be taken back.

But Imam Abu Hanifah, is of the view that Mohabaat is the stronger, because it is interwoven in a compact of exchange; contrary to emancipation, as in that there is no exchange.

3. Mohabaat or emancipation precedes the bequests.

It may be noted as a rule, that where a person bequeaths many legacies, and the one-third of his property is sufficient for all of them, they are all to be executed without preference to any of them. But if, in addition to the legacies, he in his last illness also emancipates a slave, or does orders for emancipation

after his death, or sells anything by Mohabaat, in such a case both such emancipations, as well as the Mohabaat, have preference over to the legacies, and are therefore to be first satisfied from one-third of the estate; and the remaining is then to be divided equally among the legatees.

4. Appropriation of a sum, by bequest, to the emancipation of a slave and subsequent loss or failure of any part of it; and appropriation of a sum for performance of pilgrimage.

If a person, on his deathbed, keeps aside one hundred Dirhams, and makes the will that “after his death the said sum should be spent in emancipation of a slave,” and one Dirham of it is lost, in such a case Imam Abu Hanifah is of the view that the will is void, and that the remaining ninety-nine Dirhams cannot be spent in emancipating a slave.

But if, the person makes the will that “the said sum should be used as expenses of pilgrimage to Mecca,” in such a case the loss of one Dirham does not validate the will, but the remaining ninety-nine Dirhams can be used as desired by the testator, by sending a person from such a distance as can enable him to reach Mecca by means of the said sum.

Imam Abu Yusuf and Imam Muhammad are of the view that the will is valid in the former case and therefore the ninety nine Dirhams can be used in emancipation of a slave, in the same manner as in the other case to the performance of the pilgrimage.

5. Slaves exceeding one-third of the property, emancipated on a deathbed, but the heirs give their consent to his freedom.

If a person during his death-illness emancipates a slave of the value of one hundred Dirhams, and dies, leaving two sons and one hundred Dirhams, and the emancipated slave and his heirs give their consent to the emancipation, the slave, in such a

case is not required to perform any emancipatory service, but will be free without any service, because although the manumission was equal to a bequest in the proportion beyond one-third of the emancipator's property, but it is valid on account of the consent of the heirs.

6. Bequest of emancipation, in favour of a slave.

If a person makes the will that "his heirs should emancipate his slave after his death," and the slave, after the death of the testator, commits an offense, and the heirs give him, as compensation, to the avenger of offence, the will is void.

But if, the heirs agree to pay a redemptionary atonement ; the will remains valid, and does not become void.

7. Where the heirs and the legatee agree concerning a slave emancipated by the testator, but disagree as regards the date of the act.

If a person bequeaths to another "person, "one-third of his property", and leaves, among his other goods, a slave, and the legatee and the heirs agree that the testator had emancipated the slave, but differ as regards the time of emancipation, the legatee saying that it was during his heath, and the heirs, saying that it was during his illness, in such a case the statement of the heirs should be accepted, and the legatee is entitled only to what remains after deduction of the value of the slave from one-third of the testator's property.

8. An alleged emancipation and debt, credited by the heirs.

If a person dies, leaving no other property except one slave and the slave says to the heirs "your father while he was in health, emancipated me," and another person says to them "your father was indebted to me for one hundred Dirhams," and the heirs accept both these statements, the slave is, in a such case, required to perform emancipatory service to the extent of his value, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad, are of the view that the slave is emancipated without performing any service at all.

Section

WILLS FOR PIOUS PURPOSES.

1. Execution of bequests to sundry religious purposes, and ordained duties.

If a person makes many bequests for performance of sundry religious duties, such as pilgrimage, prayers, and so forth, it is necessary to execute first these which are absolutely incumbent and ordained, even if the testator may have mentioned them first or not; because the perform of the ordained duties is of more importance than those of the acts which are merely voluntary; and the law, therefore, supposes that the purpose of the testator was to perform of them first.

2. Unless all the purposes mentioned are of equal importance.

But if the many duties, the purposes of the will, are all of the same importance, and of similar force, and one-third of the estate will suffices not for the discharge all of them, they should in such a case are to be executed according to the order in which they have been mentioned by the testator, as it may be supposed that those to which of them he gave the precedence were, in his opinion, the most urgent.

Tahavee is of the view that alms should be given before pilgrimage. There is also one view of Imam Abu Yusuf to the same effect. But another view also reported from him is, that pilgrimage precedes alms; and this is also the opinion of Imam Muhammad.

3. Where the purposes of the bequests are purely of a voluntary nature.

If the execution of all religious wills, where the purposes of them are not binding duties such as the erection of a mosque, or of a receptacle for travelers, or of a bridge, it is necessary to follow the arrangement made by the testator, as it may be supposed that he thought the first mentioned to be the most urgent

The jurists, moreover, have said that if a person makes many bequests, some for the performance of religious duties immediately enjoined by Allah, and others for benevolent purposes amongst mankind, in such a case one-third of his property should be kept aside for the execution of them; and whatever may be the share spent in the performance of the duties belonging to Allah, it should be used according to the order of arrangement, made by the testator.

It may also be said that every different duty should be considered as a distinct legacy; because the purpose of each is the attainment of the goodwill of the Almighty, every duty has a purpose in itself, and each is therefore to be considered as a legacy left to a different person.

4. Rules in bequests towards the performance of a pilgrimage.

If a person makes the will that "the pilgrimage incumbent on him should be performed on his behalf after his death," in such a case the heirs should send a person for this purpose from the city of the testator, and provide him with such conveyances and equipments as are suitable to the testator's rank.

But if the property of the testator is not sufficient for the expense of sending a person from his own city, in such a case a person should be sent from some other nearer place, the distance of which from Mecca may be proportioned to the amount of the property.

If a person sets out from his own city, with an intention of performing the pilgrimage to Mecca, and dies on the road, after having willed that the pilgrimage should be performed by others on his behalf, a person should be deputed for this purpose from the city of the testator, according to Imam Abu Hanifah and this also is the opinion of Imam Zufar. But Imam Abu Yusuf and Imam Muhammad, hold that a person is should be sent from the place at which the testator had arrived in the prosecution of his intention.

The same difference of opinion exists where a person, having undertaken the pilgrimage on account of another, dies in the like manner on the road.

CHAPTER 4

WILLS IN FAVOUR OF RELATIVES AND OTHER CONNECTIONS.

(Hidayah, Kitab-ul-Wasaya, Baab-ul-Wasiyat Lil Aqarib Wa Ghairohum)

1. Bequest to a neighbour

If a person makes a will in favour of "his neighbour," this, according to Imam Abu Hanifah, means a will to his neighbour living in the adjoining house. But Imam Abu Yusuf and Imam Muhammad, are of the view that the word neighbour includes all inhabitants of the vicinity, belonging to the same mosque.

2. All competent descriptions of persons.

It may also be noted that the jurists are of the view that every person comes under the above description of "neighbour", whether he is owner of a house or not, or, whether a man or a woman, a Muslim or a Zimmee. The term "neighbour", is equally applies to all of these. Imam Abu Hanifah is also of the view that an absolute slave who possesses a house in the neighbourhood, is entitled to the benefit of the will. But Imam Abu Yusuf and Imam Muhammad are of a different view.

3. Bequest in favour of "As-haar" of the testator.

"As-haar" is the plural of "Sahar", which means the "father-in-law." If a person makes a will in favour of his "As-haar, all relatives of his wife within the prohibited degrees e.g., her father, brother etc., are included in it ; and similarly all relatives of his father's wife (i.e., his step mother) within the prohibited degrees, are also included in it, because they are also the As-haar of the testator. This definition of As-haar has been adopted by Imam Muhammad and Abu 'Obaidah.

It may be noted that all the relatives of the wife within the prohibited degrees are included in the will, inspite of the fact that at the time of the death of the testator, she is in her 'Iddat on account of a revocable divorce. But if the divorce is irreversible, her relations are not included, because the existence of relationship of As-haar depends on the actual existence of the marriage at the time of the testator's death; and by an irreversible divorce marriage relationship is finished.

4. And to his Khatan (son-in-law).

If a person makes a Will in favour of his "Khatan," it is a Will in favour of the husbands of his female relations within the prohibited degrees; and in it are included all the relations of these husbands within the prohibited degrees, because they also come under the definition of Khatan. Some jurists, however are of the view that this is according to the ancient custom; but in the present times Khatan means only the husbands.

It may also be noted that, in this respect, freemen and slaves, and the near and the distant relatives, are all equal, because the term Khatan includes all of them.

5. And to his Aqraba.

If a person makes a bequest in favour of his "Aqraba" (relatives) it is to be executed in favour of his nearest of kin within the prohibited degrees, and if they are available, in favour of the next in nearness, and so on with respect to the rest within the prohibited degrees, in succession. The will, in such a case, includes two or more; but the father, mother, or children of the testator are not included in it. This is according to Imam Abu Hanifah.

According to Imam Abu Yusuf and Imam Muhammad, the bequest includes only those who are descendents of the most distant progenitor of the testator, being the Muslim.

If a person, having two paternal and two maternal uncles, makes a bequest in favour of his "Aqraba", it is in favour of the paternal unless only, according to Imam Abu Hanifah, because he is of the view that regard is to be given to the order of relationship; while, according to Imam Abu Yusuf and Imam Muhammad, all the four uncles are included in it as according to them no regard is to be given to the order of relationship.

But If the testator has only one paternal and two maternal uncles, then one-half of the legacy will go to the paternal uncle, and the other half will go to the two maternal uncles, without regard to the plural number, which, in bequests, includes two because, if there were two paternal uncles, the whole legacy would have gone to them, therefore if there is one only, he will get no more than one-half, and the other half will go to the two maternal uncles.

But if the person had made the will for his "relatives," the position would have been otherwise, because in that case the whole legacy would have gone to the paternal uncle, and nothing to the two maternal uncles.

But if in the case of a will in favour of "relations" the testator has a paternal uncle only and no maternal uncles, the paternal uncle will be entitled to no more than a moiety of one-third of the estate; because, if there had been two paternal uncles, they would have taken the whole between them, one therefore gets only one-half.

But if, he has a paternal uncle and aunt, and a maternal uncle and aunt, the legacy will go in equal shares to the paternal uncle and aunt, as both are related to the testator within equal degree of affinity, and their connection is of a stronger nature than that of the maternal uncle or aunt. A paternal aunt, even though she is not entitled to inherit, is however capable of succeeding to a legacy, in the same manner as it is with respect to a relative who is a slave or an infidel.

It may be noted that, in all such cases, if the testator has no prohibited relation, the will is void, because it is restricted, to those related within the prohibited degrees.

6. Or to the Ehl of a particular person.

If a person makes a will in favour of “the Ehl of somebody,” it is to be held as a bequest to the wife of the person mentioned, according to Imam Abu Hanifah

But Imam Abu Yusuf and Imam Muhammad are of the view that the will is intended for every individual of the family, entitled to maintenance from the person.

7. Or of the house of particular person.

If a person makes a will in favour of “the Ehl of the house of somebody,” the father and grandfather of the person named are included in such will, as well as all the descendants of the remotest ancestor, on the paternal side, being Muslims ; and if a person makes a will in favour of “the Ehl of somebody,” it is a will for “the Ehl of his house,” the term Ehl signifying to the tribe of which he is a descendant.

If a person makes a will for “the Ehl of such a person’s” “Nasab” [race] or “Jins” [generation], in such a case by the “Nasab” is meant all those who have descended from his ancestors in general, but by the “Jins” are meant only those who have descended from the paternal ancestors, not from the maternal ancestors, because men are said to be of the generation of their fathers, and not of their mothers.

But it will be otherwise where the term “Qarabat” [affinity] is used; because that implies both with father as well as the mother.

8. Or to the orphans, blind, lame, or widows, of a particular race.

If a person makes a will for "the orphans, the blind, the lame, or the widows, of the race of somebody," and the individuals of the race named can be known, the bequest includes them all rich as well as poor, males as well as females; because the execution of such a will is practicable in this case, because the ascertainment of the legatees is possible.

But if the individuals of the race named are not capable of ascertainment in such a case only the poor ones are included in the will and not the rich ones because the will is of a pious nature, and the purpose of it can be best attained by satisfying the needs of the poor ones.

But it is otherwise if a person makes a will for "the youths, the virgins, of a particular race," who are many because in such a case the will is void; because, as the expression used does not indicate the need, the words of the testator cannot be taken to apply to the poor ones; nor can, the will can possibly be hold to be valid in favour of all the individuals of the race named, because, as they are not to be known, it is not possible to define them, and a will for unknown legatees is not valid.

9. Or to the race of a particular person.

If a person makes a will for "the race of somebody," in such a case, according to Imam Abu Yusuf and Imam Muhammad, and also according to the first view of Imam Abu Hanifah, the women of the said race are also included in the bequest, because the plural term "Banee" includes both the females as well as the males. Imam Abu Hanifah, however, afterwards changed this view, and held that the males of the race only are to be included, and not the females; because the term "Banee" applies to men literally, but to women only figuratively; and a word should be taken in its literal, and not its figurative, significance.

But where “the race of such a person” is the proper name of any particular tribe the position will be otherwise, because in that case the bequest will include the women also, as the term “Banee”, in such a case, includes the females of the tribe along with the males, in the same manner as in can the bequest, being in favour of the general expression “Bani Adam” [the sons of Adam], includes the freedmen, the sworn confederates [Haleefs], the slaves, as well as the Mawalaat confederates of that particular tribe.

10. Or to the Aulaad of a particular race.

If a person makes a will for the “Aulaad” (children) of the race of somebody,” the males as well as the females will have equal rights in such a will, because the term “Aulaad” includes all of the children.

11. Bequest to the heirs of a particular person.

If a person makes a will for “the heirs of somebody,” the legacy is in such a case is to be divided among the heirs of that particular person, in according to the rules of inheritance, i.e. a male will get as much as two females.

12. Bequest to “the Mawlaas” (i.e. emancipated or emancipator) of the testator.

If a person makes a will for “his Mawlaas,” and he has some “Mawlaas” who had emancipated him, and also some whom he had emancipated, the will is not valid; because the term “Mawla” implies two different meanings, viz., the emancipator, as well as the emancipated, and it cannot be know which of these two the testator intended, nor can the intention be understood to include both; because a word having two opposite meanings cannot be used at one end the same time; and as it is not known which sense the testator meant, the legatee is therefore uncertain; and an uncertain will is not valid.

CHAPTER 5

USUFRUCTUARY WILLS.

*(Hidayah, Kitab-ul-Wasaya, Baab-ul-Wasiyat Bis Sikni Wal
Khidmat Wal Samar)*

1. Article bequeathed in usufruct.

If a person makes the will in respect of the service of his slave, or the use of his house, for a definite or an indefinite period, such will is valid.

Similarly, if a person makes the will in respect of the wages of his slave, or the rent of his house, for a definite or indefinite period, it is valid.

2. Must be consigned to the legatee.

In both these cases, it is necessary to hand over the house or the slave to the legatee if not exceeding one-third of the property, so that he may enjoy the wages or service of the slave, or the rent, or use of the house during the prescribed period, and then give it back to the heirs of the testator.

3. If it constitutes the sole estate.

If the only property of the testator is the slave, or the house, in such a case the slave is to be kept one day by the legatee, and two days by the heirs, alternately; but the house, will have to be divided into three equal parts, of which one will be given to the legatee, and two will be given to the heirs, as the legatee will be entitled to one-third of the house, and two-thirds of it will go to the heirs.

4. The heirs (in the latter case) not allowed to sell their share.

It is not in such a case lawful for the heirs to sell the two-third of the house which will be given to them. This is according to the Zahir Rawayat.

But according to Imam Abu Yusuf, such sale is lawful, because two-third share is purely their own property.

5. Bequest becomes void on the death of the legatee.

If the legatee dies before the expiration of the specified period of usufruct, the property bequeathed in usufruct immediately returns to the heirs of the testator. But if the legatee dies during the testator's life time, the will becomes void.

6. Bequest of the produce of an article.

If a person makes a will of the rent of his house, or earnings of his slave, to Zaid, in such a case some are of the view that it is lawful for Zaid to reside in the said house himself, or to use the slave for his own service. But the more accepted view is, that it is not lawful.

7. Bequest of the use does not entitle the legatee to let it on hire.

It is not lawful for the legatee in respect of the usufruct of a slave, or of a house to let them out on hire.

8. Bequest of the use of a slave.

If a person makes the will of the service of his slave to another, person, the legatee is not entitled to carry the slave to another city from the city of the testator; unless his own family resides in the other city, in which case he can carry him to that city, provided the slave does not exceed not one-third of the testator's property.

9. Bequest of one year's income, if the article exceeds one-third of the estate.

If a person makes the will for one year's earnings of his slave, or rent of his house, to another, and he has no other property except such house or the slave, the legatee in such a case will get one third only of one year's income.

10. Bequest of the use of an article to one, and the substance of it to another.

If a man makes the will of the person of his slave in favour of Zaid, and that of the service of him in favour of Umar, and the slave exceeds not one-third of the testator's estate, then his person will be for Zaid, and his service will be for Umar.

11. Bequest of an article to one, and its contents to another, if expressed together.

If a person makes a will of his female slave to one person and of the child in her womb to another person, or of a ring to one person and of the stone of it to another person, or of a leathern bag, containing dates, to one person, and of the dates to another person, and the legacy do not exceed one-third of the estate, in such a case the first legatee will get his legacy, but the legatee of the contained article will not be entitled to any thing. But this will be where the second bequest is mentioned together with the first.

But if they are mentioned separately as if the testator first says, "I give my female slave to Zaid", and then remains silent, and thereafter says, "I give the child in her womb to Umar", the effect, according to Imam Abu Yusuf, will be the same as above mentioned; but Imam Muhammad says that in such a case the female slave will go to the first legatee, and her child will be shared equally by the two, The same applies to the two other cases, viz., the cases of the ring and the bag.

12. Bequest of the fruit of a garden.

If a person makes the will of “the fruit of his garden,” in favour of such person get the fruit actually present at the time of the testator’s death, but the fruit that not may grow afterwards.

But if, the testator says “I make the will of the fruit of my garden forever in favour of such person” to the legatee in such a case will be entitled to the fruit then existing, as well as the fruit that will grow afterwards during his life.

But if, the testator makes the will of the product of his garden (not the fruit), the legatee will then be entitled to the present product and also to all that may be collected from it upto the time of his death, even though the word “perpetual” has not been specifically mentioned by him in the will.

13. Bequest of the product of an animal.

If a person makes the will of the wool of a sheep, or its milk, or young, and then dies, the legatee will in such a case will be entitled to whatever may be available from these things at the time of the testator’s death, and not to what may be available afterwards inspite of the word “perpetual” used specifically by him in the will because the term wool, or anything else (mentioned above), do not imply what is not actually present at that time.

CHAPTER 6

WILLS BY THE ZIMMEES.

(Hidayah, Kitab-ul-Wasaya, Baab-ul-Wasiyat-ul-Zimmi)

1. Church or synagogue, founded during health.

If a Jew or a Christian, who is in good health, builds a church or a synagogue, and then dies, such building is to be inherited (by his legal heirs) according to all our jurists.

2. Bequest of a house for an infidel place of worship.

If a Jew or Christian makes a will that, "after his death his house should be made a church or synagogue for an specific sect of people," the will is valid, according to all our jurists, and is to take effect up to one-third of the testator's estate.

3. Particular legatees mentioned, or not.

If a Jew or Christian makes a will that "his house should be converted into a church or synagogue for a sect of people," but does specify any particular sect, the will is valid, according to Imam Abu Hanifah. But according to Imam Abu Yusuf and Imam Muhammad, it is not valid.

4. Bequests of Zimmees are of four kinds.

'(1) Wills made for a purposes which are held as pious according to their faith, but not according their to the faith of Muslims, as for instance the building of a church or a synagogue or the slaughter of hogs for feeding the poor ones of the polytheists, Imam Abu Hanifah holds such will as valid, as being in conformity with the faith of the testator. But the two disciples hold it as not valid, as being sinful. (2) Wills made for the

purposes which are held pious by the Muslims but not by the Zimmes, as for instance the construction of a mosque for the Muslims or for pilgrimage to Mecca, or burning the lamp in the mosque. All these wills are not valid as opposed to the faith of the testator himself, according to agreed view of all our jurists. But if they are made in favour of some specific persons, in such a case they will be valid. (3) Wills made for a purpose which are held as pious by Muslims as well as by the Zimmes, as for instance burning a lamp in the Baitul Muquddas or waging war against the infidel Tartars, are valid, whether they are made in favour of specific persons or not. (4) Wills made for the purpose which are not held as pious by the Zimmes as well as by the Muslims, as for instance the support of singers and dissolute women, are not valid, as this are of a sinful nature; unless, they are made in favour of specific persons, in which can they will be valid.

5. Will of a sensualist or innovator.

A sensualist, (Sahibul Hawa) or an innovator, (Sahibul Bid'at) provided he is not to the extent of open and avowed infidelity, stands, as regards, the will in the same position as a true believer, because the law takes into consideration only his apparent state, and it is that of a Muslim; but if he is to the extent of to open infidelity, he is to be taken as an apostate; and as regards his will there is difference of opinion. Imam Abu Hanifah is of the view that in such a case his bequest will remain in suspense, and become valid upon his repentance, or become void upon his death or expatriation, But Imam Abu Yusuf and Imam Muhammad hold that it is in all respects valid.

6. Will of a female apostate.

The will made by an apostate woman is held to be valid by all; because women in such cases are left to themselves, and not put to death, as in the case of men.

7. Mustamin bequeathing the whole of his property.

If a Mustamin makes the will the of his entire property in favour of a Muslim or a Zimmee, it is valid; because a will of the entire estate by a Muslim is deemed to be illegal because it effects the right of the testator's heirs (unless they assent such will). But the heirs of the Mustamin have no such rights, they as taken as, dead, so far as relates to the Muslim government, because they are in a hostile country. Besides, the property of a Mustamin is in security only on account of the protection he receives from the Muslim state, and the protection which he enjoys is in his own right; and not in the right of his heirs.

8. If a Mustamin bequeaths a part only,

If a Mustamin makes the will of a part of his property, the will to be is executed accordingly, and the remaining part of his property, will go to his heirs, even though they are residents of an hostile country, as this is the law regarding the Mustamins.

9. Emancipation, or Tadbeer, granted by a Mustamin on his deathbed,

If a Mustamin, before his death, emancipates his slave, or makes him a Modabbir in the Muslim territory, it is valid, and the slave will be accordingly free, even though his value exceeds one third of his master's estate; because a will beyond one-third of the property is taken as illegal only because it affects the right of the testator's heirs; but a Mustamin's heirs are possessed of no right.

10. Bequest in favour of a Mustamin.

If a Muslim or Zimmee makes a will in favour of a Mustamin, it is valid; because a Mustamin, so long as he is resident of a Muslim country, is to be taken in the light of a Zimmee; and as generosity and benevolence in favour of such person is also allowed to Muslims during life, it is also lawful for them to extend such acts to a period after their death.

11. Bequests of a Zimmee.

If a Zimmee makes the will of more than one-third of his property in favour of a stranger, or to an heir, it is not valid, because it is contrary to the laws of the Muslims to which they have laws conforming in respect of all worldly affairs.

12. Zimmee may make a bequest in favour of an unbeliever of a different sect.

If a Zimmee makes a will in favour of an infidel of a different sect, it is valid, due to the analogy of the wills relating to succession by inheritance. All the different sects of the disbelievers are to be considered as of one class.

13. Not being a hostile infidel.

If a Zimmee, resident of the Muslim territory, makes a will in favour of a hostile infidel, it is not valid, because as inheritance does not go to those, because of the difference of country, it follows that a will from the one to the other is of no effect, as will is similar to inheritance.

EXECUTORS AND THEIR POWERS.

(Hidayah, Kitab-ul-Wasaya, Baab-ul-Wasi Wa Maa Yumlikohu)

1. Executor, accepting his appointment in the presence of the testator.

If a person appoints another person as his executor, it is for that other person to accept or not accept the appointment, in the presence of the testator, because none has the power to compel anybody to interfere in his affairs. But if the executor accepts his appointment in the presence of the testator, and then, in his absence, or after his death, refuses it, such refusal is not admitted; because the testator had placed the reliance on his acceptance; and, therefore, if the refusal was allowed, in his absence, or after his death, he would, be deceived.

2. His silence leaves him an option of rejection.

If a person appoints another person as his executor, and that other person keeps silence, without any indication of his acceptance or refusal, he is in such a case entitled, after the death of the testator, to accept or refuse the appointment,

3. Any act indicative of his acceptance.

But if a person, under these circumstances, after the death of the testator, disposes of any part of the legacy by sale, then, as an act of this kind amounts to a clear indication of his acceptance, execution of the legacy becomes binding on him.

4. Having rejected the appointment, after the testator's death, he may still accept it.

If a person appoints another person as his executor, and that person keeps silence until the testator's death, and then refuses the office, and then accepts it, such acceptance is valid,

unless the Qazi, during the interim period, has set him aside, and appointed another person on account of his first refusal.

5. Where a slave, a reprobate, or an infidel, is appointed.

A person may appoint a slave, reprobate, or an infidel, to be his executor, but it is necessary for the Qazi to set aside such appointment, and appoint another person,

6. Appointment of the testator's slave.

If a person appoints his own slave as his executor taken any of his heirs has reached the age of maturity, it is not valid.

But if, the heirs are all infants, the appointment is in such a case is valid, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that it is not valid.

7. Executor's incapacity.

If an executor is not able to properly execute his office, it is necessary for the Qazi to associate another with him, so that the duties of the office may be properly executed jointly by both of them.

8. Executor pleading incapacity.

If an executor brings to the notice of to the Qazi his inability to execute the duties of his office, it is necessary, that the Qazi, before accepting his representation, should make inquiry to confirm the truth of it.

9. If he appears perfectly fit for the office.

If an executor is found perfectly fit for the discharge of his office, and trustworthy in it the Qazi is not entitled to dismiss him from his offices.

10. Removal on the complaint of the heirs.

If all or part of the heirs make a complaint against the executor, even then the Qazi should not set him aside until his guilt is proved, because he acts under an authority given to him by the deceased himself.

But if, he proves to be guilty, it is necessary for the Qazi to set him aside and appoint another person in his place.

11. One of the joint executors cannot act without the other.

If a person appoints two executors, none of them is singularly entitled, according to Imam Abu Hanifah and Imam Muhammad, to act without concurrence of the other, except in special circumstances.

But Imam Abu Yusuf is of the view that in all cases any of them can even singularly act without the other.

12. Except in matters requiring immediate execution.

The case in which Imam Abu Hanifah and Imam Muhammad, also hold the acts of any executor, even acting singly, to be valid, are such cases which need immediate execution. Thus it is lawful for any executor even singly, to disburse the funeral expenses, because a delay in it may occasion the body to become offensive. Similarly, any of the executors, even singly, can purchase the food or clothes for the infant children of the testator, as this is also a matter of urgency, which admits no delay.

13. Or which are of an incumbent nature.

Similarly, it is lawful for any of the executors to even singly restore a deposit, or a usurped article, or a thing which had been purchased by the testator under an not valid contract

or preserve the property left by the testator, or discharge the debts of the testator.

14. Or in which the interest or advantage of the estate are concerned.

Similarly, any of the executors may singly file a suit in respect of the claim of the testator, because cooperation of both testators in it would not be practicable.

The acceptance of a gift for an infant is also an act which any of the testators may perform singly.

Similarly it is also permitted to any of the executors even singly, to sell the goods subject to spoiling, as for instance the case of fruit, and the like; and also to collect together and keep the scattered property of the testator, as delay in such cases may cause the destruction of the property.

15. A testator appointing different executors at different times.

If a person appoints two executors in a separate manner as for instance he first says to one "I have appointed you my executor," and then, at a different time says to another "I have appointed you my executor", some are of the view that in such a case each of them has individually a power of exercising the duty of his appointment, without consulting the other, while some say that concerning such a case also there is disagreement between Imam Abu Hanifah and Imam Muhammad on one side, and Imam Abu Yusuf on the other, because a will is not final until the death of the testator, and as such at that time both will be the executors together, even though they had been appointed separately.

16. Death of a joint executor.

If one of the two executors dies, it is necessary for the Qazi to appoint another in his place.

17. Unless the deceased has himself nominated his successor.

But if the deceased executor had appointed the living executor to act singly for him, in such a case it will be lawful for the latter according to the Zahir Rawayat to act alone, and it will not be necessary for the Qazi to appoint another in the place of the deceased executors.

18. Executor of an executor.

If an executor, before to his death, appoints another person as his executor, in such a case the person so appointed will be entitled to act as executor, both for him, as well as also for the person for whose affairs his immediate testator had been acting as executor.

19. Executor is entitled to possess himself of the portions of infant and absent adult heirs, on their behalf.

If the executor, when the legatees are present, divides off the estate of the testator from the legacies, on behalf of his heirs who are infants, or adult absentee, and takes possession of their portions, it is lawful.

20. But not of the legacies of infant or absent legatees.

But if, the executor, the heirs being adult and present, divides off the legacies from the estate, and takes possession of them on behalf of infant or absent legatees, it is not lawful.

21. Legacy appropriated to pilgrimage, if lost.

If a person makes the will of a sum for the performance of pilgrimage to Mecca, and then dies, and the executor divides off the said sum from the heirs, and takes possession of it, and the same is then lost or destroyed, in his charge, or in that of the person whom he had nominated for the performance of the pilgrimage, in such a case, according to Imam Abu Hanifah, one-third of the remaining property of the deceased should be used for the pilgrimage.

But Imam Abu Yusuf, is of the view, holds that if the sum that has been thus lost had been originally equal to one-third of the property, nothing is then to be taken from the heirs; but that if it was less, the deficiency should be used for the purpose of the pilgrimage.

Imam Muhammad, however, is of the view that in neither case is the executor entitled to take anything from the heirs.

22. Legacy, after being divided off by the Qazi, goes to the legatee's heirs in case of his death.

If a person makes a will of third of one thousand Dirhams to another person who is at that time absent, and the heirs deposit the said sum with the Qazi, in order to divide and separate the share of the absent legatee, the division thus made by the Qazi will be valid, because of the validity of the will, and if the absentee then dies, before declaring his acceptance, the legacy will devolve to his heirs.

23. Executor can sell a slave of estate for the discharging the debts upon it, in absence of the creditors.

It is lawful for the executor, for discharging the debts of the deceased, to sell a slave for a suitable price, in the absence of the creditors.

24. Unless the slave is involved in debt.

But it will be otherwise in respect of an indebted slave; because the sale of such a slave in the absence of the creditors will not be valid, as their right lies in the person of the slave, since they have a claim to the earnings of his labour, which will not be possible on account of the sale of the slave.

25. Executor, having sold and received the price of an article which then proves to be property of another.

If a person appoints another person as his executor,

asking him, after his death, to sell a slave, and give the price in charity, and the executor accordingly sells the slave and takes possession of the price, and it is then lost or destroyed with him, and the slave proves to be the property of another person, the executor will be responsible to the purchaser for the price, customary to the laws of sale; and he will be entitled to take an equal from the goods of the deceased, being, an agent on his behalf.

This indemnification, according to Imam Abu Hanifah, he is entitled to take from the whole of the estate, and such is also the Zahir Rawayat.

But it is reported from Imam Muhammad, that he is to indemnify himself from the one-third of the goods.

26. If this has been lost.

If the executor sells a slave who, on account of inheritance, had fallen to the share of a child of the deceased, and takes possession of the price, and it is then lost in his hands, and the slave proves to be the property of some other person, the purchaser in such a case will be entitled to the return of the price from the executor, and the executor will be entitled to indemnify himself from the share of the child on whose behalf he had sold the slave in question; and the child will be entitled to another share from the shares of the other heirs; because upon the slave proving to be the property of some other person, the distribution of inheritance, as it was first made, is finished, as the case, will, in fact, be the same as if no such slave had ever existed, or had been part of the estate, and came to the share of the child by inheritance.

27. Executor may accept a transfer for a debtor to his infant ward.

If a person indebted to an orphan wants to transfer his debt to some other person, and the executor agrees to the same, such agreement is valid, if it is in the interest of the orphan himself.

28. Or sell or purchase moveables on his account.

It is also lawful for an executor to sell or purchase moveables, on behalf of the orphan under his charge, either on equal basis, or at such a rate as to cause a negligible loss, but not at such a rate as to cause a great and apparent loss.

29. He may also sell moveables on account of an absent adult heir.

An executor has also the power to sell every property belonging to an adult absent heir, excepting the immoveable properties.

30. He cannot trade with his ward's property.

It is not lawful for an executor to trade with the property of the orphan.

31. He may sell moveable property on account of the infant or absent adult brother of the testator.

According to Imam Muhammad and Imam Abu Yusuf, the executor of a brother, in respect of an infant brother, or one who is of mature age, who is absent, stands in the same position as the executor of a father with respect to his adult absent son and is empowered to sell the moveable property of the orphan or absentee; and similarly of an executor appointed by the mother or uncle; because, as the mother and uncle are entitled to interfere in the management of the property as far as it relates to its preservation, so also is the executor is entitled who represents them.

32. Power of a father's executor precedes that of the grandfather.

The power of the father's executor, in the management of the property of his orphans, is superior to, and precedes, the power of the executor appointed by the grandfather.

33. If there is no executor, the grandfather is the father's representative.

If a father dies without appointing an executor, the grandfather represents the father; because a grandfather is most nearly related to the children of his son, and most interested in their welfare; and as such the grandfather is entitled to contract the infant wards in marriage, in preference to the father's executor, even though the latter has preference over him in matters of management of the property.

CHAPTER 8

EVIDENCE REGARDING THE WILLS.

(Hidayah, Kitab-ul-Wasaya, Fasl Fish Shahadat)

1. Evidence of two executors to the appointment of a third.

If two executors give evidence that the deceased had associated a third person with them, and that person denies his having done so, the evidence of the executors is of no effect; because their assertion, having a tendency to their own advantage, in the case it will afford them from part of their labour, lays them open to suspicion.

If on the contrary, the third person claims or admits of the executorship, their evidence is valid.

2. Evidence of orphans to the appointment of an executor.

If two orphans give evidence that their deceased father had appointed a particular person his executor, and the person mentioned denies the same, their evidence is not credible, being liable to a suspicion in the advantages they would draw from the labours of a person exerted towards the preservation of their property.

3. Testimony of executors with respect to property, on behalf of an infant.

If two executors give evidence, on behalf of an infant heir (their ward), concerning property of the deceased, or of any other person, it is of no effect; because their testimony merely tends to prove their right to the management of such property.

4. Or on behalf of an adult.

If two executors give evidence, on behalf of an adult heir, in respect of the property of the deceased, it is not valid; but it is valid in respect of the property of any other person. This is according of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that in both cases the evidence is valid.

5. Mutual evidence of parties, on behalf of each other.

If two persons give evidence in respect of a debt of one thousand Dirhams, which was due from a deceased person to Umar and Zaid, and Umar and Zaid give a similar evidence in favour of these two, the evidence on both sides is valid.

But if, each of the parties in the same manner give evidence that legacies had been left by the deceased to the other, their testimonies are not valid. This is according to Imam Abu Hanifah and Imam Muhammad.

But Imam Abu Yusuf holds that in either of these cases, these evidences are not valid.

6. Unless each legacy, respectively, consists of a slave.

If two persons give evidence that a specific person had given in a will his female slave as a legacy to two others, and the two others give evidence that the same person had given a will a male slave to these two, both testimonies are valid.

7. Mutual evidence of this nature.

If two persons give evidence that a specific person had given in a will the one-third of his property to Zaid and Umar, and Zaid and Umar, on the other hand, give evidence that the

same person had given in a will one-third of his property to these two, the evidence of both parties is void and of no legal effect similarly if the two give evidence that the person had given in the will his male slave to Zaid and Umar, and Zaid and Umar, on the other hand, give evidence that the said person had given in the will his female slave to those two; because, as the evidence on each part tends, in those cases, to establish a right of participation, it is therefore not totally free from suspicion.

BOOK – VIII

WADI'AT

(DEPOSIT)

WADI'AT *

(DEPOSIT)

(Hidayah, Kitab-ul-Wadi'at)

Definition of the "Wadi'at".

Legally "Wadi'at", signifies "keeping of his property by a person with another person."

The person who gives his property to another person to keep it is known as the "Mode", or the depositor; the person who is empowered, to keep is known as the "Mustaude", or trustee; and the property so given to another, for keeping it is known as the "Wadi'at", because Wada' literally means "to leave", and the thing in question is left with the "Mustaude", or trustee.

1. Responsibility of trustee for a deposit.

A property kept in deposit remains with the person who is given the charge of it, as a trust, and if it is lost or destroyed in the trustee's hands, without any default on his part, he is not responsible for it; because the Holy Prophet has said, "an honest trustee is not responsible;" (Dara Qutni' and Ibne Maajah) and also, because there is a necessity, amongst the mankind, for deposits; and this necessity could not be fulfilled in case of making the trustees responsible, as no one could then accept the trust.

2. He may keep it himself, or commit the care of it to any of his family.

A trustee can keep the property himself, or hand it over, for keeping it, to some other person of his family, such as his wife his son, his mother, or his father.

Qur'an, Ch.2 (Baqarah), verses 283; Ch.4(Nisa), verses 58; Ch.70(Ma'aarij), verses 19 to 32; Ch.23(Molminoos), Verses 1 to 8; Ch.8 (Anfaal), verses 27 and 28; 'Ainul Hidayah Vol. III pp. 651 to 666

3. If he gives charge of it to a stranger.

But if the trustee gives the property in the charge of any person other than a member of his own family, as if he gives it on hire to some person out of his family, for keeping it, or gives it in deposit to some person out of his family, he will be responsible for it.

4. So also, if he keeps it in a place of custody belonging to another.

If a trustee keeps the property in a place of custody belonging to another person, he will be responsible for it.

5. Putting it out of his own possession for the immediate preservation of it.

If the house of a trustee catches fire; and he gives the property in deposit with him to his neighbour, or if, while in a boat which is about to sink, he throws the property into another boat, and it is in either case lost, he will not be responsible, for it because he acted only for the preservation of it, and therefore according to the consent of the depositor.

But the statement of the trustee only, in such cases, is not to be accepted unless supported by witnesses.

6. Neglecting to deliver it on demand.

If the owner of the property demands it from the trustee, and he does not deliver it to him, inspite of the fact that he is capable of such delivery, he will be in such a case responsible for it.

7. If he mixes it inseparable with his own property.

If the trustee mixes the property in deposit with him with his own property, in such a manner that separation of it becomes

difficult, he should in such a case make an adequate compensation and the owner, according to Imam Abu Hanifah, is not entitled to share the mixed property, whether the mixture is of a homogeneous nature such as milk with milk, wheat with wheat, or white Dirhams with white Dirhams, or of a heterogeneous nature such as oil of sesame with oil of olives, or wheat with barley.

But Imam Abu Yusuf and Imam Muhammad are, however of the view that where the mixture is of homogenous articles not of a liquid nature, such as white Dirhams with white Dirhams, or wheat with wheat, the owner of the deposit will be entitled to becoming a sharer with the trustee, or of taking a compensation for the value.

8. If the mixture be occasioned by accident.

But if a property in deposit is mixed up with the property of the trustee, not on account of any fault of the latter, but it is due to any accident, as if a bag containing the deposit, and another containing property of the trustee, should both be torn, and the contents mingled together, in such a case, the trustee will become a sharer in the property with the depositor, and will not be responsible for any compensation.

9. If the trustee spends a part, and supplies the deficiency, by mixture, from his own property.

If a trustee spends part of the property in deposit with him, and then brings a similar to what he had spent, and mixes it with the remaining part of the deposit, in such a manner that its separation becomes difficult, he, in such a case, will be responsible for the entire deposit.

10. Transgression with respect to the deposit.

If a trustee commits a difficult in respect of the property in deposit, with him, by converting it to his own use, as

if, being a quadruped, he rides upon it; or, being a gown, he wears it; or, being a slave, he uses his services, or by giving it to the care of a stranger, and he then gives up the use of it, or gets it back from the stranger, his responsibility thereupon is finished.

11. If the trustee denies the deposit, upon demand.

If the owner of the property in deposit demands it back from the trustee and the trustee denies the deposit, and it is then lost, the trustee, in such as case, will be responsible for it.

If, also, even after the denial, the trustee admits that the property in question was in deposit with him, still he will not thereby be exempted from the responsibility.

12. If the denial is made to a stranger.

If the trustee denies the deposit of the property with him to someone other than the owner, he will not be responsible according to Imam Abu Hanifah, because the denial to any person other than the owner may be for the sake of preserving the property itself. Imam, however, holds a contrary view.

13. Trustee is entitled to carry the deposit with him upon a journey.

A trustee is entitled, according to Imam Abu Hanifah, to carry the property in deposit with him when he goes on a journey, even though carriage and other expenses may have thereby to be incurred.

Imam Abu Yusuf and Imam Muhammad however, hold that this is not permitted to him where carriage or other expense are to be incurred.

14. Provided the contract is absolute, the road safe, and the journey necessary.

It may however, be noted that such a journey will be permitted if the contract is absolute, the road on which the trustee will travels is safe, and the journey is necessary.

But if the journey is not necessary, and the trustee undertakes the journey with all his family, he will not be responsible; but if, the journey is not necessary, and he leaves his family behind, he will be responsible, as in such a case it is his duty to leave the property in deposit with him with his family.

15. Unless this is expressly prohibited.

If the owner specifically prohibits the trustee from carrying the property in deposit with him out of the city, and still he carries it out, he in that such a case he will be responsible for it, as the prohibition imposed on him is valid, because keeping of the article in a city is most safe.

16. In case of a deposit by two persons.

If two men deposit any property jointly with another person, and one of them thereafter comes, and demands his share of the property in deposit, the trustee should not give it, unless the other depositor is also present, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad hold that the trustee should deliver the claimant his share; and the same is also the view mentioned in Qadooree's Compilation.

17. Two persons receiving a divisible article in trust.

If a person deposits with two persons, a property which is divisible, it is not lawful for any of these trustees to give such property entirely to the other, but they should divide it, and keep each one-half; But, if the property is not divisible, any of them can lawfully keep it entirely with the consent of the other. This is according to of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad hold that it is lawful for any of the parties to take entire charge, with the consent of the other, in either case.

18. Restrictions are not regarded where they are repugnant to custom or convenience.

If the owner of the property in deposit says to the trustee "deliver not the property in deposit with you to your wife," and still he delivers it to his wife, in that case, be responsible for it.

19. Or where they relate to the particular apartment in a house.

If the owner says to the trustee. "Keep the property in deposit with you in this room of the Sarai," and he keeps it in another room of the same Sarai, in such a case he will not be responsible for it; because the condition was useless, as there is no difference with respect to keeping in different rooms of the same Sarai. But if, he keeps it in a different Sarai, he will be responsible; because, as difference of Sarais causes difference in the keeping, the condition therefore is of use, and the prohibition is therefore valid. If, however, there is an evident difference between the two different rooms of the same Sarai as if, the Sarai is expensive, the room prohibited is full of holes and crevices, the condition imposed will be valid, and the trustee will be responsible in case of keeping it in that room.

20. Where the deposit is transferred to a second trustee, and lost.

If a person deposits something with another person, and the other person again deposits it with a third person, and it is lost in the third person's hands, in such a case, the owner of the thing deposited, according to Imam Abu Hanifah, should take compensation from the first trustee, and not from the second one.

But Imam Abu Yusuf and Imam Muhammad hold that the owner is entitled to take the compensation from the first or from the second trustee; and that, if he takes it from the first trustee, the first trustee is not empowered to indemnification from the second trustee; but that, in case of his taking it from the second trustee, the second trustee is then entitled to take indemnification from the first trustee.

21. Claim advanced by two persons to a sum of money in the possession of a third person.

If two persons separately claim one thousand Dirhams in the possession of a third person; each saying that he had deposited them with him; and the possessor denies their claims, but refuses to take an oath on it, the one thousand Dirhams should, in such a case, will be divided between the two claimants, and the defendant will remains responsible to them for one thousand more.

GHASB
(USURPATION)

GHASB *

(USURPATION)
(Hidayah, Kitab-ul-Ghasb)

Definition of "Ghasb".

Literally "Ghasb", means "forcibly taking of a thing from another," and legally it signifies the taking of the property of another, valuable as well as sacred, without the consent of its owner, thus finishing the owner's possession of it.

1. Acts by which usurpation is proved.

Usurpation is proved by taking service from the slave of another person, or by putting load upon the animal of another person; but not by sitting upon the bed of another person; because by taking service from the slave of another person, and by putting the load the animals of another person, the possession of the owner is finished; but by sitting upon the bed of another person, the possession of its owner, is not finished.

2. Wilful usurper is an offender.

It may be noted that if any person knowingly and intentionally usurps the property of another person, under the law he is treated as an offender, and becomes liable for compensation.

But if, he has not usurpation the thing knowingly and intentionally, as where a person causes damage to any property thinking it to be belonging to himself, and it afterwards proves the property of another person, in such a case, though he will be liable for compensation, as compensation is the right of the owner; but he will not be treated as an offender.

Qur'an, Ch.3 (Aale Imran), verses 16; Ch.4(Nisa), verses 107 and 108 ; Ch.5 (Maa'idah), verses 13; Ch.5 (Anfaal), Verses 27,28 and 58; Ch.2 (Yousuf), verses 52; Ch.22 (Hajj), verses 38; and Mishkaat, Kitabul Buyoo ; Babul Ghasb, 'Ainul Hidayah Vol. III pp. 866 to 899

3. Usurper of an article of the class of similars.

If a person usurps anything of the class of similars, as for instance articles of weight, or measurement of capacity, of which the specification are nearly equal, and it is destroyed in his hands, he is in such a case liable to its owner for a similar thing.

But if, the usurper is not in a position to give a similar thing, because of no similar is found, he in such a case will be responsible to pay the value of the article at the time of the fitting of the suit by the owner. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf are of the view that he will be responsible for the value of the thing that was on the day of usurpation.

Imam Muhammad, however, has said that he will be responsible for the value of the article that was on the day when its similar was not found.

4. If the article is of the class of not similars.

If a person usurps anything of the class of not similar things as for instance where the specification are different, like household goods, he will be in such a case liable for the value of the article that was on the day of usurpation.

5. Article usurped to be restored to the owner.

It is necessary for the usurper to restore the actual article usurped to its owner if it is still in his possession.

6. In the place where it was usurped.

It may be noted that, according to the view of the majority of the jurists, it is necessary for the usurper to restore the thing to the owner in the place where he had usurped it, because the value of things may differ in different places.

7. Failing of this, the usurper must be imprisoned.

If the usurper asserts that he has lost the usurped article, the Qazi should punish him with imprisoned for some length of time sufficient enough to ascertain whether or not he has the thing in his possession, and then order him to give the value of it to its owner.

8. Usurpation (so as to occasion responsibility) cannot take place but in moveable property.

It may also be noted, that the term "usurpation" to create responsibility applies only in respect of moveable articles, such as garments, or the like; being finishing of the owner, possession cannot be effected except by taking away and therefore, if a person usurps the land, and the land is destroyed in his possession that is, rendered useless by an inundation, or the like, the usurper is not liable for it. This is according to Imam Abu Hanifah and Imam Abu Yusuf.

But Imam Muhammad is of the view that the usurper will be responsible for the land; and this was also the first view of Imam Abu Yusuf, which has also been adopted by Imam Shaafe'ee.

9. Usurper of a house is responsible for the furniture.

A usurper of a house is responsible, according to all our jurists, for whatever he damages of a house, by his residence in it, or by his pulling it down, because it is intentional damage, and compensation for fixed property is incurred by intentional damage, as where, for instance, a person takes away the manure or water from land as it is an act in respect of the substance of the land.

10. If he sells the house, and the owner has no witnesses.

If a person usurps a house, sells it, and hands over its possession to the purchaser, and admits the usurpation, and

the purchaser denies it; and there are no witnesses of the owner to prove it, in such a case there is a difference of opinion between Imam Abu Hanifah and Imam Abu Yusuf on one side, and Imam Muhammad on the other side. According to the first two, the seller of the house is not responsible for the sale and delivery of its possession to the purchaser (contrary to the view of Imam Muhammad); because sale and delivery of the house to the purchaser is merely a usurpation by the seller; and usurpation of moveable property according to Imam Abu Yusuf and Imam Muhammad does not require compensation.

11. Usurper of the land responsible for the damage caused by cultivation of it.

If usurped land is destroyed by the cultivation of it, the usurper will be liable to pay compensation for the damage, because he has destroyed the land. Moreover, he should deduct from the produce of the land the amount of the seed he has sown, and also the amount he has paid for the damage; and the surplus that remain, should be given in charity.

The author of *Hidayah* says that this is according to Imam Abu Hanifah and Imam Muhammad; but according to Imam Abu Yusuf, to give the surplus in charity is not necessary.

12. Usurper of a moveable property.

When a usurped moveable property is destroyed while in the possession of the usurper, by his fault, or by the fault of any another person, in either case he is liable to pay the value of it to its owner.

13. If he himself makes it defective.

If the usurper, himself by his own act, makes defective the thing he has usurped, he is liable to make good the defect.

14. But not for any depreciation sustained by it in his hands.

But he is not liable for any depreciation in the value of the usurped article if he gives back the usurped article in the place of usurpation.

15. Usurper of a slave, giving him on hire to another.

If a person usurps a slave and gives him on hire for service to another person to work, and gets his wages, and the slave is thereby adversely affected in his value, in such a case, upon the principle laid down in the previous case, the usurper will have to pay compensation for the damage, caused to the slave, and will have to give the entire wages received by him in charity.

The author of *Hidayah* says that this is according to Imam Abu Hanifah and Imam Muhammad; while according to Imam Abu Yusuf there is no necessity for giving the wages in charity.

16. If the slave is destroyed.

But if, the slave is destroyed in the possession of the usurper, making him liable for his entire value, he can in such a case give the wages in the compensation.

17. Profits acquired by means of usurped money.

If a person usurps one thousand Dirhams, and with those thousand purchases a females slave, and afterwards sells her for two thousand Dirhams, and then with those two thousand purchases another female slave, and also sells her for three thousand Dirhams, in such a case the usurper will have to give in charity the entire profit, i.e. two thousand Dirhams.

18. But not profits of any different description.

If a person purchases with one thousand usurped Dirhams a female slave of the value of two thousand Dirhams and gives her as a gift to another person; or purchases wheat with the said one thousand Dirhams, and eats the same; he will not, under such circumstances, be liable to give anything in charity.

Section (1)

USURPED GOODS CHANGED BY ACTS OF THE USURPER.

(Fasl Fee Maa Yataghayyar Be Fe 'lil Ghasib)

1. Change made in the usurped article.

If a usurped article is altered by the usurper, in the manner that it loses its name as well as its original purpose, it will then be held as separated from the right of the owner, and become the property of the usurper, and the usurper will become liable for it; but he will not be entitled to get any profit from it till he pays the compensation for it to its owner.

Examples of this are: where a person usurps a goat, slaughter it, and then cooks it or boils it; or usurps the wheat, and then grinds it into flour, or usurps iron, and makes a sword of it; or usurps the clay, and makes a vessel of it.

2. Change made in gold or silver.

If a person usurps gold or silver, and converts it into Dirhams or Deenars, or makes a vessel of it, such silver or gold will not be treated as separate from the property of the owner, according to Imam Abu Hanifah, and therefore he will be entitled to take it from the usurper without any compensation.

But Imam Abu Yusuf and Imam Muhammad are of the view that the usurper, in such a case, will acquire a property in the metal, and will have to pay compensation of a similar quantity of gold or silver to its owner.

3. Construction of a building upon a usurped beam.

If a person usurps a beam, and builds a house on it, the beam is, in such a case, will be treated as separate from the property of the owner, and the usurper will be liable to pay compensation to him for the value of it.

4. Slaying a usurped animal.

If a person usurps and slaughter the goat of another person, the owner will in such a case, be entitled to take compensation for the value from the usurper, and hand over the goat to him, or to keep the goat, and receive from the usurper compensation for the damage caused to the goat by slaughtering it.

5. Damage caused to usurped cloth.

If a person usurps the cloth of another person, and tears it off causing a small rent in it, he will in such a case liable for the damage, and the cloth will remain with its owner or, because the substance of it is present in every respect, as nothing more has happened to it than a mere defect; and therefore if the rent is large, which destroys many of its uses, the owner will in such a case entitled to take the full value of the cloth from the usurper, and give him the cloth, or to keep the cloth and take compensation for the damage caused to it.

6. Planting or building upon usurped land.

If a person usurps the land, and plants trees on it, or erects a building upon it, he will in such a case be ordered to remove the trees and clear the land, and to give back to its owner.

But if, removal of the trees or the building will be injurious to the land, the owner of the land will in such a case, be entitled to pay to the proprietor of the trees or the building compensation equal to the value they would have when removed from the land, and possess them himself ; as in this there will be an advantage to both, and the injury to both will be avoided.

7. Dying usurped cloth, or mixing usurped flour with oil.

If a person usurps white cloth of another person and then dyes it as red, or usurps the flour of another person and then mixes it with oil, in such a case the owner will be entitled to take from the usurper compensation equal to the value of the white cloth, or an equal quantity of the flour, and give the red cloth or the mixed flour to the usurper; or, take the red cloth or the mixed flour, and give to the usurper compensation equal to the additional value that these articles may have acquired on account of the red colour, or the mixture of oil.

Section (2)

DAMAGING THE USURPED GOODS

1. Usurper damaging the goods usurped.

If a person usurps any article of goods or furniture, and causes damage to it, and the owner of it demands compensation for the value from the usurper, the usurper in such a case will become the owner of the usurped article.

2. Amount of the usurped article to be determined by the declaration of the usurper on oath, or by evidence of the owner.

It may be noted that, in determining the value of the usurped article, the assertion of the usurper on oath, is to be accepted, as the owner is the claimant of excessive value, and the

usurper denies it, and the assertion of the denier upon oath should be admitted; unless, the owner adduces evidence in support of his claim; as in that case the assertion of the owner is to be admitted, as being supported by evidence, as it is a convincing proof.

3. After accepting this, the owner cannot demand the article.

If, the usurped article appears, or is found, at a time when the value of it is more than the compensation which the usurper has given to the owner in satisfaction of the claim of the owner, or on account of the evidence produced by him, or of the non-denial of the usurper, the owner, in such a case, is not entitled to take the usurped article. It, remain as the property of the usurper.

But If, the usurped article is found at a time when its value is equal to, or less than, the compensation taken by the owner in conformity with the assertion or oath of the usurper, the law according to the Zahir Rawayat is the same as already mentioned ; that is, the owner will be entitled to adhering to the compensation he has taken, or of taking back from the usurper the usurped article, and return to him the amount of the compensation. This view is approved; because the consent of the owner in taking the compensation was not complete in inasmuch as he claimed a larger amount ; which he did not get, and therefore he has the option as above, because of the non-existence of his consent.

4. Sale of a usurped slave by the usurper.

If a person usurps a slave, and sells him, and the owner of the slave takes the value of the slave from the usurper by way of compensation, the sale in such a case will be valid.

5. Produce of the usurped property.

The fruit of an usurped orchard, and the children of a usurped female slave, together with their produce as for instance,

increase of stature and beauty, will be treated as trust in the hands of the usurper. If, therefore, they are destroyed, he will not be responsible for them ; unless, he is guilty of trespass with respect to them, or has refused to comply with the demand of the owner to deliver them to him; as in such cases he will be responsible.

6. Liability of the usurper of a female slave for any damage she may receive by the birth of a child.

If a female slave has been injured by giving birth to a child, while in the possession of the usurper, and the value of the child is equal to the injury sustained by her the usurper will not be liable for a compensation.

7. Usurper of a female slave impregnating her.

If a person usurps a female slave, and has sexual intercourse with her, and she becomes pregnant, and he gives her back in that condition to her owner, and she then dies on account of childbirth, the usurper in that case will be liable to pay compensation equal to her value on the day she becomes pregnant. But if she was free, no compensation will be payable, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that no compensation is payable even if she was slave.

8. There is no hire for the use of an usurped article.

A usurper is not liable to pay the hire for the use of the usurped article but, if it is damaged then he will be liable for the damage.

USURPATION OF GOODS OF NO VALUE.

(Fasl Fee Ghasb Maa Laa Yatqoom)

1. **A Muslim is responsible for destroying the wine or pork of a Zimmee.**

If a Muslim destroys the wine or the pork of a Zimmee, he is liable to pay the compensation equal to the value of the same, But if he destroys the wine or the pork of a Muslim, no compensation will be payable by him.

2. **And should compensate it by payment of the value.**

Thus it is clear that if a Muslim destroys the wine or the pork of a Zimmee, he will have to compensate it by payment of the value of the pork, and also of the wine, inspite of the fact it is of a similar class.

3. **Change made in the usurped article.**

If a person usurps the wine of a Muslim, and changes it into vinegar by putting it alternately in the sun and in the shade; or usurps the skin of a carrion, and makes changes in it by tanning or dressing it by the use of any valuable article, then the owner of the wine is entitled to take the vinegar, without payment of anything to the usurper ; but the owners of the skin is entitled to take it, or payment of the value of the increase it may have received from the change to the usurper.

4. **Changing usurped wine into vinegar, by mixing in it some valuable ingredient.**

If a usurper of the wine changes it into vinegar by putting salt into it, the jurists say that, according to Imam Abu Hanifah, the vinegar will become the property of the usurper without any

thing becoming due from him; while, according to Imam Abu Yusuf and Imam Muhammad, the owner is entitled to take the vinegar, on payment of compensation to the usurper for the value of the increase in the article by means of the salt, that is to say, he will be liable to give him a quantity of vinegar equal to the weight of the salt.

But if, the owner wants to leave the vinegar with the usurper, and takes a compensation from him for its value, then the rule will be the same as in respect of the change in the skin.

5. Person destroying the musical instruments, or the drink of a Muslim

If a person damages the lute, the tabor, the pipe, or the cymbal of a Muslim, or throws away his Sukr, or Monaasaf, he will be responsible, because the sale of such articles is lawful, according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad of the view that he will not be responsible, because they hold the sale of such articles as unlawful.

Some say that this difference of opinion is only in respect of such musical instruments which are used merely for the sale of amusement; but if a person damages a drum, which is used in celebrating a marriage, he will be responsible, according to all the jurists.

Some, also, say that in fixing the responsibility, the view are based on the rule laid down by Imam Abu Yusuf and Imam Muhammad.

By Sukr is taken to be the juice of unripe dates, which is caused to ferment and acquire a spirit without boiling; and by Monaasaf, is meant the juice of unripe grapes, boiled until only one half of it remains.

As regards the liquor boiled in the smallest degree, which is known as Baazuq, there are two views noted from Imam Abu Hanifah—one, that it is a lawful subject both for the sale and responsibility; and another, that it is not so.

6. Compensate for them is their intrinsic value.

Following the rule laid down by Imam Abu Hanifah, the destroyer, in the case here considered, is liable for the value of the articles in themselves, irrespective of the particular amusement they contribute. Thus if a female singer, for instance is destroyed, she is to be valued merely as a slave girl ; and the same applies to fighting rams, tumbling pigeons, game cocks, or eunuch slaves. In other words, if any of these is destroyed, it is to be valued and accounted for at the rate it would have borne if not fit for the light and evil purposes to which it is to be commonly applied; and similarly are the pipes, tabors, and other musical instruments.

It may be noted that, in the case of throwing away the Sukr or Munassaf, the destroyer is liable for the value of the article, and not for a similar of it, because it does not behave of a Muslim to be the owner of such articles.

But if, a person destroys a crucifix belonging to a Christian, he will be responsible for the value it bears as a crucifix; because Christians are entitled to follow their own way of worship.

7. The usurper of a Mudabbirah, and the usurper of Umm-e-Walad, who dies in his possession.

If a person usurps the Mudabbirah of another person and she dies in his possession, he will be responsible to pay him her value. But, if a person usurps the Umm-e-Walad of another person, and she dies in his possession, he will not be responsible to pay him her value. This is according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the usurper will be responsible to pay her value to her owner in both cases.

The reason for this difference of view is, that a Mudabbirah is universally accepted to be a valuable property; and Umm-e-Walad is not valuable, according to Imam Abu Hanifah; while Imam Abu Yusuf and Imam Muhammad hold Umm-e-Walad also to be valuable.

PART – III
MAZARI'AT
(CULTIVATION)

Synopsis

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BOOK – I
MAZARI'AT
(CULTIVATION)

CULTIVATION

*(Hidayah, Kitab-ul-Mazari'at)***Definition of "Muzari'at"**

Legally "Mazari'at", signifies an agreement between owner of the land, and the cultivator, to share the produce of the land in the proportions as may be agreed between them.

Difference of opinions in respect of agreement of cultivation :

An agreement of cultivation is not valid according to Imam Abu Hanifah, but Imam Abu Yusuf and Imam Muhammad hold it as valid, as it is related of the Holy Prophet that he made such an agreement with the people of Khaybar, by which it was agreed that they would cultivate the gardens and lands of Khaybar, and have one half of the fruits and grain produced from them, and that they would give the other half to the Holy Prophet. (Bukhari)

Further, an agreement of cultivation is, in fact an agreement of partnership in respect of the stock and the labour, between two parties, one being the owner of the land and the other being the cultivator of it, to share the produce between them.

It is therefore valid on account of its analogy to an agreement of Muzaribat ; because agreement of Muzaribat are valid on the principle of expediency ; because, as it often happens that there are persons who possess the property but have no capacity of trade or business, and also there are persons who possess such a capacity but have no property. It is therefore expedient of both that an agreement of Muzaribat be made between them, by which the desire of both may be accomplished; and since the same reason situation in the case of agreement of cultivation, they are therefore valid as are the agreement of Muzaribat.

*Mishkaat, Kitabul Buyoo' Baul Masaqaat Wa Muzari'ah. 'Ainul Hidayah Vol. III pp. 618 to 650

But it will be otherwise if one person gives to another person, his goats, fowls, or silkworms, to take care of them, on condition that the care taker will have one half of the produce, and the owner will have the other half ; because this is not approved ; because as the care of the keeper has no effect in creating the produce, partnership therefore does not actually exist in it.

The arguments of Imam Abu Hanifah in this respect are three-fold. Firstly, the Holy Prophet has expressly prohibited Mukhabera, which in the dialect of Medinah has the same meaning as Muzari'at i.e., agreement of cultivation. Secondly, to make an agreement of cultivation is to give hire the labourer for a part of that thing which is produced by his own labour, and therefore, in fact it is a Qafeez-ut-Tahaan, and since that is not lawful, similarly it is also not lawful. (Tahaan means a miller, or grinder of wheat, and Qafeez a cup used for measuring ; Qafeez-ut-Tahaan, therefore, means to engage on wages a person to grind wheat into flour, against giving him a measure of the flour as his wages). Thirdly, the rate of wages, in such a cases, is not certain, when the produce, if any is reaped ; or it is annihilated when there is no produce to be reaped ; and therefore, in either case the wages are not valid.

Moreover, as regards the agreement made between the Holy Prophet and the people of Khaybar, it was not in fact an agreement of cultivation, but it was rather of the nature of a tributary revenue which was allowed to be paid in kind, by way of compromise. As agreement of cultivation are thus deemed to be not valid by Imam Abu Hanifah, it follows that (agreeably to his view), where the labourer gives water, tills, and sows the land, and it still proves to be unproductive, he is entitled to the customary rate of wages adequate to his labour, since (according to Imam Abu Hanifah) the agreement of cultivation is, in effect, as an not valid wages.

But this is where the seed sown is given by the owner of the land ; because if the seed is also given by the cultivator, he is

liable for the rent of the land at the customary rate ; and if, in either case, any produce is reaped, it belongs to him who supplies the seed, as it is an increase from his property ; and the other, if he is the cultivator, is entitled to a rate of wages adequate to his labour ; or , if he is the owner of the land, to an adequate rent for his land.

In the present times, however, judgments are given by the courts according to the view of Imam Abu Yusuf and Imam Muhammad, because agreement of cultivation are in the interest of mankind, and also because they now extant everywhere.

Conditions which govern cultivation :

1. The following conditions govern the validity of agreement of cultivation :

The land should be fit of cultivation.

2. Parties should be duly qualified :

The owner of the land and the cultivator both should be competent to enter into the agreement viz., major, sane and conversant with cultivation.

3. Term of their continuance should be express :

The period or term should be expressed ; because such an agreement is for the use of the land as when the cultivator supplies the seed, or, for the use of the labour, as when the seed is to be supplied by the owner of the land.

4. Party should be specified who will supply the seed :

It should be specifically mentioned who will supply the seed so that the nature of the agreement may be clear i.e., whether it is for the use of the labour, or for the use of the land.

5. Share of the other party should be mentioned :

The share of the party who is not to supply the seeds should be expressed ; because in consequence of the agreement he will be entitled to a share ; and it is therefore necessary that the proportion of his share should be determined.

6. Land should be handed over to the cultivator :

The owner of the land should hand over the land to the cultivator, for cultivation of it, and that the owner himself shall not manage or enjoy it, because if it is stipulated in the agreement of cultivation that he will also manage, the agreement will be void.

7. Both parties to share the produce :

Both parties are to share the produce of the land after it is reaped; because an agreement for cultivation is in fact an agreement of partnership ; and, therefore, if a particular quantity of the produce is stipulated for one of the parties, it will not be valid ;

8. Specific seeds should be mentioned :

The specific kind of the seed, such as wheat, barley, etc should be mentioned, in order that the kinds in which the wages of the labourer are to be paid may be known.

9. Agreements of cultivation :

Valid Agreement of cultivation, according to Imam Abu Yusuf and Imam Muhammad, are of four kinds : (a) Where the land as well as the seed are supplied by the one, and the cattle and the labour by the other , (b) Where the land is supplied by the one, and the labour, seed, and cattle by the other ; (c) Where

the land, the seed and the cattle, are supplied by the one, and the labour by the other, (d) Where the land and cattle are supplied by the one, and the seed and labour by the other.

10. Two invalid agreements :

It may be noted, that, besides the above mentioned four kinds of agreement of cultivation, there are two more, which are, not valid; (a) Where it is stipulated that the seed will be supplied by the one, and the land, the labour and the cattle by the other ; because the sixth condition mentioned before is not found in it. (b) Where it is stipulated that the seed and cattle will be supplied by the one, and the land and the labour by the other, because in it also the sixth condition is missing.

In both these invalid cases the produce of the land according to the opinion of Imam Abu Hanifah will, belong to him who supplies the seed, upon the same principle on which it belongs to him in any other cases of agreements of cultivation which are not valid.

But according to the opinion of Imam Abu Yousuf and Imam Muhammad the produce will belong to the owner of the land ; he therefore stands in the position of a mere borrower of the seed which he has obtained by its being sown in his land.

11. Period of their duration and the produce :

Agreement of cultivation are not valid unless the period of their duration is specified because unless the produce of the land is indefinitely participated between the parties such as in one-third, one-fourth etc., in order that partnership may be proved between them.

12. If the grain alone is mentioned :

If it is stipulated, in the agreement of cultivation, that the grain will be divided equally between the parties to it and there

is no mention of the straw, still the agreement will be valid, because partnership is stipulated in the chief object of cultivation i.e., the grain such a case the straw will belong to the one who supplied the seeds, as the straw is the produce of it.

13. Straw will go to the one who supplies the seed :

If it is stipulated that the grain will be divided equally, and that the straw will go to the one who will supply the seed, it is valid because this is according to the spirit of the agreement of cultivation.

14. Straw cannot go to the other :

But if, it is stipulated that the straw will go to the one who did not supply the seed, it is not valid, because such a stipulation defeats the partnership in case nothing but straw is produced.

15. Produce to be shared according to the agreement ; and if nothing is produced, the cultivator has no claim :

When an agreement of cultivation is valid, the produce of the land is the joint property of the parties to the agreement, in such proportions as they may have agreed upon, such as one-half, one-third, or the like.

But if, nothing is produced, the cultivator will not be entitled to any thing ; because he has a right only to a share of the produce.

But it will be otherwise where the agreement of cultivation is invalid ; because in such a case an adequate wages becomes due against the person [i.e. one of the parties], but not against the produce ; and the said person will not be absolved on account of the failure of produce.

16. Where the agreement proves not valid :

When an agreement of cultivation proves to be invalid, the crop will belong to the one who has furnished the seed, because it is actually the produce of his property. Besides, the other one has no right in it except what he acquires on account of express conditions in the agreement ; and where that proves to be invalid, the entire crop will belong to the person who has supplied the seed.

17. Cultivator to gets wages :

If the seed has been supplied by the owner of the land, the cultivator will be entitled to suitable wages for his labour, provided it does not exceed what he would have received on account of the conditions of the agreement ; because, in fulfilling these conditions, he consented to give up his right to the excess. This is according to the law, laid down by Imam Abu Hanifah and Imam Yusuf.

But Imam Muhammad holds that he will entitled to suitable wages, to whatever amount.

18. Owner of the land to receive adequate rent :

If the seed has been supplied by the cultivator, the owner of the land will be entitled to receive an adequate rent for his land, whether there is any produce or not.

19. Adequate hire for the cattle, if supplied by him :

If the cattle have been supplied by the owner of the land, so as that the agreement according to the Zahir Rawayat, has become invalid, the cultivator in such a case is liable for an adequate hire for both the cattle as well the land ; and this is certainly just ; because the cattle are equally included in the contract of hire (the agreement of cultivation is, in fact, an

agreement of hire in such a case) ; and the use of the cattle and the use of the land are the uses of different kinds.

20. If agreement proves to be invalid :

Where the owner of the land, on account of supplying the seed, has become entitled to the produce, he will law-fully, on the agreement proving to be invalid, be entitled to enjoy the whole, because it was the produce of the land which was his own property.

But if, the cultivator, on account of supplying the seed, has become entitled to the produce, he can reserve for his own use a quantity equal to the seed he has supplied, and also a quantity equal to the rent he has to pay to the owner of the land, and the rest of the produce he should give for charitable purposes; because the produce comes from the seed, but grows out of the land, from which his right to the use of the land is not valid ; and as not validity in respect of the use causes a baseness in respect of the product, it follows that what remains with him as a return is lawful to him, and that everything else should be given in alms.

21. If the party who agrees to supply the seed retracts :

Where two men enter into an agreement of cultivation, and the one who had agreed to supply the seed afterwards retracts, before the sowing, the Qazi should not force him to abide by the agreement.

But if, the party who was not to supply the seed retracts, the Qazi can force him to fulfil the agreement.

22. If the owner of the land retracts :

If the owner of the land, who had agreed to furnish the seed, retracts, after the cultivator has tilled the land, the cultivator will not be entitled to receive anything for the labour he has done.

But some, are of the view, that although, according to the law, there is no compensation due to the cultivator, still, according to the conscience, it is necessary for the owner of the land to compensate the cultivator for the labour he has done, because he has actually been deceived in this matter.

23. Agreement is finished on the death of either party :

When any of the parties to the agreement dies, the agreement of cultivation, like agreements of hire, becomes annulled.

24. If the owner of the land dies when the crop has appeared :

If a person gives a piece of land to another person for a period of three years, and afterwards, when the first year's crop has appeared, but is still not fit for reaping, the said person dies, the land in such a case remains in the hands of the cultivator until the crop becomes fit for reaping , and the produce is then divided according to the conditions of the agreement ; and the agreement is annulled in respect of the remaining two years of the periods,

25. If he dies before that :

If the owner of the land dies after the cultivator has ploughed the land, and dug rivulets for watering it, but before appearing of the crop, the agreement is annulled, as in such a case the dissolution of it will not be deterrent to the cultivator's interest.

26. Proprietor of the land may dissolve the agreement :

The owner of the land is entitled to dissolve the agreement of cultivation, in case he has to sell the land to discharge the debts he may have incurred.

27. If the crop be growing :

But if, the crop has begun to grow, although it is still not fit for reaping, the land should not be sold for the payment of the owner's debts until the grain becomes ready to be reaped.

28. Agreement expiring before the crop is ready to be reaped:

If the period of the agreement of cultivation expires before the crop becomes ready for reaping, the cultivator will have to pay to the owner of the land the rent for his proportion of the land until the crop becomes ripe ; and in the mean time any work which it may require should be performed by both parties according to their respective proportions.

29. If the cultivator dies :

If the cultivator dies after the crop has appeared, and his heirs offer to continue the cultivation until it becomes fit for reaping, and the owner of the land does not agree, in such a case they are nevertheless authorized to continue the cultivation, as the owner will sustain no loss thereby ; but they will not be entitled to any rent or wages, as the agreement is continued in their own benefit.

But if, the heirs want to pull up the crop, and not to continue to cultivate, they will not be forced to continue the cultivation.

30. Incidental charges to be shared by the parties :

The expense of cutting down the crop, of carrying it to the stack, of thrashing it, and of cleaning the grain from the straw, will have to be shared by both the parties in proportion to their respective shares.

31. General rules in agreements of cultivation :

Every act of agriculture, previous to the growing up of the crop, such as watering and watching it, is to be performed by

the cultivator ; and every subsequent act required until the partition such as reaping, etc., is to be equally performed by both and lastly, every acts that is necessary after the partition such as carrying watching, is to be performed by each of them severally, on account of their respective shares.

32. And of gardening :

The above rule holds good, also, in cases of *Musaqaat*, or agreements of gardening ; that is to say, all acts previous to the growth of the fruit, such as watering, grafting, and watching the trees, are to be performed by the gardener ; and all subsequent acts, such as gathering the fruit, and watching it, previous to a partition, are to be performed by both.

If, in agreements of cultivation, the parties wants to cut down the crop while it is young ; or, in agreements of gardening, of pulling the dates while they are sour or moist, the labour of these acts is to be done by, because the intention and desire of performing them terminates the agreement, in the same manner as if the crop or dates had grown up.

**MASAQAAT
(GARDENING)**

MASAQAAT *

GARDENING.

(Hidayah, Kitab-ul-Masaqaat)

1. Nature of an agreement of gardening :

Legally "Masaqaat", signifies an agreement entered into by two persons, by which it is agreed that the one will hand over to the other his fruit trees, on the condition that the other will take care of them, and that whatever will be produced will belong to both of them, in the proportions of one half, one-third, or the like; as may be agreed upon between them.

The term "Gardening" generally applies to plantation and cultivation of dates and other fruit trees. Imam Abu Hanifah is of the view that agreement of gardening, stipulating an indefinite proportion of the produce, as one-half, or one-third, is not valid.

But Imam Abu Yusuf and Imam Muhammad, are of the view that it is valid, provided a period is mentioned ; and this is approved.

It may be noted, that agreements of gardening are generally termed "Mu'amilat" as well as "Masaquaaf"; and the same laws apply to them as those which have been laid down with respect to agreements of cultivation.

2. Doctrine of Imam Shaafe'ee :

Imam Shaafe'ee is of the view that agreements of gardening are valid ; and that agreements of cultivation are valid only, where they are in subordination to the agreements of gardening as for example, where the fruit trees grow in fertile

*Mishkaat, Kitabul Buyoo' Baul Masaqaat Wa Muzari'ah ; 'Ainul Hidayah Vol. III pp. 133 to 143

and clean land, which is watered for growth of the trees, and the owner of them directs the cultivator to sow a crop on the land on the condition that he will be entitled a share, as one-half of the produce. The reason he advances is, that the original thing, in such a case, is an agreement of Muzaribat ; and to it an agreement of gardening has a nearer resemblance than an agreement of cultivation ; because as, in agreements of gardening the partnership is in the produce, and not in the trees, so in agreement of Mozaribat the partnership is in the produce or profit, and not in the stock ; while, in agreements of cultivation, if it is agreed that partnership will be in the produce, and not in the seed, in other words, if the parties agree that the one who will supply the seed will get an equal quantity of seeds from the crop, and the remaining will belong to them both, the agreement will not be valid. As, therefore agreements of gardening have a nearer resemblance to Mozaribat than agreements of cultivation, it follows that they are the primary object, and that agreements of cultivation are lawful only as a dependant ; like a right of drawing water, which cannot be sold separately, but is included, subordinately, in the sale of the land ; or like a moveable article such as the furniture of a house, which cannot separately be made a Waqf, but is to be included in the Waqf of the house or land on which it is.

3. Specification of a period :

The specification of the period is necessary in the agreement of gardening by analogy, similarly as in the agreements of cultivation, the one is, in reality, an agreement of hire, being the same as the other.

But according to a more favourable consideration, the agreements of gardening are lawful even without any specification of the period. Thus, if two person enter into an agreement, agreeing that the one of them will deliver his date trees to the other, who will give water and maintain them until they produce the fruit, and they become ripe, and no period, such

as a year ; or the like, is mentioned, even then the agreement will be valid, and remain in force in respect of the first fruit that may be produced ; because the season for producing and ripening of the fruit is known, and does not differ much.

But it will be otherwise as regards to the agreements of cultivation, which are not valid unless the period is settled ; because the time of cultivation generally differs, some crops are sown during the autumn, some during the winter, and some during the spring ; and thus as there is difference in the time of beginning the cultivation, the period of its ending cannot be fixed because the ending of it depends on the beginning of it.

4. Where the trees are newly planted :

And it will also be otherwise as regards gardening, if one person gives to another person his trees newly planted, because in such a case the agreement will not be valid unless the period is fixed, as it is not certain when the trees will be capable of bearing the fruit, because that depends on the strength and fertility of the soil.

5. Agreement declared to be for the period till trees shall last:

And it will also be otherwise, if a person gives to another person his date garden, his herb roots, asking him to give water and grow them always until they last, or until their roots are pulled and their vegetation is finished, or if he fixes no bounds, whatever as regards the duration of the agreement in respect of the herbs; because in such a case the agreement will not be valid, as its period, will not be certain, because herbs grow so long as their roots remain in the land.

6. Specification of on very short period:

If the parties, in an agreement of gardening, agree to a period during which it is not possible for the trees to bear the

fruit, it will not be valid; because the purpose of an agreement virtually, of partnership in the produce, will be defeated.

7. Where it is possible that the object of it can be fulfilled within that period :

If the parties agree to a period during which the trees can bear the fruit, although they are generally late in bearing the fruit, it will be valid, because the object of the agreement is not likely to be defeated in such a case. If, therefore, the trees bear the fruit within the agreed period, it will belong to both of them in the proportions agreed between them; but if they do not bear the fruit until after the period has expired, the gardener will be entitled to adequate wages for his labour, because the agreement has in this case been made abortive by the error of the parties, in fixing a very short period for the trees to bear the fruit, which makes the agreement invalid as if it was actually known to be very short at the very beginning.

But it will be otherwise if the trees afterwards bear no fruit; at all, because in that case it will be supposed to be due to a blight, and not due to the shortness of the period, that the agreement will prove abortive ; the agreement, will therefore hold good, and none of the parties will be entitled to get anything from the other one.

8. Agreement in respect of fruit trees, vines, herbs, and roots:

Agreements of gardening are valid in respect of date-trees, vines &c., and also in respect of herbs and roots.

9. Dissolution of agreement by either party :

The owner of the garden is not entitled to dissolve the agreement unless he has lawful reason for doing so, such as when the claims of his creditors force him to sell it.

Similarly, the gardener is also not entitled to refuse to work, and thereby dissolve the agreement unless he has any cogent reason for it, such as sickness.

But it will be otherwise in agreements of cultivation ; because in those cases the party who supplies the seed is entitled to dissolve the agreement at any time before the sowing.

10. When agreement can be entered into :

If two person enter into an agreement of gardening, to the effect, that the one will hand over to the other his date garden, at a time when the fruit has appeared, but is still very small, and may, by giving water and necessary care, become full and large, it will be valid; but, if the fruit are perfect, and incapable of further improvement by care, it will not be valid.

Similarly, if two person enter into a agreement of cultivation, by which it is entitled that the one will hand over to the other his crop, which is yet green, and not fit for reaping, the agreement will be valid ; but if the crop is fit for reaping, it will not be valid.

11. If the agreement is invalid :

If the agreements of gardening are not valid, the gardener will be entitled to adequate wages, as an not valid agreement of gardening is equal to an not valid contract of hire, and therefore is similar to an invalid agreement of cultivation.

12. If any party dies :

If, in an agreement of gardening, one of the parties to it dies, the agreement becomes void, because it is in reality an agreement of hire.

If the owner of the garden dies, when the fruit is yet green, the gardener will be entitled to continue the work as usual until it becomes ripe, inspite of the disagreement of the heirs of the deceased owner.

But if the gardener accepts the injury, the heirs have in such a case three options, i.e., they may divide the green fruit, to the extent of their share as stipulated, or, may have the entire green fruit, and pay to the gardener the value of his share or may themselves take care of the fruit until it become ripe, and in our necessary expenses on it, and they recover a proportionable part of the expense from the share of the gardener ; because the gardener is not entitled to cause any injury to the heirs.

But if the gardener dies, his heirs may continue to work, even though the owner may not agree to it, because it is to their mutual benefit. But, if the heirs of the gardener decline working, and rather choose to gather the fruit whilst it is still green, the proprietor of the orchard has the three things in his option, as mentioned above.

13. If both parties dies :

If both the parties die, the heirs of the gardener is entitled to continue to work ; because, if the gardener had lived, and the owner of the garden had died, the gardener could have continued to work, therefore his heirs, being his substitutes, have the same right as their option. But if, they do not want continue the work, then the heirs of the owner are entitled to choose any of the three mentioned above options.

14. Agreement expiring while the fruit is still green :

If the period of the agreement expires while the fruit is still green and unripe, the gardener is entitled to continue his work until it becomes ripe ; and in such a case he will not be liable to pay any rent on account of the trees, because the letting of trees is not lawful.

But it will be otherwise as regards the agreements of cultivation ; because if their period expires while the crop is still green, the cultivator is entitled to continue the work until it become fit for reaping ; but he will be liable to pay the rent of the land, because the letting of the land is lawful.

If the period of an agreement of gardening expires while the fruit is still green ; the gardener is responsible to perform the rest of the work ; but, if the term of an agreement of cultivation expires while the crop is still green, both parties are responsible to work until the crop is fully grown.

15. Agreement can be dissolved :

Agreement of gardening can be dissolved for cogent reasons e.g., where the gardener is a thief, and there is reason to believe that he may steal the branches or leaves of the date trees, or the fruit, before it become ripe ; or, where the gardener is not in a position to work on account of sickness.

But if, the gardener wants to relinquish his work, concerning it there are two opinions on record, one, that it is lawful ; and another, that it is not lawful. This apparent difference can be reconciled, by supposing that the former opinion will apply to a case where it is stipulated that the gardener will work with his own hands, which condition he is, not able to fulfill on account of sickness.

16. Lease of land, for planting, in consideration of a part of the produce :

If a person hand over to another person a piece of land, for a specific number of years, so that he may plant trees on it, and agree that the trees and the land will be in partnership between them, each having one-half, it is not valid, for two reasons ; firstly, because they have agreed to partnership in the land, which already exists without the previous help of the gardener's labour ; and secondly, because such an agreement is

subject to the same objection as *Qafeez-ut-Tahaan* ; because in this case the owner of the garden in effect gives on hire the gardener, and fixes, as his wages, a part of its product by his labour, i.e., one-half of the trees.

In such a case, therefore, the entire fruit and trees will go to the owner of the land ; and the gardener will be entitled to the price of his trees, and also to an adequate consideration as the wages of his labour ; because as it is impossible to give him back the trees, because of their adhesion to the land, he necessarily should get their value, and also an adequate wages; nor is his wages included in what he gets for the trees ; that is to say, they are both due, distinctly ; the labour is in this case itself capable of estimation.

BOOK – III

EHYA'UL MAWAAT

(CULTIVATION OF WASTE LANDS)

EHYA-UL-MAWAAT *

CULTIVATION OF WASTE LANDS

(*Hidayah, Kitab Ehya-ul-Mawaat*)

Definition of "Mawaat"

"Mawaat", means "waste land", and legally it signifies the land which is not capable of yielding any advantage, for want of water, or inundation, or any other cause, which may prevent tillage ; and it is known as "Mawaat", or dead, because, like the dead, it is of no use.

1. Description of the land so termed :

Any land which, from a long time, is lying waste and does not belong to any person, or which was previously the property of a Muslim, who is now not known, and has been removed from a village so far that, if a person calls out from there, his voice cannot be heard there is known as "Mawaat". According to the author of *Hidayah*, this description is given by Qadooree.

Imam Muhammad has said that it is necessary that the land is neither the property of a Muslim nor a Zimnee ; and similarly, it is of no use ; and in such a case it becomes absolutely "Mawaat"; but that the land which is the property of a Muslim or a Zimnee is not "Mawaat".

If the owner is not known, the land in the mean time will belong to the Muslim community ; but if he appears, it will be hand over to him, and the cultivator will be responsible for the damage he may have suffered.

As regards the land being far away from a village as mentioned by Qadooree, Imam Abu Yusuf is of the view that this is a condition, for the reason, that where the land is contiguous to a village it cannot be declared as entirely useless to the inhabitants of it. Imam Muhammad holds it sufficient that the

**Mishkaat, Kitabul Buyoo' Babo Ehya'il Mawaate Wash Shirbe. ' Ainul Hidayah Vol. IV pp. 402 to 419*

villagers do not in reality make use of the land, whether it is contiguous to the village or not. The same is the view of Shaikhul Islam Khawahar Zaadah but Shams-ul-A'immah Sarkhasi has adopted the view of Imam Abu Yusuf.

2. Cultivation of waste lands :

Whosoever cultivates waste lands, with the permission of the Chief, gets ownership in them ; whereas, if a person cultivates them without such permission, he does not get the ownership according to Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that, in such a case also the cultivator becomes the owner.

3. Tithe and tribute from land so cultivated :

If a person cultivates waste land, a tithe only will be due from it, because it is not lawful to charge a Muslim with tribute in the beginning ; but if the land is moistened with tribute waters, tribute may lawfully be imposed, as it then becomes due on account of the water.

4. Relinquishment :

But also if, a person cultivates waste lands, and afterwards leaves them, and another person then cultivates them, some have said that the second cultivator will be best entitled to the ownership; for the first was only the owner of the profits of it, and not of the land itself; and, therefore, upon his leaving it, the second gets a superior claim.

It is however, definite that the first cultivator can resume the lands from the second one, because he is the owner of them on account of having brought them to a state of cultivation, and does not forfeit his ownership by leaving it.

5. Road to be left :

If a person cultivates any waste land, and four others thereafter so cultivate the circumjacent land as to obstruct the way to his property, Imam Muhammad has said, that his way is lead through the land of him who cultivated it at the last ; because, after three sides of the border upon his property had been cultivated, the other normally remains for his coming and going and therefore the person who cultivates it intentionally wants the destruction of his right.

6. Zimmee also acquires a property in the land he cultivates:

If a Zimmee cultivates waste land, he also becomes the owner of it, as a Muslim ; because cultivation gives a right of property. But Imam Abu Hanifah, is of the view that for its permission of the Imam is necessary. A Zimmee and a Muslim, therefore, stand on the same footing in this respect as in all other right of property.

7. Land not cultivated for three years after it is marked off :

If a person circumscribes any waste land, and puts marks upon it with stones or anything else, and keeps it as such for three years without cultivating it, the Imam can in such a case, lawfully resume it, and give it to another person.

8. Manner of marking off waste lands :

It may be noted that waste lands can also be marked off by other means beside putting stones, such as by surrounding them with the branches of trees ; by burning the under wood and thorns growing upon them; or by collecting and scattering them, mixed with a little earth, about the borders, without forming a continued boundary or, by digging a trench of one or two yards wide.

9. Cultivation is established :

Imam Muhammad has said that, if a person digs up and waters any waste land, he is to be taken as the cultivator of it ; and, if he digs it up, or waters it, singly, he is only to be held to have put a mark upon it.

Similarly, if he digs a trench or ditch, without watering the land, it is also to be considered only as marking it ; but if he moistens it with water, after digging a trench, it amounts to cultivation.

10. Enclosing it, or sowing it with seed :

Moreover, if a person erects a boundary wall round the land so high as to be a dam to the water ; he will be held to have cultivated it ; and similarly if he sows the seed in it.

11. It should not be practiced on the borders of land already cultivated :

Cultivation of waste land is not allowed immediately bordering upon lands which are flourishing; as it is necessary that a same space should be left for the use of the cattle of the owner of the other lands, and also for piling up his stacks, on account of which such land does not come under the description of waste land any more than a river or a highway ; and, accordingly, the jurists have said, that it is not lawful for the Imam to give a person anything of indispensable use to the Muslims, such as a salt pit, or a well from which the people in general get the water to drink.

12. Space appropriated to wells dug in waste lands :

Anybody who digs a well in the waste land is entitled to a space round it. Therefore, if the well is dug for the use of the camels, a space of forty yards should be annexed to it. This is according to the Traditions. Many jurists are of the view that

forty yards is the total space. But the better, is that forty yards should be left on each side of the well ; because as many lands are of a soft and moist soil, it may happen that if another person digs another well at a lesser distance from the existing well then forty yards, the water of the one may pass through the earth and mix with that of the other. And if the well is dug to draw water from it through the camels or other animals, then the space should be of sixty yards. This is according to Imam Abu Yusuf and Imam Muhammad.

But Imam Abu Hanifah holds that even in such a case also the space of forty yards is allowed.

But if the well also has a fountain in it, the space should be of five hundred yards.

Some jurists are of the view that space of five hundred yards for the a fountain is needed only in Arabia, because here the soil is hard ; but in the country, where the soil is soft, a larger extent is needed as otherwise the water of one fountain may pass through the earth and mix with that of the other.

13. Within the limits of which no other person is entitled to dig :

If a person digs a well within the limits of the owner of another well, the other person may stop him; because the limits of his well belong to him, and therefore none has the right to encroach upon them.

If, also, a person digs a well within the limits of another, with the owner of it has the option to fill it up himself gratuitously, or force one to do so.

Some are of the view that in such a case, the first owner is entitled to take compensation for the damage from the other person, and then to fill up the well himself.

14. Or, if any does so, he is liable for the accidents it may cause:

There will be no responsibility for anything that may be destroyed by falling into the first of the two wells, as the owner, in digging it, was not guilty of any trespass.

But if, anything is destroyed by falling into the second well, it will have to be atoned for as the owner of this well will be held as guilty of a trespass in digging upon the property of another.

But if, a person digs a well bordering on the property of another, without encroaching upon it, and the water of the other one is then decreased, he will not be liable for make any compensation, as he will not be held as guilty of any transgression.

Moreover, in the last case the second digger will be entitled only to the space on three sides of his well, as the space on the side of the first well is the property of the first digger.

15. Space is also appropriated to a watercourse :

The person who digs a channel, for providing water to any place, will have a space annexed to it, according to his need.

Imam Muhammad has said that, an aqueduct is the same as a well, as regards the annexing of land to it.

Some are of the view that this is the rule laid down by Imam Abu Yusuf and Imam Muhammad ; but that, according to Imam Abu Hanifah, no space is to be allowed, except when the water appears above the ground ; because as an aqueduct is in fact merely a rivulet, therefore the same rules apply to it.

Many jurists have held that when an aqueduct appears above the ground it is then to be considered in the same light as a spring or fountain ; and therefore the same space is to be annexed to it, i.e., five hundred yards.

16. Or to a tree planted in waste land :

If a person plants a tree in a waste land, he becomes entitled to a small space adjacent it ; and as such no other person is entitled to plant a tree on the space within his property, because this space is necessary for him to collect his fruits, and to heap them upon it. The space allowed for a tree should be of five yards, according to the Traditions regarding this subject.

17. Cultivation on deserted beds of rivers :

Lands through which the rivers Euphrates ; the Tigris, or any other river, had been formerly ran, none should be cultivated, if it is possible that the river may again start running over them ; because the people whose lands happen to be adjacent to the river in its previous course may not like that the river should be stopped from returning to it.

But if, the land is not expected to be again overflowed, then it is to be held to be waste land, provided it does not adjoin to any cultivated land; because such land is not the property of any one ; as superiority of water superseded any other superiority but no sooner that the land because above the water it becomes subject to the Imam.

18. Space not to be allowed to any aqueduct running through the land of another without proof of prior right:

If a person is the owner of an aqueduct, running through the land of another person, he, is not, according to Imam Abu Hanifah, entitled to any adjacent space unless he brings evidence to prove his right.

But Imam Abu Yusuf and Imam Muhammad are of the view, that on account of his ownership in the aqueduct, he is entitled to the banks on which people come and go, and which the earth has thrown up by the excavation of it occupies.

19. Differences of view regarding aqueducts :

It is recorded, in the *Jaame'-as-Sagheer*, that if a person is the owner of an aqueduct which has banks on each side, and adjacent to the banks there is a land belonging to some other person, and the banks are not in the hands of any one, lying destitute of any marks such as trees, stones or the like, to determine the ownership, of those banks will be held as belonging to the owner of the land, according to Imam Abu Hanifah ; but Imam Abu Yusuf and Imam Muhammad are of the view that they will be taken to behalf to the owner of the adequate.

But if there are, marks of any person upon them, then they are unanimous in their, opinion that the person whose marks are then will have the better claim to the banks.

But if there is a tree upon the banks, and it is not known who had planted it ; then Imam Abu Hanifah is of the view that to plant a tree is the right of the owner of the lands, while Imam Abu Yusuf and Imam Muhammad are of the view that it is the right of the owner of the aqueduct.

As regards throwing up of the earth, many say that, there is difference of opinion ; while others say that this belongs to the owner of the aqueduct, if he does not exceed the fixed bounds. As regards walking upon the blanks, some say that it is not allowed, in the opinion of Imam Abu Hanifah ; while others say that it is not prohibited, because there is a necessity for it.

Abu Jaffar has said that he would give the decree according to the view of Imam Abu Hanifah in the case of planting a tree and according the view of Imam Abu Yusuf and Imam Muhammad in the case of throwing up the earth.

According to Imam Abu Yusuf, the width of the space attached to an aqueduct is half the breadth of the aqueduct ; but according to Imam Muhammad it is the whole breadth ; and this opinion is taken as the most favourable to people at large.

Rules relating to "Shirb" (Watering)

Literally, "Shirb" means "sharing of water" but legally it signifies entitlement to take water for ones agriculture or garden since sources of water differ e.g., natural rivers dug up canals, wells, etc., the rules relating to the sharing of water also differ. In the sections that follow we will deal with this subject in detail.

Section (1)

Waters

(*Fasl Fee Miah*)

1. All persons have the right to drink water from a well, canal, or reservoir, and similarly also cattle :

If a person is the owner , of a canal, a well, or a reservoir, he is not entitled to prohibit any man or beast from drinking water from it.

It may be noted that water is of four kinds; viz., (a) water of the ocean (sweet or sour), which every person has a right to drink, or to carry it away for the purpose of watering his lands. If, therefore, any person digs a canal, and gets the water through it from the ocean to water his land, no person is entitled to stop him from so doing ; because the use of the water of the ocean is common to everyone, just like the light of the sun or moon, or the air ; (b) water of big rivers, such as the Oxus, the Euphrates, or the Tigris, in which every person has absolute right to drink, and also conditional right to use it for watering his lands. In this connection any person, who cultivates waste land, is entitled to dig a channel for the purpose of getting water for it from the

river, but his doing so should not be inconvenient to the people ; because if there is a possibility of its to be hurtful in its consequences (as if, by opening the banks, the water overflow the country and villages around), in such a case he will not be allowed to dig a channel for watering his land because to prevent public evil is of great consideration. Similar to it, also, is the erection of a mill on the banks of a river ; because the demolition of the banks by the mill will be the same as by watering land ; (c) water in which several have a share ; and in which, similarly the right of drinking is allowed to everyone ; because it has come in the Traditions that three things are common to all, i.e., water, grass, and fire. (Abu Daud, Ibne Maajah, Tabrani). Besides, wells, and the like, are not dug for the purpose of preserving the water,; and hence their water is not property of anyone ; as it is common and as such cannot be made specific property until it is separately kept and preserved ; as is with regard to a deer which lives only upon a person's land. Moreover there is also a necessity to establish this common right in respect of water, because it is not possible for every person to carry it along with him ; and because a person may need it for himself and his horse, mankind would therefore suffer very much if an unlimited use of it was not granted to them. But if a person wants to bring water for the land, he has cultivated from a river or canal which is the property of others, the owner will be entitled to prevent him, because in case otherwise their right of watering would be disturbed ; (d) water which is preserved, in vessels is the property of the person who preserves, it because of its reservation; and therefore the right of others does not extend to it ; in the same way as holds in respect of the game, after being taken by any person. In spite of this it is doubtful whether this water may not also be shared, because of the Tradition quoted above. Thus, if a person, the time of necessity, steals the water equal to the quantity which amount to theft, he will not liable to amputation.

2. Unless there is other water at a short distance :

But if a person possesses of a well, fountain, or rivulet,

he is entitled to prevent anyone from drinking this water or encroaching on his property, if there is other water at a short distance, and which is not the property of anyone else.

But if, this is not the case, the owner should then himself bring water for him to drink, or all him to take it himself, on the condition that he does not destroy the banks. This is the view reported from Tahavee.

Some hold it as approved, in case the owner of the well has dug it himself in the land which is his own property ; but, if he has dug it in waste land, he is not, in such a case, entitled to stop others from entering on his property to drink water ; because the waste land is a common right ; and as the well has been dug for promoting the common right, i.e., tithe and tribute, it therefore follows that the digging of it was not destructive to the entitlement of drinking from it.

But if, the owner, does not allow others to drink water from it, and that other person is apprehensive either of the death of himself or his horse from excessive thirst, he may then lawfully deal with the owner with weapons, because he has already aimed at his destruction in withholding his right, i.e., the water ; for the water of a well is common, and is not the property of anybody.

But it will be otherwise as regards the water kept in vessels ; because a person in need of it, where it is so kept, is only entitled to contend with the owner of it without weapons.

The same law applies to the case of a person oppressed with hunger. Many are of the view that in the case of a well it is not lawful to use the weapons; but it is permissible to contend with a stick ; because the possessor is guilty of an offence in refusing the water ; and the application of a stick is for correction.

3. Water can also be carried away for the purpose of ablution:

It is also lawful for the people to carry away water from a rivulet to perform their ablutions, or to wash their clothes.

This is approved ; because, to desire the people to purify themselves, or to wash their clothes, with such water, without carrying it away, as held by some, would be subject to great inconvenience.

4. Or for watering the trees or the parterres :

If , a person wants to water the trees or small parterre before his house, he is lawfully entitled to carry away water for that purpose from the rivulet of another ; because the law allows great liberty in the case of water, and considers the refusal of it as really offensive.

But a person is not, entitled to carry away water from the rivulet, well, or aqueduct of another person, for the use of his garden or fields, unless he is specifically permitted so to do ; and the owner can prohibit him from it ; because when water is owned in joint property, none but the owners have the right to the use of it, because otherwise their right will be defeated.

Still, the owner of the river can, if he chooses, give, or lend, the water of it to another person, because it is his property ; and because the gift of such is customary ; in the same way as it is in respect of water preserved in vessels.

Section (2)

Digging or Clearing Rivers.

(Fasl Fee Kari-ul-Anhaar)

1. Rivers are of three kinds :

Rivers are of three kinds ; (1) Those which not the property of anybody ; and of which the waters have not been divided, like the Tigris, Euphrates. &c., (2) Those which, inspite of being appropriated and divided, are, also public rivers, in which boats sail ; (3) Those rivers which are held to be the property of somebody, and divided ; and are also private, in which no boats sail.

2. Great public rivers to be cleared and repaired at the expense of public treasury :

In the first above mentioned kind of rivers, if the rivers are filled up and require the digging, it is for the "Waali" (i.e. Governor of the Province) to pay the charges of it from the public treasury ; because as the work is performed for the advantage of the Muslim community, the expenses of it are to be paid from the property of the community. But such expenses should, be spent from the funds of tribute and capitation tax, and not from those of tithe and alms ; because the latter are meant exclusively for the use of the poor, while the former are intended for contingencies.

3. Or by a general contribution of labour :

If there is no money in the public treasury, the "Waali" in such a case is entitled, with a view to promote the public utility, to force the people to repair the damage themselves, because it is presumed they will not of themselves do the work. For this reason it is reported that Hazrat Umar said to the people, "where I leave you to your own direction, without using the compulsion, matters will come to such a stage that you will even

sell your children." None should, however, be forced but such as may be able to work ; and such as are not able to work, and are rich, should pay, according to their status and ability.

4. Appropriated rivers, at the expense of their owners:

With respect to the second above mentioned kind of river, it should be cleared that, when necessary, at the expenses of their owners, without any supply from the public treasury ; as the ownership of the river specifically belongs to them, as does also the use of it. If, there-fore, any one of them does not help in the digging, the "Waali" is entitled to force him, to the extent that the others may not suffer any injury on account of his refusal

If, some of the owners of the rivers want to strengthen the banks, due to an apprehension that they may give way, and it is possible that bad results may ensure from their decay, such as inundating the neighbouring country, and breaking up the roads, the "Waali" can in such a case, a compul any of them who refuses to help in the work.

However, the "Waali" should not use force where the decay of the banks are not expected to produce any bad the result; because the fall of the banks is merely an event which is probable.

But it is otherwise in respect of clearing a river in the case of necessity ; because that is a case of certainty, for which compulsion may be used to effect it.

As regards the third above mentioned kind of rivers, they are specifically appropriated and, therefore, the digging of them is entirely the duty of their owners.

Some say that the Imam may use the force against anybody who refuses to dig ; in the same way as in the case of the second above mentioned kind of rivers.

But some others say that the Imam has no power of this kind ; as both kinds of the injury, namely, that of the partner on

whom compulsion is used, and also that which the other partners sustain on account of his refusal, are private ; and the injury to the other partners can be remedied by their taking from the one who refuses to work a part of the expenses incurred in digging the rivulet, in proportion to his share if the work is executed at the instance of the Imam.

But it is otherwise as regards the second above mentioned kind of rivers, as there one of the injuries is public.

5. Rules with respect to drains, watercourses, etc,

In digging a watercourse, the expenses incurred in the upper part are to be paid equally by all the partners ; but when the work goes beyond the land of any one of them, he is not to share the further expenses. This is the view of Imam Abu Hanifah.

But Imam Abu Yusuf and Imam Muhammad are of the view that the expenses of digging from the head to the end of the water-course are to be jointly paid by all the partners according their respective shares.

Section (3)

RIGHT OF SHIRB, DISPUTE, AND SPECIFIC PRIVILEGES IN RESPECT OF IT

(Fasl Fid Da'we Wal Ikhtilaaf Wat Tasarruf Feeh)

1. Right to get water may exist independent of the land:

A right to get water, is lawful independent of any ownership in the land on account of "Istehsaam" (favourable construction of the law) ; because a person may become entitled to it, even without the land, or by inheritance, bequest ; or by the

sale of his lands, and reserving to himself the right of Shirb. Besides, Shirb is a desirable thing, and also capable of giving advantage, the claim to it is, therefore, lawful.

2. No person is entitled to alter or disturb the course of water running through his land:

If a person is the owner of a canal running through the lands belonging to another person, and the owner of these lands, desiring that it should not run through their lands, tries to stop it, on the plea that it is his property, he should not be allowed to do so, and the canal should be allowed to run in its usual course.

But, if the canal is not in his possession (as containing no water), in such a case the assertion of the owner of the lands will be accepted; unless the other person prove by evidence that the canal is his property, or that he was previously getting water through it for watering his own lands, then the Qazi should decree it to him, as he thus proves his claim.

3. In case of disputes :

If a canal is jointly held by many persons, and they dispute regarding their shares of the right to water, then distribution should be made according to the extent of the land which each of them severally possesses.

4. A canal should not be dammed up for the convenience of any partner :

If that the person who has in his possession the major part of the canal is not able, without stopping the current, to satisfactorily enjoy his right to water, as his lands, being high, precipitate the water from them with great velocity even then, he is not be permitted to dam the canal, because thus he would destroy the right of others person, and he should, therefore, take his share of water without stopping the current.

But if, however, the other persons agree to his stopping the current so that he may thus water his land, in a satisfactory way, on make an agreement that each will stop it in his turn, it will be lawful, as it is their right.

But if it is possible to effect the stoppage with a board, they should not use clay, or any kind of plaster, without the consent of the whole, as an injury would thereby be caused to other shares of all, as an injury would thereby be caused to the other sharers.

5. No partner in a rivulet can dig a trench or erect a mill upon it :

None of the sharers is entitled to dig another rivulet leading from the common one, or to erect a water mill upon it.

6. Nor construct a water engine or a bridge :

Similarly none of the sharers is entitled to erect a small bridge which can be withdrawn, or a large bridge of stone or bricks which may be durable and fixed.

7. No partner can alter the mode of partition :

In case of distribution by sluices, if one of the partners chooses that the partition should be made by the measure of time, he is not entitled to adjust it, unless with the consent of the others ; because the already established mode is to be continued ; as the right of every one of them is thus more clearly distinguished.

8. Or increase the number of opening :

If every partner in an appropriated rivulet has specific number of holes or sluices allocated to him, none of them is entitled to increase that number, inspite of the fact that it may cause no injury to the others.

But it is otherwise in the case of large rivers, such as the Tigris or the Euphrates, because as there any person is entitled to dig a small rivulet, and fill it from them, he is consequently also entitled to increase the holes or sluices through which the waters pass from them.

9. Or convey his share into lands not entitled to receive it :

None of the partners in a river is entitled to convey his share of water into such of his lands which are not entitled to get water from that river; because this may, in due course of time, provide a ground of his having a right to water those lands from that river.

10. Or through such lands into those that are entitled :

Nor is a partner entitled to convey his share of water through such of his lands as are not entitled to it, into others that are ; because, in this case, it is possible that he would get a greater quantity of water than what is to be due, as part would be absorbed by the lands through which they first passed.

11. Nor can he shut up any of the watervents :

If two persons are joint owners of a rivulet, and get their shares by water issuing through sluices, and the one whose share lies nearest to the source wants to stop several of the sluices allocated to him, to prevent the issue of a superfluity of water into his lands, he should not be allowed so to do, because he may thereby subject the lands of the other sharer to be overflowed with water.

12. Nor adopt a partition by rotation :

Nor is he entitled to change the mode of sharing; by taking the use of the whole in rotation, instead of each getting a moiety of the whole quantity.

13. Right to water cannot be consigned as a dower :

A right to water is not capable of assignment as dower in a contract of marriage ; and therefore if such is mentioned in a marriage contract, Mehr-e-Misl, or proper dower, will be due.

14. Or given as a consideration for Khula' :

Similarly also, it cannot be given as consideration for Khula'; and therefore , if a wife bargains for her divorce, in consideration of her giving up such right, the husband can return it to her, and ; in lieu of it, take back from her the dower he had assigned to her on their marriage.

15. Or in settlement of a claim :

A right to water is not capable of being given in settlement of a claim ; because as it cannot, on account of any deed whatever, be make a property, a settlement in consideration of it is also void.

16. Or sold (without land) to discharge the debts of a deceased :

A right to water, without land, cannot be sold after the death of any person to discharge his debts, as it cannot be sold during his lifetime.

17. Accident from the use of the water :

If a person, by watering his lands, or filling them with water, overflows the lands of his neighbour, he is not, in such a case, liable to compensation, as he is not guilty of any transgression.

